Civil penalties and procedural protections
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Uncertainty surrounding the procedural protections that apply in civil penalty proceedings creates real difficulties for practitioners and litigants. To understand better the reasons for this uncertainty, this article traces the history of civil penalties in England, Australia, the United States and the European Union. Particular attention is given to the parallel civil and criminal prohibitions under the Competition and Consumer Act 2010 (Cth) (relating to cartel conduct) and under the Corporations Act 2001 (Cth) (relating to directors’ duties) and the strategic regulation theory that purportedly underpins both sets of prohibitions. It is argued that the modern rise of civil penalties calls for corresponding developments in the procedural protections that apply in civil penalty proceedings, and that the rationale for parallel civil and criminal prohibitions is questionable.

1. INTRODUCTION
In Australian Securities & Investments Commission v Hellicar (2012) 86 ALJR 522, the High Court of Australia overturned the New South Wales Court of Appeal’s conclusion that, by failing to call a particular witness in a civil penalty proceeding, the Australian Securities and Investments Commission (ASIC) had breached a duty of fairness and thus undermined the cogency of its case and failed to discharge its burden of proof. The High Court endorsed the Court of Appeal’s decision that, as the case was a civil penalty proceeding, there was no direct application of a prosecutor’s duty to call material witnesses at a criminal trial (at [140] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), [230] (Heydon J)).

Further, the six-member majority was prepared to assume, as a matter of convenience and without deciding, “that ASIC is subject to some form of duty, even if a duty of imperfect obligation, that can be described as a duty to conduct litigation fairly” (at [152] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ)). Their Honours held, however, that ASIC not calling the witness in question was not unfair and, moreover, that even if it had been unfair, the consequence of such a breach of duty would not be “to apply some indeterminate discount to the cogency of whatever evidence was called in proof of ASIC’s case”, but rather the trial judge staying the proceedings until ASIC agreed to call the witness or an appellate court considering whether there was a miscarriage of justice that necessitated a retrial (at [155]). In explaining the consequences of a breach of the putative duty, the majority deliberately reasoned by analogy with prosecutorial duties in criminal proceedings. This was notwithstanding the unanimous agreement, in both the High Court and the Court of Appeal, that such duties do not apply directly to civil penalty proceedings.

After the High Court reinstated the trial judge’s decision that the defendants, who were directors of James Hardie Industries Ltd, had breached their directors’ duties, the matter returned to the New South Wales Court of Appeal to consider penalties. In reducing the period of disqualification, the Court of Appeal took into account as “mitigating factors”:\(^1\)

- the public approbrium suffered by [the defendants], their exemplary records prior to the contraventions, their contributions to the community, the absence of a need for personal deterrence, their fitness to hold office as directors of a corporation, despite the contravention and their (qualified) contrition.

This stands in stark contrast to the approach of Finkelstein J in Australian Securities & Investments Commission v Vizard (2005) 145 FCR 57. Although Finkelstein J was also setting civil

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\(^1\) Gillfillan v Australian Securities & Investments Commission (2012) 92 ACSR 460 at [253], [2012] NSWCA 370 (Sackville AJA).
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penalties for breach of directors’ duties, he used the language of the criminal law and considered himself “sentencing … white collar corporate crime” (at [37]). His Honour held that “while good character cannot be ignored it should only play a minor role” (at [37]). This was because “a ‘white collar’ offender” has typically used their “good character” to facilitate their “offence” by enabling them to achieve the position of trust that they have breached (at [36]).

These cases illustrate well the issues that confront courts, and the reasoning they engage in, when dealing with civil penalties. Sometimes civil penalty proceedings are treated as analogous to criminal proceedings and sometimes they are not. It is rarely (if ever) considered why the analogy is considered appropriate in some situations, but not in others.

Civil penalty proceedings are similar to criminal proceedings in that both involve the executive government bringing a subject before the judiciary, alleging that the subject has broken the law and seeking a punishment to be imposed on the subject for that contravention. However, in a criminal proceeding the defendant is accorded various evidentiary and procedural protections – such as the need for proof beyond reasonable doubt, self-incrimination privilege and the prosecutorial duties of disclosure and fairness. If civil penalty proceedings have similar features to criminal proceedings, ought not the same protections apply in civil penalty proceedings too? Finkelstein J expressed this concern with some irony in another decision:

A lay person might be forgiven for thinking that in the present context the distinction between civil and criminal proceedings is somewhat artificial … Perhaps the reason courts have rejected this approach is that in a criminal proceeding a conviction may result in imprisonment whereas in a civil penalty proceeding the worst that can happen is that the defendant’s career is ruined or his life is wrecked.⁴

On the other hand, if civil penalties were abolished and replaced with criminal offences, and the associated procedural protections, whose interest would that serve? Government regulators would face more onerous procedural and evidentiary requirements and alleged wrongdoers would face the spectre of criminal charges and penalties.

These issues create real difficulties for practitioners in advising clients and acting in civil penalty proceedings. Such proceedings have very grave consequences for a client’s professional reputation and career, and can take years to work their way through the courts. Yet, it may require the High Court to settle basic questions such as the whether the defendant is required to give discovery⁵ or what is the applicable standard of proof.⁵

This article endeavours to shed light on these issues by tracing the origins of civil penalties in England, Australia, the United States and the European Union. It will be seen that, far from being an exclusively modern phenomenon, English courts were grappling with the nature of civil penalties nearly 250 years ago. The same occurred in Australia a century ago. The United States Supreme Court has wrestled for nearly 150 years with whether various constitutional rights apply in civil penalty proceedings. The same issues have arisen in the European Union under Art 6 of the European Convention on Human Rights (ECHR).⁶

Despite their long history, the prevalence and importance of civil penalties has grown over recent decades in the jurisdictions under consideration. In the United States, the legislature’s use of civil penalties has grown rapidly since the middle of last century.⁷ Professor Mann attributes this to factors including the growth of the administrative state and a desire to avoid the complexity of criminal process. Similarly, in the United Kingdom 120 pieces of legislation containing the words “civil

⁴ Australian Securities & Investments Commission v Mining Projects Group Ltd (2007) 164 FCR 32 at [35].
⁶ Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd (2003) 216 CLR 161.
penalty” – ranging alphabetically from the Air Force Act 1955 (UK) to the Welfare and Pensions Reform Act 1999 (UK) – were enacted between 1955 and 2008.\(^8\)

In present-day Australia, various statutes establish civil penalties.\(^9\) Their increased importance was recognised in 2002 when the Australian Law Reform Commission (ALRC) released a 1,000-page report on civil penalties.\(^10\) The report recommended the enactment of a “Regulatory Contraventions Statute” to, among other matters, clarify uncertainty as to the nature of, and procedure applicable to, civil penalties.\(^11\) This recommendation has not been taken up by Parliament and, as in Hellicar, it has fallen to Australian courts to decide, on an ad hoc case-by-case basis, whether procedural protections apply in civil penalty proceedings.

This article focuses on the civil penalties under the Corporations Act 2001 (Cth) concerning directors’ duties and those under the Competition and Consumer Act 2010 (Cth) concerning cartel conduct. Those two classes of civil penalties are notable because of their severity and the existence of parallel criminal offences for (virtually) identical conduct. This state of affairs has been justified on the basis of strategic regulation theory, according to which regulators should have flexibility and options in their ability to apply enforcement tools (including litigation).

Part 2 of this article traces the history of civil penalties in England since the 18th century. Part 3 covers the history of civil penalties in Australia. It recounts early court decisions considering civil penalties, the introduction of civil penalties into the Trade Practices Act 1974 (Cth) and the Corporations Act 2001 (Cth), the influence of strategic regulation theory and modern cases on the procedural protections that apply in civil penalty proceedings. Part 4 follows the United States Supreme Court’s decisions as to whether various constitutional rights are engaged by civil penalties. Part 5 considers the European Court of Human Rights’ jurisprudence on the right to a fair trial under Art 6 of the ECHR. Part 6 identifies a number of common themes in the different approaches taken in the different jurisdictions to determine whether a matter is civil or criminal, or to determine whether a procedural protection applies.

Part 7 concludes that the modern rise of civil penalties calls for corresponding developments in the procedural protections that apply in civil penalty proceedings. It also contends that strategic regulation theory does not justify parallel civil and criminal prohibitions and that, having regard to the history of civil penalties set out in this article, the concepts of “civil” and “criminal” remain fundamental and the procedural protections that the criminal law affords ought not be eroded.

