

Civil Penalties in Australian Legislation

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Abstract

Civil penalty provisions are an increasingly common feature of both State and Federal legislation in Australia. Such provisions authorise the imposition of penal sanctions upon persons who contravene the legislation notwithstanding that their liability need only be established on the civil standard of proof and in proceedings that employ the civil rules of practice and procedure. In this way the Legislature seeks to ensure compliance with the key provisions of its statutes. In this article, the authors examine the civil penalty regimes set up by four major pieces of Australian legislation - the Industrial Relations Act 1988, the Trade Practices Act 1974, the Corporations Law and the uniform consumer credit legislation. The relevant provisions of each piece of legislation are outlined, with the nature of the penalties that may be imposed and the procedures for imposing them being considered in detail. The rationale underlying the inclusion of civil penalty provisions in the various statutes is explored. The authors conclude with a series of propositions which, they submit, state the current law with respect to civil penalties in Australia.

Introduction

Increasingly, Australian legislatures are turning to the device of civil penalties as a means of ensuring compliance with key provisions of their legislation.¹ For present purposes, 'civil penalties' may be broadly defined as punitive sanctions that are imposed otherwise than through the normal criminal process. These sanctions are often financial in nature, and closely resemble fines and other punishments imposed on criminal offenders. However, the process by which these penalties are imposed is decidedly non-criminal, lacking many

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1 The same trend is occurring in the USA. See K Mann, 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' 101 *Yale LJ* 1795 at 1800, 1844 ff (1992).

of the procedural safeguards built into the criminal process to protect the citizen from arbitrary use of State power.

Much of the debate on the acceptability of civil penalty provisions centres upon the propriety of employing rules of civil procedure (including the civil standard of proof) to determine a person's liability to penal sanctions, albeit civil ones. Proponents of civil penalties tend to emphasise the public interest in observance of the law and argue that the option of imposing such penalties must be available to the legislature if certain forms of anti-social behaviour are to be suppressed. In support of their position, they rely on three main contentions:

- Civil penalties are significantly less severe than criminal penalties - the 'liberty of the subject' is not at stake, and the imposition of a civil penalty does not attract the stigma of criminal conviction. Hence the special protections for persons accused of criminal offences which are embodied in the rules of criminal procedure are both inappropriate and unnecessary.
- In cases where civil penalties may be imposed, the normal rules of civil procedure are modified to take account of the gravity of the consequences of an adverse finding. The result is that the risk of innocent persons being subjected to penal sanctions is minimised.
- Given the difference between the criminal and civil standards of proof, it will be easier to establish a defendant's liability to civil as opposed to criminal penalties. The increased likelihood of the imposition of civil penalties enhances their deterrent effect, and hence their utility as a means of ensuring compliance with legislation.

Opponents of civil penalties argue that no penalties of any kind should be imposed on persons who do not have the protection of the rules of criminal procedure. They reject all three of the above contentions, on the following grounds:

- Civil and criminal penalties are often qualitatively quite similar. Practically speaking there is little difference between a fine (a criminal sanction) and a 'pecuniary penalty' (a civil sanction) except that the maximum level set for the latter may well exceed that set for the former! The stigma that attaches to a person who is adjudged guilty of misconduct does not depend upon whether that adjudication is labelled a 'criminal conviction'. Rather it is dependent upon a combination of factors including the nature of the misconduct, its seriousness (as indicated by the penalty imposed), and the degree of

publicity it attracts. Civil offenders may suffer greater stigma than criminal offenders.

- Whatever modifications are made to the normal rules of civil procedure in penalty proceedings, these rules still provide significantly less protection for an innocent person than the rules of criminal procedure. Hence there remains a serious risk of penalties being wrongly imposed on such a person.
- Deterrence is not enhanced by punishing the innocent, and even if it were, deterrence would then be bought at too high a price.

It is impossible to assess the merits of these arguments in a vacuum. In order to separate the logic from the rhetoric, it is necessary to examine the current legal position and, in particular, the specific statutory contexts in which civil penalties are used. In this article, four major pieces of Australian legislation are examined in detail - the *Industrial Relations Act 1988* (Cth), the *Trade Practices Act 1974* (Cth), the *Corporations Law*, and the *Uniform Credit Acts* of the States. These statutes have been chosen both for their national character and because they illustrate the variety of civil penalties currently in use. In respect of each Act, the range of sanctions available, the procedure for imposing those sanctions and the rationale underlying the enactment of the civil penalty provisions are explored. The article concludes with a number of propositions which, it is submitted, set out the current state of the law on civil penalties in Australia.

Civil Penalties Under Australian Industrial Law

Section 178(1) of the *Industrial Relations Act 1988* (Cth) provides for the imposition of a civil penalty:

Subject to section 182,² where an organisation or person bound by an award or an order of the Commission breaches a term of the award or order, a penalty may be imposed by the Court or, except in the case of a breach of a bans clause, by a court of competent jurisdiction.

It will be noticed that the subsection does not expressly state that the penalty is civil. However the provision is in similar terms to its predecessor - s 119 *Conciliation and Arbitration Act 1904* (Cth) - and

2 Section 182 requires that a proceeding under s 178 in relation to a breach of a bans clause may only be instituted if a certificate has been issued. The Industrial Relations Court has exclusive jurisdiction to hear breaches of bans clauses.

the Full Court of the Federal Court unanimously decided in *Gapes v Commercial Bank of Australia Limited*³ that s 119 created a civil rather than a criminal penalty. It is submitted that the same conclusion holds good for subsection 178(1).

