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The dichotomy between
criminal and civil law. Can civil
penalties be more than just a
remedial hybrid in corporate
regulation?

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2013

DECLARATION OF ORIGINALITY

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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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I. INTRODUCTION

In the common law jurisdiction, it has long been recognised that there is a distinct division between criminal and civil law. Although the separation of law into these discrete branches may be useful for determining which procedure to follow in litigation, the real issue of maintaining such a distinction depends on whether this strict categorisation of law provides benefits to the society. There are now various debates about whether this strict separation of law has become blurred by the introduction of civil penalties as a regulatory tool.¹ This is because civil penalties have been recognised as a ‘remedial hybrid’² which exists as a statutory invention to regulate corporate conduct in today’s world of corporate dominance. It appears that our society has changed and developed in such way that corporate wrongdoing inevitably becomes a public wrong as oppose to a private wrong due to the constant interactions between corporations and the community.

Yet the term ‘civil penalties’ itself can have an ambiguous interpretation. Does one place emphasis on the word ‘penalties’ so that it can be seen as exerting a punitive effect on the corporate wrongdoer? Or does one focus on the use of the term ‘civil’ to stress that it is a civil restoration of a private wrong?³ Specifically, under the *Corporations Act 2001* (Cth), does the use of civil penalty provisions achieve the best characteristics of both criminal and civil sanctions in punishing and deterring against corporate fault? Or do they only give the illusion of a more satisfactory outcome in redressing corporate wrongs, especially when some argue

¹ Kenneth Mann, 'Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law' (1991) 101 *Yale Law Journal* 1795.

² Australian Law Reform Commission (ALRC), '*Principled Regulation Report - Federal Civil and Administrative Penalties in Australia*' (Report No 95, 2002) 73 [2.47].

³ Anne Rees, 'Civil Penalties: Emphasising the Adjective or the Noun' (2006) 34 *Australian Business Law Review* 139.

that they are only a means of providing community protection as a form of non-punitive sanction?⁴ Furthermore, the use of civil penalties to curb corporate misconduct has been problematic due to the use of civil procedure to litigate disputes.⁵ However, there is an element of concern in respect to the constitutional validity of civil penalties if future amendments are made to impose mandatory penalties or disqualification orders once a contravention of the civil penalty provisions has been declared by the courts. Such a proposition will undoubtedly appear to infringe Chapter III of the *Constitution* by removing the discretionary nature of the court and converting it into an instrument of the executive.

This thesis is divided into two parts. Part I aims to explore the jurisprudence behind the development of civil penalties within the context of the *Corporations Act* and suggests that such a novel invention ought to be reclassified as a third branch of law with its own set of procedural rules for litigation purposes. However, Part II of the thesis takes on the additional constitutional theme and discusses the various doctrines that are in place to ensure that any future drafting of or amendments to civil penalty provisions in the *Corporations Act* will withstand a constitutional challenge by the litigants.

⁴ There has been much discussion as to what is the nature of the penalty in civil penalty provisions under the *Corporations Act*, which will be discussed in detail in this thesis.

⁵ Numerous criticisms have been made against the use of civil procedure rules for civil penalty proceedings. This area will be explored in depth in part C of the thesis.

II. PART I - THE DICHOTOMY BETWEEN CRIMINAL AND CIVIL LAW*

A. *The Historical Development of Criminal and Civil Law*

1. The Essence of Criminal Law

The essence of criminal law is commonly recognised as a means to prohibit individual wrongdoing for the protection of public interest by way of punishment.⁶ The theory of punishment was noted in the works of Plato (c 427 – 347BC), who described the two key elements of punishment to be corrective and deterrent.⁷ Although this may be an oversimplification of what the criminal law entails,⁸ ultimately the law is there to provide a sense of justice to mankind. Indeed, natural law theorists like Augustine contends that, ‘a law that is unjust would not seem to be a law at all’.⁹ It is also interesting to observe that in Augustine’s book, *City of God*, a comparison is drawn between the laws of a kingdom and the rules in a criminal gang. The use of this imagery conveys a strong sense of morality as a guiding principle in determining whether law in general should be obeyed or not. Subsequently, this led to the supportive theory of using moral judgements and moral blameworthiness to further the development of criminal law from a philosophical perspective, so that it reflected ‘the spirit of

*Civil Law described in this paper is in the sense of the law that is opposed to or distinct from the criminal law in common law jurisdictions.