2. ENGLAND

The year was 1768 when Blackstone wrote in categorical terms of the dichotomy between civil and criminal wrongs:

Wrong are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties which affect the whole community, considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanours.\(^12\)

This passage was referred to in Atcheson v Everitt (1775) 1 Cowp 382; 98 ER 1142, an enforcement action not by a government regulator but by a private citizen. The plaintiff had

\(^8\) At least, according to a Westlaw search: White R, “Civil Penalties: Oxymoron, Chimera and Stealth Sanction” (2010) 126 LQR 593 at fn 27.


\(^11\) ALRC, n 10, pp 25, 263 (Recommendation 6-7).

\(^12\) Blackstone W, Commentaries (1st ed, 1768) vol 3 at 2 (cited in Australian Securities & Investments Commission v Petsas (2005) 23 ACLC 269 at 269 (Finkelstein J)).
commenced a statutory action for bribery,\textsuperscript{13} which entitled the plaintiff to sue the defendant in the plaintiff’s own name and claim from the defendant for the plaintiff’s own benefit a debt for the whole penalty. The plaintiff succeeded at trial. The defendant sought a new trial on the basis that the proceeding was, in fact, a criminal case and, accordingly, a witness who was a Quaker ought not to have been permitted to give evidence on affirmation. (Quakers objected to swearing an oath and statute permitted them to give evidence on affirmation, except in criminal cases.\textsuperscript{14}) Lord Mansfield deplored the historical intolerance of Quakers, still reflected to some extent in the legislation, and was loath to exclude the Quaker’s evidence. His Lordship held the evidence had been properly received (at 391-392; 1147-8):

Now there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions. Mr Justice Blackstone, and all modern and ancient writers upon the subject distinguish between them. Penal actions were never yet put under the head of criminal law, or crimes … It is as much a civil action, as an action for money had and received … No authority whatever has been mentioned on the other side, nor any case cited where it has been held that a penal action is a criminal case; and perhaps the point was never before doubted.

This conclusion was reached notwithstanding that bribery was also an indictable criminal offence at common law, and that the defendant might be imprisoned if he failed to pay the debt-penalty awarded to the plaintiff (at 386-387; 1144-5).

Seventeen years later, \textit{Wilson v Rastall} (1792) 4 TR 753; 100 ER 1283 considered an action under statute to recover penalties against the defendant for bribing voters to vote for one of the candidates at an election for the borough of Newark upon Trent. This action was also held to be a civil action (at 758; 1286 (Lord Kenyon CJ)). Similarly, in \textit{Cooper v Slade} (1858) 6 HL Cas 746 at 772-773; 10 ER 1488 at 1498-9 (Willes J), the House of Lords treated as a civil proceeding an action for penalties under s 2 of the \textit{Corrupt Practices Prevention Act 1854}, 17 & 18 Vict c 102. Again, this conclusion was reached notwithstanding that under the same statute the same conduct was made a criminal offence.

In \textit{Attorney-General v Radloff} (1854) 10 Ex 84; 156 ER 366, the Attorney-General sued to recover penalties for smuggling. Whether the defendant was a competent witness turned on whether the proceeding was civil or criminal. Platt B noted that not every proceeding commenced by the Attorney-General was criminal, and held that a proceeding was criminal if imprisonment could follow as an immediate consequence, not merely the loss of money or goods (at 101):

What then is a “civil proceeding” as contra-distinguished from a “criminal proceeding”? It seems to me that the true test is this, if the subject matter be of a personal character, that is, if either money or goods are sought to be recovered by means of the proceeding that is a civil proceeding; but if the proceeding is one which may affect the defendant at once, by the imprisonment of his body, in the event of a verdict of guilty, so that he is liable as a public offender that I consider a criminal proceeding.

The court, however, was equally divided, so no precedent was established. Whilst Platt B had held that the possibility of immediate imprisonment indicated that a proceeding was criminal, was it also true that if the only consequence of contravention was the recovery of a penalty, then the contravention was not a crime? Brett MR held that this was so in \textit{Attorney-General v Bradlaugh} (1885) 14 QBD 667 at 687:

Wherever an Act of Parliament imposes a new obligation, and in the same Act imposes a consequence upon the non-fulfilment of that obligation, that is the only consequence … The recovery of a penalty, if that is the only consequence, does not make the prohibited act a crime. If it did, it seems to me that that distinction which has been well known and established in law for many years between a penal statute and a criminal enactment, would fall to the ground, for every penal statute would involve a crime, and would be a criminal enactment.

The case concerned whether a member of the House of Commons who had no belief in a “Supreme Being” could take the oath required of parliamentarians on pain of penalty under the \textit{Parliamentary Oaths Act 1866}, 29 Vict c 19, ss 3, 5. No appeal would lie if the case was criminal. In

\textsuperscript{13} Under the \textit{Corrupt Practices at Parliamentary Elections Act 1728}, 2 Geo 2, c 24, s 7.

\textsuperscript{14} Quakers Act 1695, 7 & 8 Wm 3, c 34.
contrast to Brett MR’s certainty, Lindley LJ considered that “there are matters which are on the boundary line which divides civil from criminal matters, and this is one of them” (at 715).

Lindley LJ’s more circumspect approach was echoed in R v Tyler and International Commercial Company [1891] 2 QB 588. The proceeding was brought seeking penalties against the company for failing to forward a list of its members to the Registrar of Joint Stock Companies as required under the Companies Act 1862, 25 & 26 Vict c 89. Bowen LJ considered that in each case where a statute “impose[s], as the result of non-compliance with the directions of the statute, a pecuniary loss on the individual who does not so comply”, “it is a question of the construction of the Act” whether “the intention of the legislature [was] to make the disobedience of the law a misdemeanour” or merely that the person “must submit to the penalty”.

Brett MR’s judgment in Bradlaugh was, however, applied directly in Brown v Allweather Mechanical Grouting Co Ltd [1953] 2 WLR 402. Lord Goddard CJ held that an excise penalty under the Vehicles (Excise) Act 1949, 12, 13 & 14 Geo 6, c 89 was quite different to a fine. Commenting on the earlier case, Lord Goddard explained (at 405): “It was far more common in those days than it is nowdays to prohibit certain acts and to impose, as the sanction, the recovery of the penalty, which the Acts very often provided could be recovered by a common informer”, that is, a private citizen. Lord Goddard referred to common informers as “a particular type of public nuisance” that had been abolished the previous year by the Common Informers Act 1951, 14 & 15 Geo 6, c 39.

The ability of common informers to seek discovery and interrogatories was considered in Mexborough v Whitwood Urban District Council [1897] 2 QBD 111. Lord Esher MR held that a common informer could not seek discovery or interrogatories not only in criminal cases but also in civil actions for a penalty (at 115).

The following year his Lordship considered the issue discussed by the divided court in Radloff: the relationship between imprisonment and criminal proceedings. The case was Seaman v Burley [1896] 2 QB 344 and it concerned whether a judgment to enforce payment of a poor-rate by warrant of distress was a judgment in a criminal cause or matter within s 47 of the Supreme Court of Judicature Act 1873, 36 & 37 Vict c 66. If it was a judgment in a criminal cause or matter within the meaning of that section, no appeal would lie. Lord Esher MR considered that “the question is really one of procedure”, noting that an assault could be the subject of a civil or criminal proceeding (at 346). His Lordship concluded that the matter was criminal because, on the authorities, “the question is not whether the proceeding must, but whether it may end in imprisonment”. Lord Justice Kay agreed (at 349):

I think we are bound by the decisions on that point to hold that though it does not necessarily follow that there will be a commitment to prison, yet if the proceedings before the magistrates may have that result, that is enough to show that the proceeding is in the nature of a criminal proceeding, in which there is no appeal to this Court.

Seaman was cited in Amand v Home Secretary and Minister of Defence of Royal Netherlands Government [1943] AC 147 at 157, a case decided during World War II. A Dutch citizen who had been charged in the Netherlands with desertion was arrested in England. The Dutch citizen unsuccessfully sought a writ of habeas corpus in the English courts. It was held that no appeal lay as it was a “criminal cause or matter”. Viscount Simon LC explained (at 156): “If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal.” This “test” was subsequently applied by Lord Denning in R v Southampton Justices; Ex parte Green [1976] QB 11 at 15.