The Sanction

Under section 178(4) the maximum penalty that may be imposed by a State or Territory court for breach of an award or order is \$500. Where the penalty is imposed by the Industrial Relations Court of Australia, the maximum penalty varies with the type of breach. If the breach is taken to have been committed under a provision included in an award or order under s 111(1)(e), the penalty is \$500;⁴ where the breach is of a term of an award constituted by a certified agreement or enterprise flexibility agreement, or a term of an award that states that it is a paid rates award, and continues for more than one day, the maximum penalty is \$5,000, and \$2,500 for each day for which the breach continues. Where the above does not apply but the breach is of a term of a paid rates award or of a certified or enterprise flexibility agreement, the maximum penalty is \$5,000; in any other case the maximum penalty is \$1,000.⁵ Section 170EF(1) which came into force on 30 March 1994 also gives the Industrial Relations Court power to impose a penalty of not more than \$1,000 on an employer who does not comply with the requirements relating to the retrenchment of 15 or more employees. The previous penalties which were described as 'ridiculously out of tune with modern day reality',⁶ were substantially increased by the amendments which

3 (1979) 27 ALR 87. This case cleared up the confusion caused by the decision of the Australian Industrial Court in *Vehicle Builders' Employers Federation of Australia v General Motors - Holden Pty Ltd* (1977) 32 FLR 100 which held that the proceedings were criminal. For criticisms, see A Freiberg and R C McCallum, 'The Enforcement of Federal Awards: Civil or Criminal Penalties' (1979) 7 ABLR 246.

4 Section 111(1) sets out the powers of the Commission and under paragraph (e) the Commission may, in relation to an industrial dispute: 'make an award or order including, or vary an award or order so as to include, a provision to the effect that engaging in conduct in breach of a specified term of the award or order shall be taken to constitute the commission of a separate breach of the term on each day on which the conduct continues'.

5 In line with the parties freedom to negotiate their terms in certified or enterprise flexibility agreement, note that s 178(4A) allows the parties to specify an amount that is greater or lesser than \$2,500 (in s 178(4)(a)(iia)(B)) for specified breaches in their agreement.

6 Per the Chief Industrial Magistrate of New South Wales in *Ecob v Poletti* (1989) AILR 308. The case involved a member of the AWU who was allegedly substantially underpaid contrary to the Horse Training

came into force from 30 March 1994. In determining the appropriate level of penalty, the courts have adhered to the view that the maximum is reserved for the worst possible case.⁷ All the surrounding circumstances are to be taken into account including the nature of the contravention,⁸ and the moral culpability⁹ and previous conduct of the contravenor.¹⁰ The courts have a discretion to order that the amount of the penalty be paid to the applicant.¹¹

Procedure

As *Gapes* established, the proceedings for the imposition of a penalty under section 178(1) are civil in nature, and hence the civil rules of evidence and procedure are employed.

Section 178(5) sets out the persons who may initiate an action to sue for and recover a penalty: an inspector; a party to the award or order; an employer who is a member of an organisation and who is affected by the breach; a person whose employment is, or at the time of the breach was, subject to the award and who is affected by the breach; an organisation that is affected, or any of whose members are affected, by the breach; or an officer or an employee of an organisation that is affected, or any of whose members are affected, by the breach where the officer or employee is authorised, under the rules of the organisation, to sue on behalf of the organisation.

Section 357 provides a procedure for enforcement of penalties. Under subsection (1), a certificate signed by the Registrar, specifying the amount imposed by a court under section 178 (and any costs or expenses), and by whom and to whom respectively it is payable, may be filed in the Industrial Relations Court of Australia or in any other court of competent jurisdiction. Under subsection (2) such a certificate is enforceable in all respects as a final judgment of the court in which it is filed.

Industry Award 1976, and had not been paid pro rata long service leave payments on termination. The proceeding had been brought under the 1904 legislation and the *Long Service Leave Act* 1955 (NSW). The Chief Magistrate commented on the penalty under the Federal legislation as being of little deterrent effect.

7 *Gregory v Philip Morris Limited* (1988) 80 ALR 455 at 478.

8 *Wheeler v Philip Morris Limited* (1990) AILR 165.

9 *Masters v Highway One Transport Pty Ltd* (1990) AILR 226; *Gregory v Philip Morris Limited* (1988) 80 ALR 455 at 459 (per Jenkinson J).

10 *Gregory v Philip Morris Limited* (1988) 80 ALR 455.

11 See s 356(b) and eg *Gregory v Philip Morris Limited* (1988) 80 ALR 455 at 459.

Rationale

Section 178 is contained in Division 1 of Part VIII of the *Industrial Relations Act*. Part VIII is headed 'Compliance', and Division 1 'Penalties for Contravention of Awards and Orders'. This is a strong indication that pecuniary penalties have as their objective, compliance with the provisions of the Act in general, but more specifically, compliance with the provisions relating to awards and orders.

Further support for this view can be obtained from the case law. In *Gapes* Sweeney J, who delivered the judgment of the Full Federal Court, sought reasons for the use of pecuniary penalties in the predecessor to the current Act. His Honour stated:

Conviction always carried a stigma and no doubt, in the case of employers who would at least in past years have been the ones most likely to feel the brunt of the section, a conviction and fine even though lesser in amount than a penalty ordered to be paid would be regarded as harsher treatment. I think the legislature quite consciously adopted this difference and has clearly maintained it.¹²

Smithers J, another member of the Full Federal Court in *Gapes*, made several observations with respect to the purpose of section 119. Having noted the parties who can sue and recover a penalty, His Honour commented: 'The interests of these parties are primarily if not solely to promote the interest of the public in the observance of awards'.¹³

Civil Penalties Under the Trade Practices Act 1974

Section 76 of the *Trade Practices Act 1974* (Cth) empowers the Court to impose substantial pecuniary penalties on persons who contravene, attempt to contravene, or are involved in a contravention of a provision of Part IV - Restrictive Trade Practices. Such contraventions constitute 'civil offences with civil penalties'.¹⁴

The Sanction

The maximum penalty that may be imposed upon a natural person is \$500,000,¹⁵ whilst the maximum for bodies corporate is \$10 million.¹⁶

12 (1979) 27 ALR 87 at 111.

13 (1979) 27 ALR 87 at 90.

14 Per Senator Murphy as he then was in the debate on the Trade Practices Bill 1974 *Parliamentary Debates - Senate* Vol 61, 15/8/74 at 988.

15 Section 76(1B).

These penalties are significantly higher than those available for criminal breaches of Part V - Consumer Protection.¹⁷ In determining the appropriate penalty, the Court must have regard to 'all relevant matters' including the nature and extent of the contravention, any loss or damage resulting, the circumstances surrounding the contravention, and any previous misconduct by the defendant.¹⁸

Procedure

The proceedings for the imposition of a civil penalty are an interesting mix of civil and criminal procedure. This can be seen from Table A, which compares certain features of proceedings for civil penalties for breach of Part IV, with criminal proceedings for breach of Part V.