⁶ Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 5th ed, 2006) 1.

⁷ J M Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 31.

⁸ Ibid 33. Especially as Plato also describes the various aspects of voluntary and involuntary wrongs, which is attributed to the offender’s state of mind or an element of fault (*mens rea*) in modern day criminal offences

⁹ Jonathan Crowe, *Legal Theory* (Thomson Reuters (Professional) Australia Ltd, 2009), 24 – citing Saint Augustine in Book I, Part V of ‘*On Free Choice of the Will*’.

Kantianism within the criminal law [as it] informs this overlap between judgements in law and in morality'.¹⁰

Inevitably, when the domination of Christian belief in natural law began to erode away and the new wave of legal positivism emerged, the jurisprudence of criminal law refocused on the original elements of criminalisation such as punishment, retribution and deterrence. The works of legal positivists such as John Austin continued to reinforce the punishment aspect of criminal law as noted in his *command theory of law*.¹¹ He postulated that, 'every law or rule is a *command* or a species of commands'¹² and that, 'as distinguished from the commands which may be named occasional or particular, a law is a command, which obliges to a course of conduct; or which obliges, generally and indefinitely, to acts or forbearances of a class.'¹³ Furthermore, a duty is imposed under such obligations and to disobey the command would mean that you will be 'liable to evil'.¹⁴ The meaning of evil is elaborated by Austin as he introduces the concept of sanctions and punishment.

The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a *sanction*, or an *enforcement of obedience*. Or (varying the phrase) the command or the duty is said to be *sanctioned* or *enforced* by the chance of incurring the evil.

Considered as thus abstracted from the command and the duty which it enforces, the evil to be incurred by disobedience is frequently styled a

¹⁰ Alan Norrie, 'Legal and Moral Judgement in the "General Part"' in Shaun McVeigh and Alison Young Peter Rush (ed), *Criminal Legal Doctrine* (Dartmouth Publishing Company Ltd and Ashgate Publishing Ltd, 1997) , 2. However, the author argues that the division between legal and moral judgement in recent times has grown to such an extent that in the extreme case, it paralyses society's ability to judge crime (p3).

¹¹ John Austin, *The Province of Jurisprudence Determined* (Lenox Hill Pub & Dist . Co. (Burt Franklin), 2nd ed, 1970).

¹² Ibid 5.

¹³ Ibid 27.

¹⁴ Ibid 6.

punishment. But as punishments, strictly so called, are only a *class* of sanctions, the term is too narrow to express the meaning adequately.¹⁵

The significance of Austin's contribution is that it laid down the general foundation for the ideology of penal sanctions and distinguished it from other bodies of law, in particular, law that fell into the realm of civil jurisdiction. H.L.A Hart famously criticised Austin's theory for creating the notion of 'orders backed by threats',¹⁶ which was well suited in justifying the existence of criminal law, but failed to take into account other classes of law which 'provide individuals with *facilities* for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law'.¹⁷

Nevertheless, despite the influence by scholars of legal positivism on the expansion of criminal law, the undertone of religious morality was famously revived by Lord Patrick Devlin in the 1950s, who stated that 'society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence'.¹⁸ In essence, Devlin considered that criminal law was designed to serve the purpose of deterring 'immoral behaviour'.¹⁹ Unfortunately, his theory was also heavily criticised and limited by the fact that there is no universal set of 'common morality',²⁰ especially when the moral attitudes of society changed as time went by. Yet, it has been said that the need

¹⁵ Ibid 8.

¹⁶ H.L.A.Hart, *The Concept of Law* (Oxford University Press, 1961) 27.

¹⁷ Ibid. Some examples of these include law of marriage and constitutional law, as the threat of sanctions are not fundamental on the duty to obey such laws.

¹⁸ From a series of lectures in the 1950s which was subsequently published in the book: Lord Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) 11.

¹⁹ Mark Finlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press, 2009)3.

²⁰ Mirko Bagaric, 'The "Civil-isation" of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 188.

for criminal law in society is to provide a deserved response to culpable wrongdoing.²¹ However, if the overall purpose of having criminal law is to prevent potential harmful behaviour to others in society,²² then the difficulty arises when determining what is considered to be ‘harmful’ and how could it be measured.²³ Obviously, punishment can have a moral or educative effect²⁴ beyond just simple deterrence, especially when considering more conventional crimes such as murder and rape. This thought of re-educating the offender has emerged as a concept of *rehabilitation* during the last 150 years,²⁵ and perhaps, lessens the harsh view of punishment in that it may be seen as a means to prevent recidivism. Therefore, it appears that some of the above mentioned underlying principles of criminal law were subsequently encapsulated in the theory of criminalization, whereby it aimed to provide a ‘set of conditions under which the state is permitted to resort to punishment’.²⁶ We now turn to the ideology behind civil law in an attempt to contrast its mode of usage with the criminal law.

