This thesis is presented for the Honours degree of Bachelor of Laws of Murdoch University
The dichotomy between criminal and civil law. Can civil penalties be more than just a remedial hybrid in corporate regulation?

Maria Farrar

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DECLARATION OF ORIGINALITY

I, Maria Farrar, hereby declare that this thesis is of my own work and research. It has not been submitted anywhere else. Where other sources of information have been used, they have been acknowledged.

Maria Farrar

Dated: November 2013
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ABSTRACT

The traditional distinction between criminal law and civil law in the common law jurisdiction has been increasingly distorted. There is now a growing concern to suggest that such a differentiation is no longer obvious in today’s society. The use of Blackstone’s Commentaries to describe the two divisions of law as public wrongs versus private wrongs may appear to lack contemporary application especially in dealing with corporate regulation.

In Australia, the Corporations Act 2001 (Cth) uses civil penalties as a form of strategic regulation of corporate conduct. It is viewed as an alternative to criminal prosecution or civil redress for corporate wrongdoing. For this reason, civil penalties are often referred to as a hybridisation of the criminal and civil law. Arguably though, they exhibit remedial aspects of both criminal sanctions and civil compensation. Unfortunately, many civil penalty proceedings have presented with procedural problems during the course of litigation. Therefore, it is suggested that the time is right for legislative intervention in developing a new procedural rule specifically for civil penalty proceedings.

This thesis explores the development of civil penalties and suggests that it should be formally recognised as a third branch of substantive law. It is argued that it deserves its own procedural rule in order to serve its purpose in corporate regulation. This thesis also attempts to point out the hidden dangers which could render civil penalties unconstitutional by infringing Chapter III of the Constitution. This could occur if parliament tries to usurp their power onto the
judiciary by introducing a mandatory imposition of penalties or disqualification
orders into the legislation. Then the court will be subjected to the will of the
government and its independence in the exercise of judicial power. Although
there are currently very few constitutional challenges to the existing civil penalty
provisions under the Corporations Act, the High Court is re-developing the
jurisprudence of the Kable principle in contemporary civil legislation. It appears
to be an unsettled area of law which could affect the way civil penalties operate in
the future if amendments are made to include mandatory terms.
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