16 Section 76(1A).

17 Section 79(1). Maximum penalties are \$40,000 for a natural person, and \$200,000 for a body corporate.

18 Section 76(1). In *TPC v CSR Ltd* (1991) ATPR 41-076, in the context of s 76 proceedings for breaches of ss 46 and 47, French J listed some other factors relevant to determining the appropriate penalty at 52,152-3:

-size of the contravening company

-degree of power it has;

-deliberateness of the contravention;

-whether senior management were involved;

-whether the company has a corporate culture conducive to compliance with the Act; and

-whether the company had co-operated with the enforcement authorities.

Table A: Procedure - Selected Features

	Criminal Offences	Civil Offences
Initiator of Proceedings	TPC or persons authorised by TPC, Minister or Secretary of the Department (s 163(4))	TPC or Minister (s 77(1))
Power of TPC to obtain information documents and evidence	Conferred by s 155	Conferred by s 155
Time limit for initiation of proceedings	3 years (s 79(6))	6 years (s 77(2))
Standard of proof	Beyond reasonable doubt	On the balance of probabilities
Evidence and procedure	Criminal	Civil

In some respects, proceedings for civil and criminal penalties are alike. For example, an agent of the State is the initiator of proceedings, and section 155 can be used to compel even a potential defendant to supply information prior to the commencement of proceeding.¹⁹ Section 155(7) expressly provides that a person cannot refuse to supply the information on the ground that it may incriminate that person.²⁰ No express mention is made of civil offences or penalties but the High Court of Australia has held that a person may not refuse to supply information on the ground that he or she may be subjected to a civil penalty.²¹

19 But s 155 cannot be used once proceedings have commenced: *Brambles Holdings v TPC* (1980) 32 ALR 328; *Hammond v The Commonwealth* (1982) 56 ALJR 767. The non-availability of provisions like s 155 when litigation is pending is consistent with the views expressed by a majority of Justices in the High Court of Australia in *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 12 ACSR 452 at 471 (per Mason CJ, Toohey J), 511 (McHugh J) and 494-5 (per Deane, Dawson, Gaudron JJ). Contra Brennan J at 479.

20 In *EPA v Caltex*, note 19 above, the High Court decided by a majority of 4 to 3 that the privilege against self-incrimination was not available in any event to corporations. See pp 471-2 (per Mason CJ, Toohey J), 478-479 (per Brennan J) and 509 (McHugh J). Contra Deane, Dawson, Gaudron JJ at 492-3.

21 *Pyneboard Pty Ltd v TPC & Anor* (1983) 57 ALJR 236. The reasoning of the majority (which comprised Mason ACJ, Wilson and Dawson JJ)

The major procedural difference between proceedings for criminal and civil offences lies in the standard of proof to be applied. When the civil penalty provisions of the *Trade Practices Act* were debated in Parliament, considerable controversy arose as to the appropriate standard of proof. The Government made it clear that the civil standard was intended, whilst the Opposition contended that the criminal standard was more appropriate.²² The final form of the legislation failed to make explicit which standard was to be applied²³ although section 78 did expressly state that criminal proceedings would not lie against a person who contravened, attempted to contravene or was involved in a contravention of Part IV. The courts ultimately confirmed that the civil standard was the correct one to be applied in proceedings under section 76.²⁴

Rationale

In the Senate debate on the *Trade Practices Bill*, the Attorney-General, Mr Lionel Murphy QC (as he then was), outlined the rationale for the introduction of civil penalties:

There is a clear distinction between the trade practices provisions and the consumer protection provisions in the Bill. For the most part, the consumer protection provisions deal with conduct which amounts to a criminal offence. This is in cases where there are false representations or conduct which is obviously of some fraudulent type and which is of a kind ordinarily covered by the criminal law. In the trade practices area, the conduct is more commercial conduct dealing with competitors, driving them out of business and so forth. An endeavour has been made to treat this area in the civil

was that the privilege against exposing oneself to civil penalties which would otherwise have been available, had been abrogated by s 155. In *EPA v Caltex*, note 19 above, the High Court by a majority of 4 to 3 held that the privilege against self incrimination was not available to corporations. It seems that the four members of the majority on the self-incrimination point, would likewise hold that the privilege against self-exposure to civil penalties would not be available to a corporation as an answer to a s 155 notice. See pp 469 (per Mason CJ & Toohey J), 479 & 483 (per Brennan J) and 502-3 (per McHugh J).

- 22 See *Parl Deb - Senate*, vol 61 15/8/74 at 982-989, 1014-1017; *Parl Deb - House of Rep*, vol 89 16/7/74 at 232, 24/7/74 at 570, 589-590.
- 23 Indeed the express reference in clause 77 in its original form to a proceeding for a pecuniary penalty being 'by way of civil action' was deleted in the course of the Senate proceedings.
- 24 *Heating Centre Pty Ltd v TPC* (1986) 65 ALR 429 at 435 per Pincus J; *TPC v Nicholas Enterprises Pty Ltd & Ors* (1979) ATPR 40-126 at 18,352 per Fisher J; *TPC v Ansett Transport Industries (Operations) Pty Ltd & Ors* (1978) ATPR 40-071 at 17,720.

sense. The nature of the penal provisions are such as to create what are called civil offences rather than criminal offences ...

We think it is important not to import into the trade practices area the notion of criminality as such Inevitably, if the Opposition is successful in its bid to include in the clause the phrase 'beyond reasonable doubt', businessmen who are caught up by these provisions will be treated as criminals.²⁵

The intention of the Legislature in creating pecuniary penalties under the *Trade Practices Act* is to deter would be offenders. As French J noted in *TPC v CSR Ltd*:²⁶

Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation, within the sense of the Old and New Testament moralities that imbue much of our criminal law, have any part to play in economic regulation of the kind contemplated by Part IV ... The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.²⁷

The deterrent purpose of the provisions was reiterated by the Attorney-General, Mr Michael Duffy, when introducing the *Trade Practices Legislation Amendment Bill 1992*. The amending legislation, inter alia, substantially increased the level of pecuniary penalties that could be imposed under section 76. Mr Duffy said:

Current penalties for breaches of the Act are inadequate ... The deterrent value of the penalties no longer reflects the seriousness with which the Government and the community view corporate misbehaviour ... It is necessary to set maximum penalties at a level which will counter the potential profits to be obtained from conduct which breaches the Act. The new penalties will help to ensure a high level of compliance ...²⁸

25 *Parl Deb - Senate*, vol 61 15/8/74 at 984-5.