²¹ Ashworth, above n 3, 17.

²² Finlay, Odgers and Yeo, above n 19, 3; Kelly, above n 7, 294-295.

²³ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 2nd ed, 2005) 52-53.

²⁴ Torstein Eckhoff, 'Justifications of Punishment' in Antony Duff and Nigel Simmonds (ed), *Philosophy and The Criminal Law* (Franz Steiner Verlag Wiesbaden GmbH, 1984) 13.

²⁵ *Ibid* 12.

²⁶ Douglas Husak, *Overcriminalization The Limits of the Criminal Law* (Oxford University Press, 2008) 77; Douglas Husak, 'Criminal Law Theory' in Martin P. Golding and William A. Edmundson (ed), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing, 2005) 110-111.

2. The philosophy and theory behind civil law

A simplistic overview of describing the law in the civil justice system is that it is anything that is not criminally enforceable by the State. Perhaps a generalisation of the difference between criminal and civil law is that ‘criminal law is designed to punish and the civil law to compensate for [the] harm caused’.²⁷ This distinction is concisely summarised by Williams in that,

[t]he difference between civil law and criminal law turns on the difference between two different objects which law seeks to pursue - redress or punishment. The object of civil law is the redress of wrongs by compelling compensation or restitution: the wrongdoer is not punished; he only suffers so much harm as is necessary to make good the wrong he has done. The person who has suffered gets a definite benefit from the law, or at least he avoids a loss. On the other hand, in the case of crimes, the main object of the law is to punish the wrongdoer; to give him and others a strong inducement not to commit same or similar crimes, to reform him if possible and perhaps to satisfy the public sense that wrongdoing ought to meet with retribution.²⁸

If we analyse this passage closely, civil law seems to provide a somewhat superior solution for the complainant than criminal law as it is primarily concerned with repairing or providing a remedy for the loss suffered by the individual rather than punishing the wrongdoer. Although arguably, if the loss incurred by an individual has ramifications for the general public then the remedies sought in civil law may serve additionally to exemplify the detriment caused and punitive damages may be awarded to deter future wrongdoings of a similar nature.

²⁷ (ALRC), above n 2, 67 [2.15].

²⁸ Geldart William, *Introduction to English Law* (Oxford University Press, 10th ed, 1991)146.

From a historical standpoint, one of the most influential contributions to the theory of law in the common law jurisdiction is Blackstone's *Commentaries on the Laws of England*. It is here that Blackstone 'not only saw natural law as limited to a few core principles but also recognized that civil authorities might appropriately determine the boundaries of these principles differently in different places and at different times.'²⁹ Blackstone upheld the thought of public versus private wrongs and distinguished the two by maintaining that,

[p]rivate wrongs are an infringement or privation of the private or civil rights belonging to individuals, and are frequently termed civil injuries. Public wrongs are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the appellation of crimes and misdemeanours.³⁰

Although Blackstone had his fair share of criticisms, especially from utilitarian scholars such as Bentham,³¹ his work has been described by Dicey as 'the one treatise on the laws of England and which must for all time remain a part of English literature'.³²

Nonetheless, as seen with the concept behind criminal law, the element of morality plays a central role in civil law too. However, the view of public morality is suppressed by the measure of 'private morality' and the 'individual

²⁹ Albert W. Alschuler, 'Rediscovering Blackstone' (1996) 145(1) *University of Pennsylvania Law Review* 1, 10.

³⁰ John C Devereux, *The Most Material Parts of Blackstone's Commentaries, Reduced to Questions & Answers* (Baker, Voorhis & Co, 1877) 167.