The status of Viscount Simon LC’s test was qualified, however, in 2001 in US v Montgomery [2001] 1 WLR 196. In that case, the House of Lords held that an order under Pt VI of the Criminal Justice Act 1988 (UK), restraining the disposal of assets alleged to be the proceeds of fraud, was essentially a civil matter, and hence could be appealed. Lord Hoffmann described Amand as “the leading authority in this House” (at 201) but considered that Viscount Simon LC had intended his test to be illustrative, rather than exhaustive, of whether a matter was criminal (at 202). His Lordship “doubt[ed] the wisdom of trying to formulate any definition of ‘criminal cause or matter’ to supplement the undefined expression used by Parliament” (at 202).
3. AUSTRALIA

A. Civil, criminal or civil penalty?

A number of Australian cases, going back more than a century, have considered whether a matter was civil or criminal. *Re Medley* (1902) 28 VLR 475 concerned the grounding of the British steamer *Paroo*, of which Medley was the Master. The Court of Marine Inquiry suspended Medley’s master’s certificate for six months, but the proceeding was quashed by the Supreme Court of Victoria. The Full Court held that no appeal lay because the matter was criminal (at 490). The Marine Board had argued that the suspension did not involve criminal charges, but the Full Court explained (at 490), in terms reminiscent of Blackstone: where there is a general law for the good of the public, for the common weal or benefit of the public, and where there is a breach of the provisions of that law, for which a penalty may be imposed, or for which there is a punitive remedy, then that matter is criminal and is not civil.

In *Houghton v Oakley* (1900) 21 LR (NSW) 26, a landlord sued his tenant under statute for fraudulently removing his goods. In the Supreme Court of New South Wales, Owen J followed Platt B in *Radloff*, holding that a matter was not criminal unless imprisonment was the “necessary and immediate consequence of the conviction or order”.

*Houghton* was overruled in New South Wales 12 years later in *Ex parte Walsh* (1912) 12 SR (NSW) 306. In that case, a wife had left her husband and taken some household furniture. The court held that the husband was able to sue his wife for recovery of the furniture or its value under s 32 of the *Police Offences Act 1901* (NSW) because the suit was not in tort, but rather criminal, and therefore permitted under statute. At the time, any person who disobeyed a court order by failing to pay a fine, penalty or sum of money was to be imprisoned “with either hard or light labour” for a period of time not exceeding the maximum prescribed, unless the amount was paid sooner. However, imprisonment was discretionary for orders under s 32 (at 311). Delivering the court’s judgment, Street J held (at 318) that the judgments of Platt B and Owen J:

> make the question depend upon the nature of the matter complained of, but the later authorities establish that whether the matter complained of is in its nature criminal or not, if the procedure is before Justices, and may end in imprisonment, the proceeding is a criminal proceeding.

An early Victorian case recognising civil penalties is *Jones v Lorne Saw Mills Pty Ltd* [1923] VLR 58, a proceeding under s 44 of the *Conciliation and Arbitration Act 1904* (Cth). Cussen J doubted that it was a criminal proceeding, as “[t]he proceeding seems to be rather in the nature of a penal action” (at 64). Nearly three decades later, Latham CJ in the High Court accepted that s 59 of the same Act created a penalty, not an offence.

The *Conciliation and Arbitration Act 1904* (Cth) arose again in *Gapes v Commercial Bank of Australia Ltd* (1979) 27 ALR 87. The case was considered so important it was heard by a specially-convened Bench of five Federal Court judges. The issue was whether a penalty proceeding

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15 Applying *Supreme Court Act 1890* (Vic), s 37.

16 In addition to caselaw, the Full Court relied on the division between civil injuries and crimes explained by Stephen, *Commentaries on the Law of England* (10th ed, 1886) vol I at 137-138.

17 *Married Women’s Property Act 1901* (NSW), s 16 (prohibiting tort claims), s 20 (allowing criminal proceedings provided the husband and wife were not living together, as was the case here). Prior to this legislation, a husband could not sue his wife at common law, as they were regarded as one person.

18 *Justices Act 1902* (NSW), s 82(2).

19 After referring to the English cases of *Mellor v Denham* (1879) 5 QBD 469; *R v Whitchurch* (1881) 7 QBD 534; *Attorney-General v Bradlaugh* (1885) 14 QBD 667; *Seaman v Burley* (1896) 2 QB 344.

20 In which case, the proceeding might be time-barred under the *Crimes Act 1914* (Cth), s 21; *Justice Act 1915* (Vic), s 210.

21 His Honour cited the entries in *Stroud’s Dictionary* for “offences”, “penal”, “penalty” and “prosecution”.

22 *R v Metal Trades Employers’ Association; Ex Parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 239: “Section 59(c) provides that any such penalty may be sued for and recovered by the Registrar and certain other persons. This section does not create an offence. It provides for an action for penalties.”
under s 119 of the Act for breach of an award of the Commonwealth Conciliation and Arbitration Commission was in respect of a criminal offence. If so, the appeal would be incompetent. Section 119 was silent on the issue but, in contrast, s 122 provided that a wilful breach of an award was a criminal offence (at 92-93 (Smithers J)). After an extensive review of the authorities, J B Sweeney J held that, as a matter of construction, s 119 did not create a criminal offence (at 111). The other judges agreed, with Deane J stating that the section did not impose any statutory obligation or prohibition; rather, it provided that, in certain circumstances, a penalty could be imposed at the suit of certain bodies (at 112).

In *Deputy Commissioner of Taxation v DTR Securities Pty Ltd* (1985) 1 NSWLR 653 at 660, Lee J referred to *Atcheson* and other English cases and held that an additional 10% payable on overdue tax\(^2\)\(^3\) was a penalty under the applicable statute of limitations.\(^2\)\(^4\) The New South Wales Court of Appeal agreed, describing it as “directly punitive, and only indirectly fiscal” and therefore “a penalty, and not a tax”.\(^2\)\(^5\) The High Court assumed this characterisation was correct.\(^2\)\(^6\)

In *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 (*Labrador*), the High Court wrestled with the quasi-criminal nature of customs proceedings. Although customs legislation\(^2\)\(^7\) provided for “Customs prosecutions” and “Excise prosecutions” for “offences” that led to convictions, such prosecutions could be:

 commenced prosecuted and proceeded with in accordance with any rules of practice (if any) established by the Court for Crown suits in revenue matters or in accordance with the usual practice and procedure of the Court in civil cases or in accordance with the directions of the Court or a Judge.\(^2\)\(^8\)

Confusingly, the High Court held that the offences needed to be proved beyond reasonable doubt, but applied the rules of evidence that did not apply to criminal proceedings.\(^2\)\(^9\) Hayne J explained that, at least from the 18th century in England, the procedure for the recovery of customs duty involved the issue of a writ of capias for the arrest of the debtor to answer the matters charged and the imprisonment of the debtor unless bail was granted. Although, to modern eyes, this procedure seems distinctly criminal, at the time it was considered merely “the king’s action for debt” (at 194). Significantly, Hayne J rejected the civil-criminal dichotomy (at [114]):

Arguments founded on classification of the proceedings as “civil” or “criminal” as determinative of the standard of proof, must fail. As reference to the historical matters mentioned earlier reveals, the classification proposed is, at best, unstable. It seeks to divide the litigious world into only two parts when, in truth, that world is more complex and varied than such a classification acknowledges. There are proceedings with both civil and criminal characteristics: for example, proceedings for a civil penalty under companies (*Corporations Act 2001* (Cth), Pt 9.4B (ss 1317DA – 1317S)) and trade practices (*Trade Practices Act 1974* (Cth), s 77) legislation. The purposes of those proceedings include purposes of deterrence, and the consequences can be large and punishing.

Eschewing any such classification, Hayne J reached the “tentative conclusions” that “it must be strongly arguable” that proof beyond reasonable doubt is required by the common law for a conviction.

\(^2\)\(^3\) *Income Tax Assessment Act 1936* (Cth), s 207(2).

\(^2\)\(^4\) *Limitation Act 1969* (NSW), s 18.

\(^2\)\(^5\) *DTR Securities Pty Ltd v Deputy Commissioner of Taxation* (1987) 8 NSWLR 204 at 210 (Samuel JA). The Court of Appeal reversed Lee J’s decision on other grounds.

\(^2\)\(^6\) *Deputy Commissioner of Taxation v DTR Securities Pty Ltd* (1988) 165 CLR 56 at 62. The High Court, however, reversed the New South Wales Court of Appeal’s decision on the basis that the *Limitation Act 1969* (NSW) did not apply in any event under the *Judiciary Act 1903* (Cth), s 64.

\(^2\)\(^7\) *Customs Act 1901* (Cth); *Excise Act 1901* (Cth).

\(^2\)\(^8\) *Customs Act 1901* (Cth), s 247 (emphasis added).