26 (1991) ATPR 41-076.

27 *Id* at 52,152. On the deterrent purpose of the provisions, see also: *TPC v Palmer Corporation Ltd* (1990) ATPR 40-995 at 50,961; *TPC v British Building Society & Ors* (1988) ATPR 40-880 at 49,545; *TPC v Carlton & United Breweries Ltd* (1990) ATPR 41-037 at 51,549; *TPC v Sony (Australia) Pty Ltd* (1990) ATPR 41-053 at 51,691; *TPC v JJ & YK Russell Pty Ltd & Ors* (1991) ATPR 41-090 at 52,442.

28 Attorney-General's Second Reading Speech, Parliamentary Debates - House of Representatives, Weekly Hansard, No 15, 3 November 1992 at 2407.

The Government's continuing concern with ensuring compliance with the *Trade Practices Act* is reflected in the Attorney-General's reference on this matter to the Australian Law Reform Commission (ALRC) in December 1992. This resulted in the release of a Discussion Paper entitled 'Compliance with the *Trade Practices Act* 1974' by the Commission in November 1993.²⁹ The Paper is mainly aimed at examining various means of enhancing compliance with the consumer protection provisions of Part V of the *Trade Practices Act*. However consideration is also given to the applicability of its proposals to other Parts of the Act, inter alia, Part IV.³⁰

In the Discussion Paper, the ALRC identifies a number of objectives which enforcement action is designed to achieve.³¹ Relevantly for present purposes, one such objective is 'to provide deterrence'- it is of course the primary function of penalty provisions to attain this goal.³² The ALRC notes the differing treatment in the *Trade Practices Act* of breaches of Part IV and Part V, the former being punishable with civil sanctions and the latter with criminal penalties. The Commission concludes that 'there seems to be no logical or compelling rationale for the civil/criminal dichotomy between Part IV and Part V'.³³ It therefore proposes that the same penalty regime, based upon certain provisions of the *Corporations Law*, apply to breaches of both those Parts. The essential features of this new regime would be:

- generally, contravention of either Part will attract civil penalties; and
- criminal liability will only be imposed if a specified mental element is proved.³⁴

This proposal is to be welcomed. Not only does it remove the automatic characterisation of any conduct in breach of Part V as criminal, but it also provides a rational basis for imposing criminal penalties as distinct from civil penalties.

29 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, Discussion Paper No 56, November 1993. A final report is expected in the latter half of 1994.

30 Id at para 1.1-1.2.

31 Id at para 2.5.

32 Penalty orders have a retributive element as well but this is secondary to their main purpose: id at paras 2.5 and 6.1.

33 Id at para 6.22.

34 Id at paras 6.6, 6.7 and 6.23.

Civil Penalties Under the 'Uniform' Consumer Credit Legislation

Substantially uniform *Credit Acts* are currently in force in Western Australia, New South Wales, Victoria, Queensland and the ACT. In this article, the provisions of the Western Australian legislation will be used by way of illustration, and references to the equivalent provisions in the legislation of the other uniform states provided in footnotes. New legislation has been proposed which, if adopted, would introduce nationally uniform consumer credit law.³⁵

Section 42 of the *Credit Act* 1984 (WA) can be described as the general civil penalty provision.³⁶ In subsection (1) it states:

Subject to section 85, where -

- (a) a credit sale contract is not in writing signed by the debtor or is not in accordance with section 35;
- (b) a loan contract is not in writing signed by the debtor or is not in accordance with section 36;
- (c) the annual percentage rate under a credit sale contract, or a loan contract, is not disclosed in accordance with section 38 and, if applicable, section 39;
- (d) a credit sale contract or a loan contract is deemed to be not in accordance with the provisions of this Division by reason of section 40(1); or
- (e) a mortgage relating to a credit sale contract, or a loan contract, is entered into in contravention of section 91(1),

the debtor is not liable to pay to the credit provider the credit charge under the contract.

Where the debtor has already paid an amount in respect of the credit charge in any of the specified circumstances, subsection (2) provides that the amount so paid becomes a debt due by the credit provider to the debtor, which may be set off by the debtor against any amount due to the credit provider under the contract.

35 The Standing Committee of Ministers of Consumer Affairs (SCOCAM) reached agreement in May 1993 on 'Credit Laws Reform: Agreed Policy'. The Policy makes it clear that the automatic civil penalty regime will be retained. Western Australia has indicated that it will not introduce template legislation but will enact its own.

36 See also, *Credit Act* 1985 (ACT) s 42 (1); *Credit Act* 1987 (Qld) s 44 (1); *Credit Act* 1984 (Vic) s 42 (1); *Credit Act* 1984 (NSW) s 42 (1).

Another civil penalty provision is contained in section 67 which applies in relation to the billing cycle of a continuing credit contract.³⁷ A third civil penalty is provided for in section 8 of a related piece of legislation, the *Credit (Administration) Act 1984 (WA)* which relieves a debtor of liability to pay the amount financed or the credit charge, where the credit provider carries on a business of providing credit without a licence.³⁸

The Sanction

The abovementioned provisions provide for a fixed penalty, that is, loss of credit charges and/or the amount financed. However it must be noted that all these sections are subject to section 85 of the *Credit Act 1984 (WA)*. Section 85(1) enables the credit provider to make an application to the Commercial Tribunal to reduce the credit provider's loss; in other words to lift the debtor's liability from zero to a level considered appropriate by the Tribunal after taking into consideration the matters set out in subsection (2).³⁹ These matters essentially comprise all the surrounding circumstances including the conduct of the credit provider and the debtor, and any loss or damage sustained by the debtor as a result of the breach.⁴⁰ The courts have made it clear that 'the Tribunal is not expected to adopt an "all or nothing" approach. It has power to do anything between reinstating the credit charge in full, or allowing none of it'.⁴¹

It should also be noted that section 42(3) of the *Credit Act 1984 (WA)* states that, 'Nothing in this section affects the liability of a person to be convicted of an offence under this Act'.⁴² Subsection

37 See also, *Credit Act 1984 (NSW)* s 67; *Credit Act 1984 (Vic)* s 67; *Credit Act 1987 (Qld)* s 68; *Credit Act 1985 (ACT)* s 67.

