

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**

2013

## **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

## **COPYRIGHT ACKNOWLEDGEMENT**

I acknowledge that a copy of this thesis will be held at the Murdoch University Library.

I understand that, under the provisions of s51.2 of the Copyright Act 1968, all or part of this thesis may be copied without infringement of copyright where such a reproduction is for the purposes of study and research.

This statement does not signal any transfer of copyright away from the author.

Maria Farrar

## **ACKNOWLEDGEMENTS**

I would like to acknowledge and thank both of my supervisors, Lorraine Finlay and The Hon. Michael Murray QC, for helping me during the development of this thesis. I am forever grateful for the time and dedication spent by my supervisors in mentoring me throughout this challenging journey. They have both been such an inspiration to me that this thesis would not have been possible without their continuous guidance.

I would also like to thank my family, friends and many of the lecturers at the Murdoch University Law School for their support and encouragement throughout my entire degree.

## 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.

## TABLE OF CONTENTS

I.	Introduction.....	1
II.	Part I – The Dichotomy between Criminal and Civil Law .....	3
	A. The Historical Development of Criminal and Civil Law .....	3
	1. The essence of criminal Law.....	3
	2. The philosophy and theory behind civil law .....	7
	3. The blurring of criminal and civil law.....	11
	B. The Nature of Civil Penalties – Evolution of a Hybrid Territory .	14
	1. The rise of civil penalties – an appropriate choice against corporate wrongdoing .....	14
	2. The role of civil penalties as an enforcement regime in Australia .....	20
	3. The hybrid characteristics of a civil penalty – having the best of both worlds? .....	23
	4. Can civil penalty provisions be substantive in nature .....	25
	C. The Growing need to establish a new civil penalty procedure.....	29
	5. The pitfalls of using civil procedure in civil penalty proceedings – a lesson learnt from the case of <i>Rich v ASIC</i> ..	29
	6. Is it appropriate to apply the civil standard of proof in civil penalty contraventions?.....	39
	7. Proposed models of a civil penalty procedure.....	47



III.	Part II – Exploring the Constitutional Validity of the <i>Corporations Act</i> .....	53
	A. Defining constitutional invalidity.....	53
	8. Infringing Chapter III of the <i>Constitution</i> .....	53
	9. The rise and fall and possible revival of the <i>Kable</i> principle..	55
	B. Examples of constitutional challenges to the <i>Corporations Act</i> ...	65
	10. The case of <i>Saraceni v Jones</i> .....	65
	11. The case of <i>Visnic v ASIC</i> .....	67
	C. Potential dangers for future drafting or amendments to civil penalty provisions in the <i>Corporations Act</i> .....	71
IV.	Conclusion .....	75
V.	Bibliography .....	77