\(^2\)\(^9\) *Evidence Act 1977* (Qld), s 92, which, related to the admissibility of documents and which, by its terms, did not apply in criminal proceedings.
of an offence, but if other relief is sought (for example, a declaration of contravention or pecuniary penalty), "it must be strongly arguable" that proof to the civil standard suffices.\(^{30}\)

In contrast, Gleeson CJ stated that the legislative descriptions of offences, guilt, conviction and punishment should be accepted at face value (at 166).\(^{31}\)

**B. Competition and Consumer Act 2010 (Cth)**

Part IV of the *Competition and Consumer Act 2010* (Cth) (formerly *Trade Practices Act 1974* (Cth)) prohibits anticompetitive conduct including anticompetitive contracts, arrangements or understandings, misuse of market power, exclusive dealing, resale price maintenance and mergers.\(^{32}\) When originally before Parliament, the government proposed that the civil standard of proof should apply to these provisions but the Opposition advocated the criminal standard.\(^{33}\) The Attorney-General, Mr Lionel Murphy QC, explained that the conduct was “commercial” and thus treated “in the civil sense”.\(^{34}\) He warned that the Opposition risked “import[ing] into the trade practices area the notion of criminality” and businessmen being “treated as criminals”. Section 77 originally referred to pecuniary penalty proceedings “by way of civil action” but the Senate deleted these words.\(^{35}\) Section 78 stated, however, that criminal proceedings would not lie.

When the courts were called on to determine the applicable standard of proof, Northrop J held that it was the civil standard of proof,\(^{36}\) keeping in mind that, under *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 343 (Latham CJ), 360ff (Dixon J), the graver the allegations the greater the strictness of proof required. Subsequently, Fisher J, who was part of the Full Court in *Gapes*, noted “it seems accepted that the requisite degree of satisfaction is the civil test, namely the balance of probabilities”,\(^{37}\) but applying the *Briginshaw* principle. In a later case it was argued that the criminal standard of proof applied, but Pincus J held that the Act clearly characterised the proceeding as civil, not criminal, and that “Parliament must be taken to have intended” the civil standard of proof would apply.\(^{38}\)

In 1974, the maximum pecuniary penalty was $50,000 for an individual and $250,000 for a body corporate.\(^{39}\) These amounts increased in 1993 to $500,000 and $10,000,000 respectively. In 2010, cartel conduct was criminalised following a campaign by the Australian Competition and Consumer Commission, which described cartel conduct as, “in reality, a form of theft”.\(^{40}\) The Act now contains

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\(^{30}\) However, even applying the civil standard, “the nature of the issue [would] necessarily [affect] the process by which reasonable satisfaction is attained” and ‘exactness of proof [would be] expected” (citing *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 363; *Helton v Allen* (1940) 63 CLR 691; *Hocking v Bell* (1945) 71 CLR 430; *Reflek v McElroy* (1965) 112 CLR 517; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170; 110 ALR 449).

\(^{31}\) Paraphrasing *Mullan v Lee* (1949) 80 CLR 198 at 217-218 (McTiernan J).

\(^{32}\) *Competition and Consumer Act 2010* (Cth), ss 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK, 45, 46, 47, 48, 50.


\(^{35}\) Gillooly and Wallace-Bruce, n 9 at 277 fn 23.

\(^{36}\) *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) 32 FLR 305; 20 ALR 31 at 52 (a merger case).

\(^{37}\) *Trade Practices Commission v Nicholas Enterprises Pty Ltd [No 2]* (1979) 40 FLR 83; 28 ALR 609 at 642. This was a cartel case. The decision was followed in two separate resale price maintenance cases: *Peter Williamson Pty Ltd v Capitol Motors Ltd* (1981) 61 FLR 257 at 264 (Franki J); *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 3 FCR 168; 55 ALR 527 at 541 (Toohey J).

\(^{38}\) *Heating Centre Pty Ltd v Trade Practices Commission* (1986) 9 FCR 153 at 160. This was a resale price maintenance case. The decision was approved by the Full Court of the Federal Court in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union (Aust) v Australian Competition & Consumer Commission* (2007) 162 FCR 466 at 479 (Weinberg, Bennett and Rares JJ).

\(^{39}\) *Trade Practices Act 1974* (Cth), s 76.

\(^{40}\) Australian Competition and Consumer Commission (ACCC) (Graham Samuel, Chairman), “Cracking Cartels”, Opening Comments to the ACCC’s Regulatory Conference, *Cracking Cartels: International and Australian Developments*, Sydney,
criminal prohibitions and civil penalty provisions\textsuperscript{41} that are identical save that, for the criminal prohibitions, the fault element of “knowledge or belief” is specified\textsuperscript{42} for the \textit{Criminal Code Act 1995} (Cth).\textsuperscript{43} The criminal offences are indictable\textsuperscript{44} and if convicted an individual may be imprisoned for up to 10 years and/or fined up to 2,000 penalty units (presently $340,000).\textsuperscript{45}

**C. Corporations Act 2001 (Cth)**

The \textit{Corporations Act} contains 30 categories of civil penalty provisions (listed in s 1317E). They include directors’ duties (ss 180-183), insolvent trading (s 588G(2)), continuous disclosure (ss 674-675), market manipulation (s 1041A) and insider trading (s 1043A). The maximum pecuniary penalty is $200,000 for individuals and, for “financial services civil penalty provisions” such as insider trading, $1,000,000 for a body corporate (s 1317G).

There is no parallel criminal offence for a directors’ duty of reasonable care and diligence (s 180), but there is (s 184) for the duty to act in good faith, in the corporation’s best interests and for a proper purpose (s 181), and the duties of directors not to use their position or information gained by virtue of that position to gain an advantage or cause detriment to the corporation (ss 181-183). The maximum criminal penalty is 2,000 penalty units (presently $340,000) and/or five years imprisonment (Sch 3). The criminal and civil prohibitions apply in the same circumstances, save that the criminal prohibition involves an additional mental element of recklessness or intentional dishonesty.\textsuperscript{46} However, this distinction is not clear-cut: a court may relieve a director from civil penalties if he/she acted honestly and “ought fairly to be excused” in all the circumstances (s 1317S).

**D. Strategic regulation theory**

Unlike cartel conduct, civil penalties for directors’ duties were introduced\textsuperscript{47} after criminal prohibitions, following recommendations by the “Cooney Committee”.\textsuperscript{48} The Committee recommended that criminal liability apply only “where conduct is genuinely criminal in nature” and that civil penalties apply “where no criminality is involved”.\textsuperscript{49} The Committee heard that the criminal penalties appeared draconian, and courts’ reluctance to imprison resulted in modest fines.\textsuperscript{50}

The Cooney Report refers to a “pyramid of enforcement … with civil measures at the base of the pyramid for the general run of cases, and criminal liability at the apex for the more exceptional instances of law-breaking”.\textsuperscript{51} This “enforcement pyramid” model was developed by strategic regulation theory,\textsuperscript{52} an economic theory of regulation which argues regulators should employ more

\textsuperscript{41} Competition and Consumer Act 2010 (Cth), ss 44ZZRF and 44ZZRG, see Sch 1 for other than bodies corporate (criminal provisions), ss 44ZZRJ and 44ZZRK (civil penalty provisions).

\textsuperscript{42} Competition and Consumer Act 2010 (Cth), ss 44ZZRF(2), 44ZZRG(2).

\textsuperscript{43} Criminal Code Act 1995 (Cth), s 5.3 defines “knowledge” as awareness that a circumstance or result exists or will exist in the ordinary course of events, but there is no corresponding definition for “belief”.

\textsuperscript{44} Competition and Consumer Act 2010 (Cth) ss 44ZZRF(4), 44ZZRG(5).

\textsuperscript{45} Competition and Consumer Act 2010 (Cth), Sch 1, ss 44ZZRF(4), 44ZZRG(4).

\textsuperscript{46} See further Criminal Code Act 1995 (Cth), s 5.4 in relation to the meaning of recklessness as a “fault element”.

\textsuperscript{47} Civil penalties were initially introduced by the \textit{Corporations Law Reform Act 1992} (Cth) and then extended to other prohibitions by the \textit{Company Law Review Act 1998} (Cth) and the \textit{Financial Services Reform Act 2001} (Cth).


\textsuperscript{49} Cooney Report, n 48, pp 190-191 (Recommendations 22, 23).

\textsuperscript{50} Cooney Report, n 48, p 188 (cited in ALRC, n 10, p 75 [2.58]).