38 *Credit (Administration) Act 1984 (NSW)* s 8; *Credit (Administration) Act 1984 (Vic)* s 64; there is no related legislation in the ACT and Queensland.

39 See also ss 85A, 85B, 86, 86A and 88; for the other jurisdictions, see *Credit Act 1985 (ACT)* ss 85, 85A, 86 and 88; *Credit Act 1984 (NSW)* ss 85, 85A, 86, 86A, 86B, 88; *Credit Act; 1984 (Vic)* ss 85, 85A, 85B, 86 and 88; *Credit Act 1987 (Qld)* ss 86, 86A, 87, 87A, 89. In ACT, NSW and Vic the application to reinstate the forfeited amounts is made to variously named Tribunals - in Qld, the application is to a court.

40 *Custom Credit Corporation Limited v Gray* (1991) ASC 56-696 at 56,997, 57,015.

41 *Walter Pugh Pty Ltd v Commissioner for Consumer Affairs* (1988) ASC 55-659 at 57,983, 57,991.

42 See also *Credit Act 1985 (ACT)* s 42 (3); *Credit Act 1984 (NSW)* s 42 (3); *Credit Act 1984 (Vic)* s 42 (3); *Credit Act 1987 (Qld)* s 44 (3).

67(2) employs identical language.⁴³ Section 85(5) and section 86 reiterate that nothing in those sections affects the liability of a person to be convicted of an offence under the *Credit Act* or the *Credit (Administration) Act* 1984.⁴⁴

Procedure

No tribunal or court proceedings are necessary to impose the civil penalties prescribed by the credit legislation - the imposition is automatic upon contravention of the relevant provisions. However, as noted above, the penalty may be remitted in proceedings before a Tribunal or a court (in Queensland); such proceedings are, of course, civil in nature.

Rationale

The leading case on the matter is the decision of the Full Court of the Supreme Court of Victoria in *Encyclopaedia Britannia (Australia) Inc v The Director of Consumer Affairs and Ors.*⁴⁵ That case involved some 1058 contracts for the sale of encyclopaedias on credit that had been made by the appellant company whilst it lacked the necessary licence. The total amount of money involved (amount financed as well as credit charges) was in the order of \$650,000. By virtue of section 64 of the *Credit (Administration) Act* 1984 (Vic), the credit provider's right to the total amount was forfeited. The Senior Referee of the Victorian Small Claims Tribunal declined to fully reinstate the debtor's liability. On appeal to the Full Supreme Court, Fullagar J (with whom Murray and Hampel JJ concurred) examined the purpose behind the civil penalties:

Although the statutes were doubtless enacted because it was thought that government regulation of the credit 'industry' would benefit the customers of the credit providers, and thus enacted with the intention of benefiting debtors, nevertheless the civil penalties, in the form of forfeiture of contractual rights against the debtors, were not intended directly to benefit debtors at all. To induce the credit providers to obtain registration, and to comply with the statutes generally, the penalty was stipulated of depriving the providers of their contractual rights against the debtors, but the fact that a debtor did not have to pay the capital or the interest was not intended to benefit the debtor; the direct benefit to the debtor was

43 See also *Credit Act* 1987 (Qld) s 68 (2); *Credit Act* 1984 (Vic) s 67 (2); *Credit Act* 1984 (NSW) s 67 (2); *Credit Act* 1985 (ACT) s 67 (2).

44 Section 86A (6) makes similar provision with respect to Section 86A; see also *Credit Act* 1987 (Qld) s 86 (5); *Credit Act* 1984 (Vic) s 85 (5); *Credit Act* 1984 (NSW) s 85 (5); *Credit Act* 1985 (ACT) s 85 (5).

45 (1988) ASC 55-636 at 57, 840.

merely incidental. When one looks, therefore, to see whether there is, on the one hand, a determination which involves \$650,000 or, on the other hand, 1,058 determinations, it is primarily to the applicant creditor that one looks rather than to each individual debtor who, entirely fortuitously and incidentally, has escaped altogether his contractual obligations subject to the condition subsequent of a Tribunal determination.⁴⁶

Civil Penalties Under the Corporations Law

The *Corporate Law Reform Act 1992* introduced into the *Corporations Law* the concept of civil penalties, thereby implementing certain recommendations contained in the 1989 *Report on the Social and Fiduciary Obligations of Company Directors* by the Senate Standing Committee on Legal and Constitutional Affairs ('the Cooney Committee').⁴⁷ That Committee recommended, inter alia, that company directors should not be subjected to criminal liability for breaches of the *Corporations Law* unless their conduct was 'genuinely criminal in nature', by which phrase the Committee meant 'accompanied by a dishonest intent'.⁴⁸

Under Part 9.4B - 'Civil and Criminal Consequences of Contravening Civil Penalty Provisions' - certain provisions of the *Corporations Law* are nominated as 'civil penalty provisions'.⁴⁹ These are:

- sections 232 (2), (4), (5) and (6), which specify the statutory duties of company officers to act honestly and carefully, and not to misuse inside information or their position;

46 (1988) ASC 55-636 at 57,840, 57,848.

47 Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Social and Fiduciary Obligations of Company Directors* (AGPS, November 1989).

48 Recommendation 7: 'Criminal liability under companies legislation not (to) apply in the absence of criminality'.

Recommendation 22: 'Subsection 232 (4) of the *Corporations Law* (to) be amended so that criminal liability under that section only applies where conduct is genuinely criminal in nature'.

Recommendation 23: 'Civil penalties (to) be provided in the *Corporations Law* for breaches where no criminality is involved, and, in appropriate circumstances, people suffering loss as a result of a breach (to) be enabled to bring a claim for damages in the proceedings taken to recover the penalty'.

See chapter 13 of the Report - 'Sanctions Against Directors' - especially at 188, 190 and 191.