³¹ Bentham heavily criticised Blackstone's work as his dedication to utilitarian philosophy meant that he disagreed with the conservatism that preaches contentment with things as they are - A.V Dicey, 'Blackstone's Commentaries' (1932) 4(3) *The Cambridge Law Journal* 286, 292

³² *Ibid* 294.

freedom of choice and action'.³³ What this effectively means is that non-criminal law still has the power and authority to redress and compensate the private wrongs of the individuals but differs in that the State does not interfere with the disagreement on a public level for the interest of the society, although it is arguable that cases that are held with great public interest will be used to as an example in providing a normative effect. The most obvious example of such is found in the law of torts, which primarily aims at providing restitution for the complainant,³⁴ as well as having an interest in offering a deterrent and loss-spreading effect.³⁵ However, in Seipp's analysis of the chronological development in early English common law, he proposed that,

[t]he distinction between crime and tort was not a difference between two kinds of wrongful acts. In most instances, the same wrong could be prosecuted either as a crime or as a tort. Nor was the distinction a difference between the kinds of persons who could initiate the actions. This conceptual distinction is best presented as a choice.³⁶

Subsequently, Seipp contends that the root of the separation between crime and tort was to have the choice between 'vengeance or compensation'.³⁷ The problem with this suggestion is that it portrays the image that compensation will have a greater burden on a poor man than a rich man, therefore, it may seemingly pervert the course of justice in that a rich man can 'afford' to break a civil law more readily than a poor man.

³³ Patrick Devlin, 'The Enforcement of Morals' in Michael J Gorr and Sterling Harwood (ed), *Crime and Punishment* (Jones and Bartlett Publishers, 1995) 18-19.

³⁴ *Todorovic v Waller* (1981) 150 CLR 402.

³⁵ *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at [123].

³⁶ David J Seipp, 'The Distinction Between Crime and Tort in the Early Common Law' (1996) 76 *Boston University Law Review* 59, 60.

³⁷ *Ibid* 84.

From a more modern day approach to the philosophy of civil law, H.L.A Hart insightfully reminds us that justice and morality are necessary features in any law, as ‘justice constitutes one segment of morality primarily concerned not with individual conduct but with the ways in which *classes* of individuals are treated’.³⁸ Furthermore, he claims that,

the laws which provide for compensation by one person of another for torts or civil injuries might be considered unjust for two different reasons. They might, on one hand, establish unfair privileges or immunities. This would be so if only peers could sue for libel, or if no white person were liable to a coloured person for trespass or assault. Such laws would violate, in a straightforward way, principles of fair distribution of the rights and duties of compensation. But such laws might also be unjust in a quite different way: for while making no unfair discriminations they might fail altogether to provide a remedy for certain types of injury inflicted by one person on another, even though morally compensation would be thought due.³⁹

This view illustrates the fact that in the private sphere of civil wrongs, the law that deals with such contraventions must adequately offer a form of compensation for the harm done if it is morally right to do so. It seems then some of the underlying features of civil law and criminal law are not that dissimilar as they both include aspects of justice, morality, deterrence by using some form of sanction against the wrongdoer. So the next logical question is to ask whether criminal and civil law still exist as well-defined divisions of law. Or has the bifurcation of the two doctrines faded as more and more modern day offences, especially those in the commercial or corporate world, have been created to be somewhat quasi-criminal in nature?

³⁸ H.L.A.Hart, above n 16, 159-160.

³⁹ Ibid.

3. The blurring of criminal and civil law

In the ancient past, there was little or no need to distinguish between civil and criminal causes or between crime and tort.⁴⁰ This is because the law from early codes did not require such distinctions to be made, merely for the reason that if a wrong was committed, the wrongdoer would be brought to justice either by means of corporal punishment, or compensation, and failure to do so may result in the person being made a slave to repay the debt.⁴¹ Lindgren puts forward the view that ‘the ancients did not need a law of crimes because they often dealt with murder, assault and theft as private wrongs to be redressed by compensation or more brutal tort substitutes’.⁴² In the heart of this view, it is consistent with the philosophy and reasoning behind both criminal and civil law, in that the focus is on righting the wrong by means of a sanction and achieving some form of justice as an outcome. Although Lindgren does maintain that ancient law did have a distinction between public wrongs and private wrongs,⁴³ it did not amount to the same concept of blameworthiness and compensation as observed in the modern day theory of criminal and civil law.

Nevertheless, Professor Mann and his supporters have identified that there is a paradigm shift towards acknowledging the general blurring between the criminal and civil law models.⁴⁴ There are several reasons which can be attributed to this

⁴⁰ James Lindgren, 'Why the Ancients May Not Have Needed a System of Criminal Law' (1996) 76 *Boston University Law Review* 30, 34.