\textsuperscript{51} Cooney Report, n 48, p 190 (citing submission by Professor Fisse).

severe sanctions for more serious contraventions in a “tit-for-tat” strategy of “responsive regulation”. The strategy follows from accepting that regulators cannot detect and punish every contravention and hence must encourage voluntary compliance. According to the ALRC, “[c]ivil monetary penalties play a key role in the pyramid as they may be sufficiently serious to act as a deterrent (if imposed at a high enough level) but do not carry the stigma of a criminal conviction”. Criminal sanctions may control isolated or instantaneous conduct, but civil sanctions better achieve continuous surveillance. Gilligan, Bird and Ramsay depict the pyramid of enforcement mechanisms available to ASIC as follows:

\textbf{Fig 1}

In contrast to the Cooney Committee and the ALRC, the top two levels of Gilligan, Bird and Ramsay’s version do not distinguish between sanctions based on whether they are criminal or civil, but rather based on whether the sanctions are incapacitative or pecuniary. This places civil banning orders above criminal fines. Further, if criminal prosecutions were the apex, as suggested by the Cooney Committee and the ALRC, the model would predict that ASIC would conduct more civil penalty proceedings than criminal proceedings for breach of directors’ duties. The reverse is true. From 1 July 2001 to 30 June 2009, there were 85 criminal prosecutions and only three civil penalty applications.

Professor Coffee suggests that, even if civil penalties are quicker and cheaper, regulators will prosecute criminally because this generates greater publicity, creates a reputation for being tough and helps boost public funding, recruitment and staff morale. Further, no regulator “believes that

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53 See further ALRC, n 10, p 76 [2.60].
55 ALRC, n 10, p 76 [2.61].
57 Gilligan et al, n 52 at 428.
58 Welsh, n 54 at 921-922.
violations of its rules are simply regulatory offenses that lack inherent moral culpability”.60 Similarly, Welsh suggests that there was a significant public backlash against ASIC for pursuing only civil, and not criminal, penalties in Vizard.61

E. Procedural protections for civil penalties

In a number of cases, the courts have considered whether procedural protections apply in civil penalty proceedings. This has been the case, in particular, with civil penalty proceedings under the Corporations Act.

In R v Associated Northern Collieries (1910) 11 CLR 738, Isaacs J refused to order discovery in an action for penalties under statute.62 The case involved alleged cartel conduct by colliery owners. His Honour’s reasoning relied on “an inherent distinction between a civil action to prevent or redress a civil injury on the one hand, and a civil action to recover a penalty on the other” (at 747).

The High Court considered Isaac J’s decision nearly a century later in Rich v Australian Securities & Investments Commission (2004) 220 CLR 129 and held that, when ASIC seeks a disqualification order against a person for contravening the law, the court ought not order the person to make discovery. This is due to the “privilege against exposure to penalties”, “one of a trilogy of privileges that bear some similarity with the privilege against incrimination” (at 141).63 Penalty privilege originated in the rules of equity relating to discovery, and was then applied more generally (at 142).64 However, unlike legal professional privilege, which is a substantive rule of law, it is not clear that penalty privilege applies outside judicial proceedings (at 142).65 The purpose of penalty privilege is to ensure “that those who allege criminality or other illegal conduct should prove it” (at 142).66

The High Court overturned the decision of the New South Wales Court of Appeal, which the majority of the High Court said was based on a false dichotomy between “punitive” and “protective” orders (at 147 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ)). ASIC accepted that, if discovery was not ordered, the person was also not required to file evidence before trial (at 136).

McHugh J concurred in the result, noting (at 152): “In substance, the nature of [the contraventions] is little different from those which attract the sanctions of the criminal law.” Kirby J dissented, seeking to give primacy to the legislation and noting that it clearly distinguished between civil and criminal proceedings (at 169). Referring to the “graduated enforcement pyramid” of strategic regulation theory, his Honour warned that penalty privilege “may risk undermining legislative attempts to develop graduated sanctions and remedies that go beyond the strict civil/penal paradigm” (at 172).67

In Australian Securities & Investments Commission v Mining Projects Group Ltd (2007) 164 FCR 32, a civil penalty case, Finkelstein J held that penalty privilege excuses a defendant from delivering

60 Coffee, n 59 at 1889.
61 Australian Securities & Investments Commission v Vizard (2005) 145 FCR 57; Welsh, n 54 at 922, 925-926
62 Australian Industries Preservation Act 1906 (Cth), ss 4, 6.
63 The other two privileges in the trilogy are the privilege against exposure to forfeiture and the privilege against exposure to ecclesiastical censure.
64 Citing Naismith v McGovern (1953) 90 CLR 336 at 341-342 (Williams, Webb, Kitto and Taylor JJ).
65 Citing Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission (2002) 213 CLR 543 at [31].
a defence that complies with pleading rules if those rules would otherwise override the privilege. If the defendant wishes to run a positive defence, the defendant ought rely on the privilege until the plaintiff’s case is concluded, and then deliver an amended defence (with the plaintiff granted a short adjournment to prepare if necessary) (at [12]-[13]). His Honour was also inclined to hold that a regulatory body bringing a civil penalty proceeding is under a duty similar to the prosecutorial duty of disclosure in criminal cases, but the issue had already been decided otherwise (at [33]-[34]).

The day after that decision, the New South Wales Court of Appeal in another civil penalty case partially dispensed with requirements to plead matters to avoid the other party being taken by surprise. The dispensation was granted to the defendant on account of penalty privilege but, unlike in Mining Projects Group, the defendant was still required to file a limited defence disclosing his intention to rely on statutory and other positive defences.

In Morley v Australian Securities & Investments Commission (2010) 247 FLR 140 at [679]-[680]; 274 ALR 205, the New South Wales Court of Appeal rejected the argument that, in a civil penalty proceeding, by analogy with criminal proceedings, ASIC owed a prosecutorial duty to call material witnesses. However, the court held that ASIC’s failure to call a material witness could breach its obligation (which ASIC conceded it had (at [701])) to act fairly with respect to the conduct of the proceeding (at [728]). Furthermore, it significantly undermined the cogency of ASIC’s case (at [775]-[777]). This conclusion followed from a number of matters, including ASIC’s obligation of fairness, the scope of ASIC’s powers and the “public interest dimension of its functions” (at [775]). As noted above (Part 1), this decision was overturned by the High Court.

4. UNITED STATES

A. Constitutional rights

The United States Supreme Court has, over more than a century, considered whether the following constitutional rights apply in civil penalty proceedings:

- the Fourth Amendment right “to be secure against … unreasonable searches and seizures”;
- the Fifth Amendment rights not to:
  - be subject “for the same offense to be twice put in jeopardy of life or limb” (Double Jeopardy Clause);
  - be “compelled in any criminal case to be a witness against himself” (Self-Incrimination Clause);
  - have “private property be taken for public use, without just compensation” (Takings Clause);
  - the Fifth and Fourteenth Amendments right not to be deprived “of life, liberty, or property, without due process of law” (Due Process Clauses); and
  - the Eighth Amendment right not to be subject to “excessive fines” (Excessive Fines Clause).

As the following decisions demonstrate, the court has taken different approaches at different times and in relation to different constitutional rights.

B. Early recognition of civil penalties

In Stockwell v US 80 US 531 at 542 (1871), the Supreme Court recognised that the government could commence a civil action for debt to recover a penalty prescribed under an Act of Congress. The Act in question prohibited receiving, concealing or buying illegally-imported goods. The penalty was forfeiture of the goods and a payment of twice their value. Since a sum certain was owed, it was “immaterial” how the liability arose.

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69 Macdonald v Australian Securities & Investments Commission (2007) 73 NSWLR 612 at 624-625: Mason P disagreed with a pre-Rich Victorian decision, where the defences were only required to indicate the matters admitted, denied or not admitted (In the Matter of Water Wheel Mills Pty Ltd (unreported, Supreme Court, Vic, 22 June 2001, Mandie J).

70 Referring to Whitehorn v The Queen (1983) 152 CLR 657.

Stockwell, the English decision of Atcheson (referred to above) and other authorities were cited in Hepner v US 213 US 103 at 108 (1909), where the Supreme Court held it was “settled law that a certain sum … prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal”. The court subsequently held that the civil standard of proof (on the preponderance of the evidence), rather than the criminal standard (beyond reasonable doubt), applied.

C. Search, seizure and self-incrimination

In Boyd v US 116 US 616 (1886), the Fourth Amendment and the Self-Incrimination Clause were infringed when a defendant in a civil penalty proceeding was ordered to produce invoices for goods the subject of an allegedly fraudulent customs declaration. The statutory penalty was a fine or imprisonment and forfeiture of the goods. The court held (at 634):

We are also clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man’s property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal … If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants – that is, civil in form – can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one.