49 Section 1317DA.

- sections 243ZE(2) and (3) which relate to contraventions of section 243H (prohibiting the giving of financial benefits to related parties of public companies);
- section 318(1), which requires directors to ensure compliance by their company with the bulk of the requirements relating to accounts set out in Part 3.6; and
- section 588C which sets out a director's duty to prevent a company from trading whilst insolvent.⁵⁰

The penalties that may be imposed on a person who breaches a civil penalty provision may be either civil or criminal, depending upon the mental state of the contravenor at the time of contravention. A person will be guilty of a criminal offence and hence liable to criminal penalties, if and only if it can be established that he or she had the mens rea specified in subsection 1317FA(1) at the relevant time. That subsection provides:

A person is guilty of an offence if the person contravenes a civil penalty provision:

(a) knowingly, intentionally or recklessly; and

(b) either: (i) dishonestly and intending to gain, whether directly or indirectly, an advantage for that or any other person; or (ii) intending to deceive or defraud someone.⁵¹

The Sanctions

In the absence of proof of the mens rea specified in section 1317FA(1), a person who contravenes a civil penalty provision is not guilty of a criminal offence, but is liable to have 'civil penalty orders' made against him or her.⁵² A 'civil penalty order' means a declaration that

50 There appears to be no good reason why the principle 'no criminal offences without criminality' cannot in the future be extended beyond the field of directors' duties. Indeed the Attorney-General, in his second reading speech on the *Corporate Law Reform Bill 1992*, stated that the Government would give careful consideration to such an extension. *Parliamentary Debates - House of Representatives, Weekly Hansard No 15, 3 November 1992 at 2403.*

51 Some of the terms used are notoriously difficult to define eg 'intent to defraud' (*R v Clark & Bodlovich* (1991) 6 WAR 137); 'honestly' (*Chew v R* (1992) 7 ACSR 481 at 491 per Dawson J). Furthermore it is difficult to see what room is left for the operation of s 232(4) if such an intent is proved - surely then there is a breach of s 232(2).

52 Even apart from s 1317FA(1) proof of some mental element may be necessary for a contravention of the provision. Eg, in *Chew v R*, note 51

a person has contravened a civil penalty provision, an order prohibiting a person from managing a corporation for a specified period, or an order requiring a person to pay to the Commonwealth a pecuniary penalty not exceeding \$200,000.⁵³ The legislation provides some limited guidance for the court in exercising its discretion to make civil penalty orders. Where the court is satisfied that a person has contravened a civil penalty provision, it must make a declaration to that effect.⁵⁴ It must not make a disqualification order if the person concerned is a 'fit and proper person to manage a corporation'.⁵⁵ The court must not make a pecuniary penalty order unless the contravention is a 'serious one'⁵⁶ or if the person concerned has been ordered to pay punitive damages by an Australian court in respect of the act constituting the contravention.⁵⁷ A court may grant relief from any of the legal consequences of contravention of a civil penalty provision (except for criminal penalties) to a person who acted honestly and who 'ought fairly to be excused'.⁵⁸

Procedure

An application for a civil penalty order is essentially a civil proceeding, in which liability must be established on the civil standard of proof⁵⁹ and generally employing the civil rules of evidence and procedure.⁶⁰ However, as can be seen from Table B, the procedure for imposing civil penalties does bear certain similarities to proceedings for criminal breaches of the civil penalty provisions.

above, the High Court decided that, for a contravention of s 229(4) of the *Companies Code* (equivalent to s 232(6) of the *Corporations Law*) to be established, proof of an intent to gain an advantage or cause a detriment is necessary. Note also s 1317FA(2).

53 Section 9; s 1317EA(2) & (3).

54 Section 1317EA(2).

55 Section 1317EA(4).

56 Section 1317EA(5).

57 Section 1317EA(6).

58 Section 1317JA.

59 Section 1332.

60 Section 1317 ED.

Table B: Procedure for Penalties - Selected Features

	Proceedings for Criminal Penalties	Proceedings for Civil Penalties
Initiator of proceedings	ASC or delegate or person authorised by Minister (s 1315) <i>DPP Act 1983</i> not affected	As for proceedings for criminal penalties (s 1317EB)
Assistance to be given to ASC, upon requirement	-By agents, parties, employees and officers of defendant (s 1317) -By anyone (s 49 ASC Law) Exceptions: -defendant -defendant's lawyer (s 1317(2), 49(4))	-By anyone (s 1317EH) Exceptions: -defendant -defendant's lawyer (s 1317EH(3))
Time limit for initiation of proceedings	5 years or such longer period as the Minister authorises (s 1316)	6 years (s 1317EC)
Standard of proof	Beyond reasonable doubt	Balance of probabilities(s 1332)
Evidence and procedure	Criminal	Civil (subject to rules of court)(s 1317ED)
Enforcement of pecuniary penalties	State laws for the enforcement of fines apply (s 15A <i>Crimes Act</i> (Cth) applied by s 29 of the <i>State Corporations Acts</i>)	Enforced as a judgment of the court (s 1317EG)
Effect of certificate evidencing contravention	Certificate is conclusive evidence of the conviction or the court's declaration or finding (as the case may be) and contravention (s 1317HF)	As for proceedings for criminal penalties (s 1317HF)

The prosecuting authority must elect whether to pursue criminal or civil penalty proceedings against a wrongdoer.⁶¹ Where proceedings for a civil penalty are commenced, no criminal proceedings may be

61 See Explanatory Memorandum to Corporate Law Reform Bill 1992, para 39.

subsequently instituted in respect of the same contravention.⁶² Where criminal proceedings are instituted, the finalisation of such proceedings generally precludes the making of an application for a civil penalty order or results in the automatic dismissal of any pending application.⁶³ A court dealing with a criminal charge, that is satisfied beyond a reasonable doubt that the defendant contravened the relevant provision but is not satisfied that he or she did so with the mens rea necessary to constitute the commission of an offence, may find the defendant not guilty of the criminal offence but guilty of the contravention.⁶⁴ Thereupon, the defendant becomes liable to have civil penalty orders made against him or her.⁶⁵

Rationale

The introduction of the civil penalty provisions into the *Corporations Law* represents a conscious attempt by the Legislature to protect the community interest by enhancing shareholder protection, whilst not 'unnecessarily burdening the vast majority of company directors who are honest and competent'.⁶⁶ As the Federal Attorney-General at the time, the Honourable Mr Michael Duffy, stated in his second reading speech on the *Corporate Law Reform Bill 1992*:

The Bill also provides that where a director breaches his or her duty, but is not acting with any dishonest or fraudulent intent, the director should no longer be exposed to criminal sanctions and possible gaol terms. But it also says that shareholders should be protected against breaches by the substitution of appropriate civil

62 Section 1317FB.

63 Sections 1317GC and 1317GD. Civil penalty proceedings may commence or continue where the court that finds a contravention has taken place under ss 1317GF, GG or GH lacks the power to make civil penalty orders, ie it is not 'the Court' under s 9. An application for a civil penalty order can then be made to 'the Court' based upon the finding of a contravention that will be embodied in a s 1317HF certificate.