⁴¹ *Ibid* 35.

⁴² *Ibid* 56.

⁴³ *Ibid*.

⁴⁴ Neil Andrews, 'If the Dog Catches the Mice: The Civil Settlement of Criminal Conduct under the Corporations Act and the Australian Securities and Investments Act' (2003) 15 *Australian Journal of Corporate Law* 1, 3; (ALRC), above n 2, 117 [3.53]; Bagaric, above n 20, 192; John (Jr) C Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It' (1991) 101 *Yale Law Journal* 1875, 1887; Susan R Klein, 'Redrawing the Criminal-Civil Boundary' (1998-1999) 2 *Buffalo Criminal Law Review* 679, 680; Mann, above n 1, 1798; Carol S Steiker, 'Punishment and Procedure: Punishment Theory and the Criminal-Civil

phenomenon, with the obvious one being the growth and expansion of the commercial sector which has dominated the change in law and policies during the last century. Other plausible explanations include the idea of over-criminalization of law, whereby some would argue that the range of criminal offences is 'so diverse that the criminal law is devoid of a justificatory principle,'⁴⁵ while others suggest that there are limitations for using criminal law to settle civil disputes especially when there is a lack of fault element in the offence proscribed,⁴⁶ which is similar to instances where some criminal offences are comprised of strict or absolute liability.⁴⁷ Mann claims that such blurring between the two spheres of law was attributed to Bentham and the introduction of utilitarian philosophy, which claims that 'the object of the law was to manipulate pain and pleasure to achieve the greatest good, [and] this understanding of law as manipulating behaviour [is one] that bridged the gap between criminal and civil law'.⁴⁸

Additionally, he claims that the utilitarian theory also contributed to the deterrence theory by proposing that people are less likely to commit a wrong if they knew they will be fined for it than if they were to pay for the wrong as a form of compensation afterwards.⁴⁹ In essence, Mann submits that 'both civil and criminal law create negative sanctions for wrongful behaviour',⁵⁰ but this is no more surprising than basically accepting a fundamental idea of law, for what else would be the purpose of having law if it fails to deter and correct wrongful behaviour in society?

Procedural Divide' (1996-1997) 85(4) *Georgetown Law Journal* 778, 780; Issachar Rosen-Zvi and Talia Fisher, 'Overcoming Procedural Boundaries' (2008) 94 *Virginia Law Review* 79, 82.

⁴⁵ Bagaric, above n 20, 184. The author argues that 'most criminal offences are no worse than civil wrongs...and the decision whether to make an activity a criminal offence appears to be no more sophisticated than tossing a coin'.

⁴⁶ Andrews, above n 44, 5.

⁴⁷ (ALRC), above n 2, 117 [3.53].

⁴⁸ Mann, above n 1, 1845.

⁴⁹ *Ibid.*

⁵⁰ Mann, above n 1, 1846.

However, Professor Coffee sees the ‘paradigms blur as a form of encroachment of the criminal law on the civil law’⁵¹ and expresses the concern that due to the discretionary nature in judicial lawmaking, the standard by which decisions are made will hinder upon ‘the natural desire of judges to leave themselves discretion and flexibility in future cases’.⁵² Coffee views this as a problem in that he claims there is a ‘trend toward[s] the delegation of this discretion in recent legislation empowering both civil authorities and private individuals to seek quasi-criminal penalties’.⁵³ This opinion is also mirrored in Professor Klein’s article in light of the procedural protections offered in criminal trials. The concern raised is that in the US,

[t]he Court has attempted to maintain the bright line between civil and criminal actions, taking on a greater philosophical challenge than it can handle...[given that there has been] recent and enormous increase in the enactment of, and litigation surrounding, nominally “civil” statutes which impose what appear to be “punitive” sanctions [it] requires a definitive, or at least intelligible response. Unfortunately, the Court has been inconsistent both in declaring whether the imposition of punishment is the feature which marks a given proceeding as “criminal” rather than “civil,” and in providing a definition or developing a theory of “punishment”.⁵⁴

This grim outlook of the Court’s ability to define civil and criminal actions is somewhat narrow in that it does not seem to take into account that the Court can only decide on the nature of a case, whether it be civil or criminal, based on the facts presented, the intention of the legislature and the observance of any

⁵¹ Coffee, above n 44, 1878.

⁵² Ibid 1879.