Applying this reasoning in subsequent decisions, the procedural protections afforded in criminal cases were extended to civil penalty cases. Under the Self-Incrimination Clause, a defendant facing civil penalties could not be compelled to testify at trial. Nor could an unregistered gambler be required by statute to submit incriminating registration statements and tax returns notwithstanding that the only penalty sought was forfeiture of the proceeds of crime and notwithstanding that centuries of legal history supported such forfeiture. Moreover, the “exclusionary rule”, which prohibits the use of evidence obtained by searches breaching the Fourth Amendment, was extended to forfeiture proceedings, even though not criminal. However, in Hepner v US 213 US 103 at 112 (1909) the court confirmed:

the Lees and Boyd cases do not modify or disturb but recognize the general rule that penalties may be recovered by civil actions, although such actions may be so far criminal in their nature that the defendant cannot be compelled to testify against himself in such actions in respect to any matters involving, or that may involve, his being guilty of a criminal offense.

Also, outside the Self-Incrimination Clause, the guaranties for criminal trials in Art 3 of the United States Constitution and the Sixth Amendment were held not to apply in civil penalty cases. Those guaranties include the right to confront witnesses.

Further, the current authority of Boyd is doubtful for two principal reasons. First, Boyd held that the Fourth Amendment permitted searches for and seizures of instruments of crime, proceeds of crime and weapons, but prohibited searches for and seizures of evidentiary material such as incriminating documents. The immunity for evidentiary material was later overruled.

72 Atcheson v Everitt (1775) 1 Cowp 382; 98 ER 1142.
73 US v Regan 37 US 37 (1914). This was an action for debt to recover a penalty of $1,000 for assisting or encouraging migrant workers to enter the United States.
77 US v Regan 232 US 37 at 50 (1914).
More fundamentally, the Supreme Court held in *US v Ward* 448 US 242 (1980) that the Self-Incrimination Clause was not breached in a proceeding for a “civil penalty” imposed by environmental legislation upon the lessee of an onshore drilling facility, where the lessee was obliged to report a discharge or spill. The court relied on the civil-criminal distinction and emphasised that “whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction.”

The court then set out a two-limb test (at 248-249):

First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. [See *One Lot Emerald Cut Stones v US* 409 US 232 at 236-237 (1972).] Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. [See *Flemming v Nestor* 363 US 603 at 617-621 (1960).]

In relation to the second limb, “only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground”. Although “certainly neither exhaustive nor dispositive”, the seven considerations listed in *Kennedy v Mendoza-Martinez* 372 US 144 at 168-169 (1963) provided some guidance:

1. “whether the sanction involves an affirmative disability or restraint”;
2. “whether it has historically been regarded as a punishment”;
3. “whether it comes into play only on a finding of scienter”;
4. “whether its operation will promote the traditional aims of punishment – retribution and deterrence”;
5. “whether the behavior to which it applies is already a crime”;
6. “whether an alternative purpose to which it may rationally be connected is assignable for it”; and
7. “whether it appears excessive in relation to the alternative purpose assigned”.

In *Ward*, the court acknowledged (at 258), that “[r]ead broadly, *Boyd* might control the present case”, but *Boyd*’s reasoning had been confined by subsequent cases and could be distinguished. *Boyd* dealt with forfeiture of property. Also, unlike in *Boyd*, “the civil remedy and the criminal remedy are contained in separate statutes enacted 70 years apart” and a statutory provision prevented the mandatory notification from being used in any criminal prosecution, except for perjury or giving a false statement (*Ward* at 254). “More importantly”, the legislation was not criminal under the two-limb test, and “it would be quite anomalous to hold that [the legislation] created a criminal penalty for the purposes of the Self-Incrimination Clause but a civil penalty for all other purposes” (at 254).

**D. Double jeopardy, excessive fines and liquidated damages**

In *Rex Trailer Co v US* 350 US 148 (1956), the petitioner had been prosecuted criminally for defrauding the government, and argued that the Double Jeopardy Clause prohibited a subsequent civil penalty proceeding. However, the Clause “prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense” (at 150-151). The court considered that the civil penalty was not criminal because it was analogous to “liquidated damages” for the loss suffered by society and the cost of enforcing the law. Liquidated damages, when reasonable, are not penalties and are civil in nature (at 151). In the instant case, “it cannot be said that the measure of recovery fixed by Congress in the Act is so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty” (at 154). Further, as with liquidated damages, the government need not prove that it suffered loss (at 152-153).

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82 Citing *Helvering v Mitchell* 303 US 391 at 399 (1938).

83 Citing *US v United Engineering & Contracting Co* 234 US 236 at 241 (1914). The analogy with liquidated damages was also employed in *US v Ward* 448 US 242 at 258 (1980), where one of the reasons for distinguishing *Boyd* was that *Boyd* dealt with forfeiture of property, “a penalty that had absolutely no correlation to any damages sustained by society or to the cost of enforcing the law” whereas in *Ward* “the penalty is much more analogous to traditional civil damages”.

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(2013) 87 ALJ 404
In US v Halper 490 US 435 (1989), however, the civil penalty amount was held to be excessive. Halper had been convicted, fined and gaol for numerous small Medicare frauds totalling US$585. The government’s costs were approximately $16,000. Civil penalties under the False Claims Act, calculated on the basis of $2,000 per offence, totalled $130,000. The Supreme Court considered that, although the government was entitled to a degree of latitude in the amount of compensation it could recover, the amount of $130,000 bore “no rational relation to the goal of compensating the Government for its loss” and hence appeared to be punishment (at 449). The court explained (at 447-448):

“In making this assessment, the labels “criminal” and “civil” are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads.

This reasoning was extended to the Excessive Fines Clause in Austin v US 509 US 602 (1993), where the Supreme Court held that the statutory forfeiture of real property used in selling cocaine was clearly punitive. The court rejected arguments that the Clause applied only to proceedings that were criminal (or criminal under the two-limb Ward test) and that the Clause did not apply because the forfeiture was remedial (at 607, 619-622).

Halper and Austin were, however, distinguished in US v Ursery 518 US 267 (1996). The court held that the Double Jeopardy Clause was not infringed when a house used for marijuana growing was forfeited in civil forfeiture proceedings, and then the owner of the house was criminally prosecuted. While civil penalties punished the wrongdoer, civil forfeiture relied on a legal fiction that the property itself was punished (at 282). Unlike civil penalties, which “are designed as a rough form of ‘liquidated damages’” (at 283-284), forfeiture confiscated the instruments and proceeds of crime, so it was inappropriate to balance the value of the property forfeited against the harm suffered by the government.

Finally, Halper was overturned in Hudson v US 522 US 93 (1997). The Supreme Court held that the Double Jeopardy Clause was not infringed when two bank officers received administrative monetary penalties and were banned from their occupation, and were later criminally indicted. Applying the two-limb Ward test, and the Mendoza-Martinez factors as “useful guideposts” (at 99-100), the court classified the earlier penalties as civil, not criminal. Halper was “ill considered”, given its deviation from longstanding principles, and “unworkable”, given that “all civil penalties have some deterrent effect” (at 101-102). Moving away from the liquidated damages notion, the court said: “If a sanction must be ‘solely’ remedial (that is, entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause” (at 102). Lastly, some of Halper’s objectives were met by other constitutional provisions, with the Due Process and Equal Protection Clauses prohibiting “sanctions which are downright irrational” (at 103) and the Excessive Fines Clause protecting against “excessive civil fines, including forfeitures” (at 103). The advantage of additional protection under the Double Jeopardy Clause was “more than offset by the confusion created by attempting to distinguish between ‘punitive’ and ‘nonpunitive’ penalties” (at 103).

5. European Union

Article 6 of the ECHR enshrines the “Right to a fair trial”. This includes the right to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”, which

84 The court noted the history of the Excessive Fines Clause, and its derivation from the English Bill of Rights 1689, 1 Wm & M sess 2, c 2, s 10.
applies to the determination of civil rights and obligations as well as criminal charges (Art 6(1)). Other rights are guaranteed only for criminal offences: the right to be presumed innocent until proven guilty (Art 6(2)) and the “minimum” rights of the accused to be informed of the charge, to adequate time and facilities to prepare the defence, to defend himself/herself or to legal representation, to examine and obtain witnesses and to an interpreter (Art 6(3)).

What is considered “criminal”, however, varies from state to state. To classify according to the relevant domestic law would therefore be inequitable and discriminatory and undermine the intended universality of the procedural safeguards.88 The European Court of Human Rights has thus held that whether various matters involve a “criminal charge” for the purpose of Art 6 depends on the three “Engel criteria” (Engel v Netherlands (1976) 22 Eur Court HR (ser A) at [82]):

• the domestic classification;
• the nature of the offence; and
• the severity of the potential penalty.