64 Sections 1317GF, GG, GH. Note also the definition of 'guilty' in s 73A, and the power of committal and appeal courts to preclude applications for civil penalty orders (ss 1317GE, GJ).

65 Subsections 1317GF(4), GH(3) GK (2) (where the court making the finding is 'the Court'); otherwise a civil penalty application must be made to 'the Court' (see note 63 above).

66 Government's Response to the Report of the Senate Standing Committee On Legal and Constitutional Affairs on *The Social and Fiduciary Obligations of Director*, *Parl Deb - Senate*, Thursday 28 Nov, 1991 at p 3611. Note also the concerns expressed in the Cooney Committee's Report that people may avoid directorships if the potential penalties are too severe : paras 13.4 and 13.7, note 47 above.

penalties, including pecuniary penalties and disqualification in the case of serious breaches.⁶⁷

The civil penalty provisions seek to strike an appropriate balance between the competing interests.

Conclusions

A number of conclusions emerge from this comparative study.

(a) Function of Civil Penalties

Civil penalties have a defined function. They play a crucial role in ensuring compliance with specific provisions of the legislation. In all the Acts examined, it is plain that the provisions which may attract a civil penalty are regarded as 'key provisions' by the legislature. If those provisions are not complied with, there is a real risk that the aims of the legislation in each case would be defeated. As an instance, in the industrial relations sphere, if the terms of awards are not complied with, this would spell the end of the award system, and would probably lead to the disintegration of the whole statutory framework. The Legislature therefore finds it necessary to particularly encourage compliance with those provisions, not by turning persons who contravene them into criminals nor merely by rendering such persons liable to pay compensation, but rather by employing the convenient 'half way house' of civil penalties.

(b) The Sanctions That May Be Imposed

Firstly, imprisonment is never an available sanction - it is a criminal rather than a civil penalty. The type of misconduct that will attract a civil penalty is properly regarded as not 'truly criminal', and hence incarceration is not an appropriate option.

Secondly, the financial penalties that can be imposed are substantial, and often exceed the penalties available for criminal offences. In the industrial relations, trade practices and corporations areas, a limit is set on the amount of the penalty that can be imposed. In the consumer credit area, on the other hand, there is no real limit. Once a relevant breach occurs the consumer is relieved of all liability. Where a number of contracts are involved, this can translate into millions of dollars. The credit provider is then faced with the choice of doing nothing and therefore losing it all or making an application to the relevant tribunal or court which then determines whether the

⁶⁷ *Parliamentary Debates - House of Representatives, Weekly Hansard*, No 15, 3 November 1992 at 2400.

debtor's liability should be increased. Looking at the maximum penalties that can be imposed, one is tempted to conclude that the penalties in the trade practices and corporations areas, should have the most deterrent effect. However, it would seem that the civil penalties in the consumer credit area have been most effective to date. The provisions as originally introduced, had so much impact that the various legislatures recently passed amendments to water down the effect on credit providers.⁶⁸ The civil penalties in the industrial relations area stood out as being inordinately low until the recent amendments increased them, in some cases by five times.

Thirdly, the actual penalty to be imposed is determined by reference to specific criteria which are either set out in the statute itself or formulated by the courts and Tribunals. All relevant factors must be taken into account including: the seriousness of the contravention; the damage done by it; the moral culpability, previous misconduct, and the degree of co-operation of the wrongdoer.

Fourthly, the imposition of a civil penalty does not amount to a criminal conviction and hence a person who is civilly penalised will not be affected by the consequences which normally flow from such a conviction. For example, an individual may be required to disclose a conviction in a whole range of circumstances entirely unrelated to the business or transaction in respect of which the offence was committed. For instance, an application for a visa to most, if not all countries, requires the disclosure of all convictions. This can cause more than a few problems for the company director or other executive travelling for the purposes of company business. On the other hand, a contravention of a civil penalty provision need not be disclosed as it does not constitute a conviction. However, such a contravention may be relevant in determining whether an applicant for various types of commercial licence is a fit and proper person to hold such a licence.

(c) Procedure for Imposing Civil Penalties

Firstly, the imposition of a civil penalty may be automatic by virtue of the legislation or at the discretion of the court. The consumer

68 Since 1990, a number of amendments have been made which provide that an application by a credit provider for reinstatement of amounts forfeited due to the civil penalty provisions will operate as a stay of the penalty until the tribunal or court determines the reinstatement application: see s 85B (WA); s 86A (Qld); s 85A (NSW, Vic, ACT). For explanation see, in particular, Second Reading Speech of Queensland Minister in 1991 reprinted in CCH, *Consumer Sales and Credit Reporter* Vol 2, at 53-577 and that of the NSW Minister in 1992 reprinted in id at 53-606.

credit area stands in sharp contrast to the other statutory regimes considered. The consumer does not have to take any action to start with - the civil penalty provision operates automatically. The onus then shifts to the credit provider to take steps to minimise its losses. This approach is highly beneficial to individual consumers who otherwise may be unable to take legal action against a large corporation. Under all the other statutes examined, action has to be taken against the contravenor and the alleged breach has to be established, before a penalty can be imposed.

Secondly, where proceedings must be taken to establish liability to civil penalties, the standard of proof required and the procedure to be followed is civil rather than criminal. That is not to say, however, that the normal interlocutory procedures can be used to subject the defendant to some form of inquisitorial process. As Mason ACJ, Wilson and Dawson JJ noted in the High Court of Australia in *Pyneboard Pty Ltd v Trade Practices Commission*:⁶⁹

It is well settled that '...a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture or ecclesiastical censure' to use the words of Bowen LJ in *Redfern v Redfern* [1891] P 139 at 147. See also *Martin v Treacher* (1886), 16 QBD 507; *Earl of Mexborough v Whitwood Urban District Council* [1897] 2 QB 111; *R v Associated Northern Collieries* (1910) 11 CLR 733. Indeed, in a civil action brought merely to establish a forfeiture or enforce a penalty the rule is that neither discovery nor interrogatories will be allowed (*In re a Debtor* [1910] 2 KB 59 at 66; *Associated Northern Collieries* (at p747)).⁷⁰

69 (1983) 57 ALJR 236.