If the matter is criminal under domestic law, that is conclusive. If not, that classification has only “formal and relative value” and the court considers the second and third criteria. Those criteria operate alternatively but if the conclusion is not clear both criteria may be considered cumulatively.89

For the second Engel criterion, which is more important than the matter not being considered criminal under domestic law, the following factors suggest a criminal charge:90

• the rule is binding on all citizens, not a given group with a special status;91
• the proceedings were brought by a public authority under statutory powers of enforcement;92
• the sanction is punitive, which is “the customary distinguishing feature of criminal penalties”;93

and
• the conduct is classified as criminal in other contracting states.94

The third Engel criterion addresses whether the potential sanction, by its nature and degree of severity, belongs in general to the “criminal” sphere.95 Deprivations of liberty that are punishment (unless not appreciably detrimental) belong to the criminal sphere in a society subscribing to the rule of law.96 This is consistent with Art 5(1) of the ECHR, which permits deprivation of liberty only in connection with criminal proceedings. In one case, disqualification from public office for 10 years, along with the nature of the matter (making a false declaration), was held to involve a criminal charge.97 Article 6 has been held applicable to:98

• contraventions of prison99 and military100 disciplinary rules punishable by detention;
• road traffic violations punishable by fines;101 and

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89 Ezeh v United Kingdom [2003] X Eur Court HR 485 at [86].
90 See further European Court of Human Rights, “Key Case-law Issues: Article 6 (Notion of a Criminal Charge)” (last updated 31 December 2006) at [6].
91 Bendenoun v France (1994) 284 Eur Court HR (ser A) at [47].
92 Benham v United Kingdom [1996] III Eur Court HR 22 at [56].
93 Öztürk v Germany (1984) 73 Eur Court HR (ser A) at [47].
94 Öztürk v Germany (1984) 73 Eur Court HR (ser A) at [53].
95 Öztürk v Germany (1984) 73 Eur Court HR (ser A) at [54].
96 Engel v Netherlands (1976) 22 Eur Court HR (ser A) at [82].
97 Matyjek v Poland (decision) (European Court of Human Rights, Fourth Section, Application No 38184/03, 30 May 2005) at [58].
99 Ezeh v United Kingdom [2003] X Eur Court HR 485 at [82].
100 Engel v Netherlands (1976) 22 Eur Court HR (ser A) at [85].
101 Lutz v Germany (1987) 123 Eur Court HR (ser A).
customs contraventions.\textsuperscript{102} 
It has been held not to apply to:\textsuperscript{103} 
• the precautionary immediate revocation of a driving licence;\textsuperscript{104} 
• disqualification from standing for election;\textsuperscript{105} 
• bans on political parties;\textsuperscript{106} 
• commissions of inquiry established by parliament;\textsuperscript{107} 
• the expulsion of aliens;\textsuperscript{108} 
• extradition proceedings;\textsuperscript{109} 
• applications for legal aid (in relation to art 6(1));\textsuperscript{110} and 
• forfeiture of property affecting the rights of third parties not at risk of criminal proceedings.\textsuperscript{111}

In another case, the Human Rights Commission classified a competition law proceeding as criminal, based primarily on the magnitude of the maximum penalty, which revealed its deterrent purpose.\textsuperscript{112} The case ultimately settled,\textsuperscript{113} but was cited in \textit{Jussila v Finland} [2006] XIII Eur Court HR 892 at [43] as authority that Art 6 can apply to competition law and as an example of how the \textit{Engel} criteria have “underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law”. In \textit{Jussila}, Finland admitted certain tax surcharges were punishment to deter re-offending, rather than compensation for damage. From this, the court concluded “the surcharges were imposed by a rule whose purpose was deterrent and punitive” and “that this establishes the criminal nature of the offence”, “notwithstanding the minor nature of the tax surcharge” (at [38]).

6. Distinguishing Criteria

The four jurisdictions reviewed in this article demonstrate different methods of determining whether a matter is civil or criminal, and whether procedural protections should apply. There are, however, similarities between the test established by the Supreme Court of the United States in \textit{Ward} and the first and third criteria established by the European Court of Human Rights in \textit{Engel}. Further, the cases suggest broad support for the use of the following criteria to decide whether a matter is civil or criminal, or whether procedural protections apply:

1. \textit{Legislative classification as civil}: This is given great weight in the United States under the \textit{Ward} test but less so in the European Union under the \textit{Engel} criteria. In Australia, it determines the standard of proof, but the courts are reluctant to accept the civil standard where there are indications of a criminal matter,\textsuperscript{114} and may apply common law procedural protections.\textsuperscript{115}

\textsuperscript{102} \textit{Salabiaku v France} (1988) 141-A Eur Court HR (ser A).
\textsuperscript{103} See European Court of Human Rights, n 90 at [10]-[28].
\textsuperscript{104} \textit{Escoubet v Belgium} [1999] VII Eur Court HR 1034.
\textsuperscript{105} \textit{Pierre-Bloch v France} [1997] VI Eur Court HR 84 at [53]-[60].
\textsuperscript{106} \textit{Refah Partisi (Welfare Party) v Turkey} (European Court of Human Rights, Third Section, Application Nos 41340/98, 41342/98, 41343/98, 41344/98, 3 October 2000).
\textsuperscript{107} \textit{Montera v Italy} (European Court of Human Rights, First Section, Application No 64713/01, 9 July 2002).
\textsuperscript{108} \textit{Maaouia v France} [2000] X Eur Court HR 455 at [39].
\textsuperscript{109} \textit{Peñafiel Salgado v Spain} (European Court of Human Rights, Fourth Section, Application No 65964/01, 16 April 2002).
\textsuperscript{110} \textit{Gutfreund v France} [2003] VII Eur Court HR 1076.
\textsuperscript{111} \textit{Air Canada v United Kingdom} (1986) 316-A Eur Court HR (ser A) 20 at [54] (forfeiture of an aircraft); \textit{AGOSI v United Kingdom} (1986) 108 Eur Court HR (ser A) 22 at [65]-[66] (forfeiture of coins).
\textsuperscript{113} \textit{Société Stenuit v France} (1992) 232-A Eur Court HR (ser A).
\textsuperscript{114} For example, \textit{Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd} (2003) 216 CLR 161 at 206.
Civil penalties and procedural protections

2. Punitive: This is critical under the *Engel* criteria and leads to penalty privilege in Australia. It was decisive in *Re Medley* (1902) 28 VLR 490. Under the *Ward* test, it transforms a nominally-civil prohibition into a criminal prohibition – but only in exceptional cases. However, as noted in *Labrador* and *Hudson*, unless civil penalties must be strictly compensatory (akin to liquidated damages), this criterion cannot distinguish between civil and criminal penalties. Severity may not be a reliable guide because, as the ALRC noted, multi-million dollar civil penalties are more onerous than lesser criminal fines.

3. Imprisonment: Although once imposed for failure to pay a debt (or judgment debt), imprisonment has long been recognised as the key indicator of criminality in England and Australia. It is conclusive under the ECHR. The ALRC strongly considered that imprisonment was only appropriate for crimes.

4. Conviction: This proved decisive in *Labrador*, but not in *Rich*, as Kirby J noted. It may therefore be conclusive but not exclusive, as with imprisonment.

Other plausible rationales did not figure prominently in the cases reviewed:

1. Mental element: The requirement of a guilty mind is commonly considered a hallmark of the criminal justice system. It distinguishes the criminal offences for directors’ duties and cartel conduct from their civil penalty counterparts (see above, Part 3(B), (C)). However, it features in the cases reviewed only as one of seven *Mendoza-Martinez* factors, which are only guideposts for the *Ward* test. Further, a mental element (other than voluntariness) is unnecessary in crimes of strict or absolute liability, which are used in the regulatory area. Conversely, deliberateness is taken into account in setting the amount of civil penalties. Moreover, although a guilty mind suggests moral culpability, the requirement to prove a guilty mind protects an accused who did not have one, so omitting that requirement does not justify omitting other protections.

2. Inherently criminal conduct: Some theorists maintain criminal law is for morally blameworthy conduct. This is difficult to see where parallel criminal and civil prohibitions exist. In *Labrador*, Hayne J eschewed appeals to “some ‘essential character’ of proceedings”, stating: “By what process of distillation the ‘essential character’ of proceedings could be revealed is not apparent.” This comment was endorsed by the majority in *Rich*. According to Coffee, “the...
limited empirical evidence on public attitudes toward white-collar crimes suggests that the public learns what is criminal from what is punished, not vice versa”, that is, “the use of the criminal sanction changes public perceptions of the severity of an offense, increasing the public’s estimate of its inherent culpability.” Coffee further proposes that criminal law deters conduct absolutely, while civil law “prices” conduct that should only be deterred optimally. This view is not reflected in the cases.