70 (1983) 57 ALJR 236 at 238. See also *Castlemaine Perkins Ltd v Queen Street Hotels Pty Ltd & Ors* [1968] Qd R 501 at 509 (per WB Campbell, J); *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat and Livestock Corp & Ors* (1979) ATPR 40-137 at 18,486 (per Deane, J); *TPC v George Weston Foods* (1979) ATPR 40-114 and *Metroplaza Pty Ltd v Girvan NSW Pty Ltd (in liq)* (1992) ATPR 41-187. There is no difference in principle between an application for an order for discovery or to answer interrogatories, and the issue of a *sub poena duces tecum*: *TPC v TNT Management Pty Ltd* (1984) ATPR 40-446; *Master Builders' Association of NSW v Plumbers & Gasfitters' Employees Union of Australia* (1987) ATPR 40-786; cf *Air Pacific Ltd v TWU* (1993) ATPR 41-217. It would seem from *EPA v Caltex*, note 19 above, that a majority of Justices of the High Court would support the retention of the privilege against self exposure to penalty by corporations in respect of notices to provide information given under court rules as opposed to some statutory provision. Brennan J does so expressly at 479-483. Deane, Dawson and Gaudron JJ do so impliedly by holding that the privilege

Likewise, the civil standard of proof is sufficiently flexible to accommodate the penal nature of the proceedings and in particular the gravity of the consequences of an adverse finding. In *Briginshaw v Briginshaw*,⁷¹ Dixon J, as he then was, explained the civil standard of proof in this way:

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences ...

This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained ...⁷²

Justice Dixon's exposition has been approved and applied many times.⁷³ As the Full Court of the High Court of Australia noted in *Rejtek v McElroy*,⁷⁴ '... the degree of satisfaction for which the civil

against self incrimination (a fortiori the privilege against self-exposure to penalty) is available to corporations.

71 (1938) 60 CLR 336

72 (1938) 60 CLR 336 at 361-363. See also *id* at 343-344 per Latham CJ.

73 *Cool & Sons Pty Ltd v O'Brien Glass Industries Ltd* (1981) ATPR 40-220 at 42, 996; *Peter Williamson Pty Ltd v Capital Motors Ltd* (1982) 40-291 at 43,636; *Heating Centre Pty Ltd v TPC* (1986) 65 ALR 429 at 435 per Pincus J (Full Court FCA); *TPC v Nicholas Enterprises Pty Ltd & Ors* (1979) ATPR 40-126 at 18,352 per Fisher J; *TPC v Ansett Transport Industries (Operations) Pty Ltd & Ors* (1978) ATPR 40-071 at 17,720.

74 (1965) 112 CLR 517.

standard of proof calls may vary according to the gravity of the fact to be proved'.⁷⁵ However that is not to say that where the allegation is serious, the civil standard approximates to the criminal standard. As their Honours continued in *Rejtek v McElroy*:

But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge ...⁷⁶

It is submitted that the above mentioned modifications to the normal rules of civil procedure play a vital role in ensuring the fair and just operation of civil penalty provisions. Hence questions like those raised in the recent ALRC Discussion Paper, 'Compliance with the *Trade Practices Act 1974*'⁷⁷ (Should the *Briginshaw* test be excluded from proceedings seeking civil penalties under the Act?⁷⁸ Ought the Trade Practices Commission be able to utilise the processes of discovery and interrogatories in such proceedings?⁷⁹) must be answered firmly in the negative.

(d) The Relationship of Civil Penalties to Criminal Sanctions and Civil Compensation

It is not uncommon for a statute to provide that breach of a particular provision renders the contravenor liable both to a civil penalty, and to civil remedies, for example, compensation orders.⁸⁰ This practice is unobjectionable since the penalty and the compensatory remedy serve different ends. However if the same contravention can give rise both to a criminal and a civil penalty, the spectre of double punishment appears.⁸¹ Under both the *Corporations*

75 Id at 521.

76 Id at 521-2.

77 Note 29 above.

78 Id at para 6.10, issue 6E.

79 Id at para 9.22, issue 9F.

80 Eg *Corporations Law* ss 1317HA, 1317HD.

81 The US Supreme Court has recently held that, by virtue of the double jeopardy clause in the 5th Amendment to the United States Constitution, imposition of a civil penalty precludes subsequent

Law and the uniform *Credit Acts*, such a potential problem arises and each piece of legislation expressly deals with it. The *Corporations Law* makes it clear that the imposition of a criminal sanction for breach of a civil penalty provision effectively bars the imposition of a civil penalty in respect of the same contravention, and vice versa.⁸² However, in the consumer credit area, the Legislature has made it equally clear that both criminal and civil penalties can be imposed in respect of the same contravention.⁸³ It is submitted that the approach of the *Corporations Law* is preferable, and that no good reason has been shown for double punishment of credit providers.

(e) The Future of Civil Penalties

It is certain that the use of civil penalties will increase in the years to come. In the authors' view, this is a proper course for the law to take. Civil penalties strike an appropriate balance between the interests of the community and the individuals who may be subject to them. By their use, the Legislature is able to promote compliance with its legislation without the need to criminalise the conduct in question. The individual penalised is not subjected to imprisonment or the stigma of criminal conviction and the civil rules of procedure and standard of proof are sufficiently flexible to ensure that innocent persons are not caught in the civil penalties net.

imposition of a criminal penalty for the same misconduct: *US v Harper* 490 US 435 (1989). See also discussion in Mann, note 1 above, at p 1841 ff.

82 Ss 1317FB - 1317GL.

83 Sections 42(3), 67(2), 86A(6) *Credit Act* 1984 (WA); see supra pp 13-14. See *Household Financial Services Ltd & Various Debtors & Anor* (1990) ASC 56-022 at 59,223.