3. **Seriousness of harm**: This criterion seems logical but criminal offences are not always more serious than civil contraventions. Minor traffic and parking offences are criminal, whereas cartel conduct and insider trading may be prosecuted civilly. Professor Bagaric argues that “the type of activities which are prohibited by the criminal law are so diverse that the criminal law is devoid of a justificatory principle” and is merely a “set of disparate rules … devoid of a unifying thread”.

4. **Procedural**: It has been asserted: “A crime (or offence) is a legal wrong that can be followed by criminal proceedings which may result in punishment.” While this reflects a practical reality, it does not assist in determining whether procedural protections should apply in the first place. It also suggests that, if civil penalties attract more procedural protections, they – and potentially defendants – appear more criminal in nature.

5. **Stigma**: Being branded a criminal undoubtedly imports a social stigma – especially for individuals. However, there appears to be public confusion regarding the difference between criminal sanctions and civil penalties, with civil pecuniary penalties frequently described in the media as “fines”.

It is important to remember that courts have made these decisions about whether a matter is civil or criminal for very specific purposes. In *Atchison v Everitt* (1775) 1 Cowp 382; 98 ER 1142, the purpose was to determine whether a Quaker could give evidence on affirmation. Hence, the question was whether the matter was “criminal” within the meaning of the particular statute in question. In *Ex parte Walsh* (1912) 12 SR (NSW) 306, the purpose was to determine whether a husband could sue his wife. In other cases, the purpose was to determine whether there could be an appeal, what standard of proof applied, whether a limitation period applied, or whether the defendant was entitled to a specific procedural protection afforded in criminal proceedings. Further, as Labrador demonstrated, a matter can in effect be classified as civil for one purpose (the standard of proof) and criminal for another purpose (the rules concerning admissibility of evidence).

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137 ALRC, n 10, p 121.

138 For example, *Attorney-General v Bradlaugh* (1885) 14 QBD 667; *Seaman v Burley* [1896] 2 QB 344; *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147; *US v Montgomery* [2001] 1 WLR 196; *Re Medley* (1902) 28 VR 475; *Gapes v Commercial Bank of Australia Ltd* (1979) 27 ALR 87.


140 *Deputy Commissioner of Taxation v DTR Securities Pty Ltd* (1985) 1 NSWLR 653; *DTR Securities Pty Ltd v Deputy Commissioner of Taxation* (1987) 8 NSWLR 204.

7. Conclusion

The long history of civil penalty cases in England, Australia, the United States and the European Union referred to in this article undermines Blackstone’s clear dichotomy between civil and criminal matters. The distinction is, as Hayne J explained in Labrador, unstable at best. As Lindley LJ put it so long ago, “there are matters which are on the boundary line which divides civil from criminal matters.” Consequently, courts have needed to make difficult decisions about whether a matter is civil or criminal.

Two of the jurisdictions considered – the United States and the European Union – have human rights charters. The other two jurisdictions – Australia and England (at least at the time of most of the cases considered) – did not. Despite these differences, there is considerable overlap between the types of matters considered in determining whether a matter is civil or criminal, or whether a procedural protection applies (see above, Part 6).

Even without a human rights charter, Australian courts have provided defendants in civil penalty proceedings with a series of procedural protections (see above, Part 3(E)). Those protections have been fashioned in a piecemeal fashion, relying, for example, on the penalty principle and common law presumptions in statutory interpretation. That is how Australian and English courts have dealt with civil penalties for the last few centuries. However, the innovation of modern civil penalties means there is now a need for a corresponding innovation to ensure appropriate procedural protections are applied. If we are to have civil penalty proceedings, it would be preferable to have clarity regarding the procedural protections that apply. It is now a decade since the ALRC called for these matters to be set out in statute. In a similar vein across the Pacific, Mann called two decades ago for the development of a proper “middleground” jurisprudence to cater for civil penalties.

Yet, in this author’s view, even a regulatory contraventions statute that expresses clearly the procedural protections that apply is unlikely to quell the controversy regarding civil penalties unless consideration is also given afresh to when it is appropriate for the legislature to employ civil penalties in the first place. Courts will treat with apprehension civil penalty provisions that are of sufficient seriousness to warrant the application of the criminal law, but seemingly carry inadequate procedural protections. As has already been seen to some extent in civil penalty cases under the Corporations Act 2001 (Cth) (see above, Part 3(E)), this apprehension is likely to find expression in various types of case management orders which, under modern rules of court and judicial thinking, courts have ample power and inclination to implement. Whilst courts may make such orders to discharge their broad duty to do justice between the parties, such orders frustrate the expectation of regulators that they can pursue civil penalties expeditiously and without the requirements of criminal proceedings. The situation is uncertain and undesirable for all concerned – including practitioners responsible for advising and representing their clients in civil penalty proceedings.

The most glaring example of these difficulties is where there are parallel civil and criminal prohibitions and penalties, with the civil penalties as severe as the criminal (save that the former do not include imprisonment). This state of affairs has traditionally been justified on the basis of strategic regulation theory. The theory is, however, contradicted by the empirical evidence that ASIC conducts far more criminal than civil penalty proceedings for breach of directors’ duties. For the reasons given by Coffee (see above, Part 3(D)), a regulator is likely to prosecute criminally whenever possible. The choice of civil versus criminal proceedings is therefore likely to be influenced more by the strength of the regulator’s case rather than, as the justification based on strategic regulation theory assumes, the seriousness of the contravention as part of a “tit-for-tat” game theory strategy. This thesis

142 Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd (2003) 216 CLR 161 at 198-199.
143 Attorney-General v Bradlaugh (1885) 14 QBD 667 at 715.
144 ALRC, n 10, pp 25, 263 (Recommendation 6-7).
145 Mann, n 7 at 1844.
146 Welsh, n 54 at 921-922.
147 Coffee, n 59 at 1888.
is consistent with the enforcement pyramid described by Gilligan, Bird and Ramsay, who do not put criminal penalties above civil penalties: instead they group civil and criminal penalties together but put incapacitative penalties and management banning orders above pecuniary penalties.\textsuperscript{148}

As a result, strategic regulation theory is, in this author’s view, an unconvincing justification for parallel civil and criminal prohibitions. The history of civil penalties in England, Australia, the United States and the European Union shows that we cannot maintain Blackstone’s simple civil-criminal dichotomy. The same history also shows, however, that the concepts of “civil” and “criminal” remain fundamental and it remains vital to prevent the erosion of those concepts and the procedural protections that the criminal law affords.

For now, practitioners can only advise and represent clients as best they can in the knowledge that the controversy surrounding civil penalties, and the procedural protections that apply in civil penalty proceedings, has continued for centuries, has troubled courts in many jurisdictions and is a story set to continue into the foreseeable future.

\textbf{POSTSCRIPT}

On 19 March 2013, the Victorian Court of Appeal handed down its judgment in \textit{Australian Securities \& Investments Commission v Ingleby} (2013) 93 ACSR 274; [2013] VSCA 49. The court unanimously rejected the approach of the Full Court of the Federal Court to approving settlements in civil penalty cases, as set out in \textit{NW Frozen Foods Pty Ltd v Australian Competition \& Consumer Commission} (1996) 71 FCR 285 and \textit{Minister for Industry, Tourism \& Resources v Mobil Oil Australia Pty Ltd} [2004] FCAFC 72, which accords significant leeway to negotiated settlements provided the penalties agreed are within the permissible “range”. In the leading judgment on this issue in \textit{Ingleby} (at [2]-[5]), Weinberg JA emphasised the similarity between criminal and civil penalties, but suggested that the “fundamental distinction” was that “no federal civil penalty provisions ... include a term of imprisonment” and moreover, that any such penalty might be unconstitutional (at [6]). The Victorian Court of Appeal’s decision can therefore be added to the modern authorities listed above in Part 6 that rely on imprisonment as the touchstone of criminality. The current conflict in authorities between the Victorian and federal jurisdictions in relation to the approval of negotiated civil penalties can also be seen as a further consequence of the troublesome hybrid nature of civil penalties. The civil, “non-criminal” form of civil penalties supports the expediency of approving negotiated settlements, whereas the penal, quasi-criminal character of civil penalties supports greater judicial oversight and intervention. The conflict in the authorities, and the uncertainty it creates, is of significant concern to parties seeking to reach a negotiated settlement with a regulator of civil penalty proceedings.

\textsuperscript{148} Gilligan et al, n 52 at 428.