⁵³ Ibid 1880. The article is based on US case law and a reply to Kenneth Mann’s advocate for punitive civil sanctions that would largely parallel criminal sanctions.

⁵⁴ Klein, above n 44, 680-681.

precedents from prior case law. Besides, it may simply be that there was no need to determine the philosophy of whether the case ought to be treated as civil or criminal if that question does not arise.

Since the dichotomy between criminal and civil law is no longer in debate solely within the crime/tort arena, the influx of case law that deals with ‘white-collar crime’ over the last few decades has changed the moral attitudes towards corporate culpability and regulatory schemes that aim at deterring against future civil wrongs. I shall now discuss the evolutionary process of the emergence of civil penalties as a form of middle-ground jurisprudence in the common law jurisdiction.

B. *The Nature of Civil Penalties – Evolution of a Hybrid Territory*

1. The rise of civil penalties – an appropriate choice against corporate wrongdoing

The term ‘white-collar crime’ and ‘corporate crime’ are associated with ‘criminal offences which are committed by companies and other for-profit organisations [which] are punished by the State’.⁵⁵ Corporate crime is said to be broadly defined as,

a crime committed within the course of one's occupation by persons of relatively high social status. But in contrast to those white collar offences, such as embezzlement or misuse of computers for fun or profit, which are committed by individuals *against* companies, corporate crime involves offences committed by companies or their

⁵⁵ James Gobert and Maurice Punch, *Rethinking Corporate Crime* (LexisNexis Butterworths, 2003) 11.

agents against members of the public, the environment, creditors, investors or corporate competitors.⁵⁶

Yet according to Acquah-Gaisie, white-collar crime and corporate crime should not be used synonymously as they ought to be distinguished by the individual versus organisational fault elements of these crimes. He defined 'white collar crime [as being] business crime committed for personal gain by an individual who may be a corporate employee in a position of trust, [while] corporate crime is committed for a corporation: the proceeds go to the body corporate'.⁵⁷

Although the term 'white-collar crime' was introduced by Edwin H Sutherland in the United States in 1939,⁵⁸ it was originally intended as a means to address the individual criminal behaviour of professional men like business managers and executives during the course of their occupation, but it was not aimed at describing their criminal behaviour in terms of conventional criminal offences like murder, adultery and intoxication, 'since these are not customarily a part of their occupational procedures'.⁵⁹ The issue of using the terminology of 'white collar crime' is that it creates a negative connotation of labelling a person with the stigma of being a criminal in the traditional sense. In addition, there is the danger of rendering the individual as being a scapegoat to answer for corporate crimes,

⁵⁶Peter Grabosky and John Braithwaite, 'Corporate Crime in Australia ' (1987) (No. 5) *Trends and Issues in Crime and Criminal Justice* 1, 2 (Published from the Australian Institute of Criminology; <<http://www.aic.gov.au/publications/current%20series/tandi/1-20/tandi05.html>>).

⁵⁷ Gerald Acquah-Gaisie, 'Corporate Crimes: Criminal Intent and Just Restitution' (2001) 13 *Australian Journal of Corporate Law* 219, 219.

⁵⁸ Gilbert Geis, 'White-Collar Crime: What Is It?' in Kip Schlegel and David Weisburd (ed), *White-Collar Crime Reconsidered* (Northeastern University Press, 1992) 32.

⁵⁹ *Ibid* 33.

especially if they are being pressured into making illegitimate decisions that ultimately leads to a breach of law.⁶⁰

In *ASIC v Vizard*,⁶¹ Finkelstine J elaborated on the usage of white collar crime by suggesting that,

[i]t now has wider scope. *Black's Law Dictionary* (8th ed, 2004) defines "white collar" crime as "[a] non-violent crime [usually] involving cheating or dishonesty in commercial matters. Examples include fraud, embezzlement, bribery, and insider trading". I have also referred to the widely held view that "white collar" offenders are treated lightly. The reason seems to be this. Traditional sentencing holds that factors such as an unblemished past life, a reputation for honesty, an involvement in and a contribution towards community affairs, and so on (generally referred to by the umbrella expression "good character") are important factors in mitigation of sentence. I do not wish to deny the relevance of those factors, but in some cases they may result in the imposition of a very lenient sentence. At any rate there must be a limit to how far good character can be taken into account when dealing with a "white collar" offender, especially where the contravention concerns dishonesty or the abuse of a position of trust. Those convicted of such offences rarely have a criminal record. It is their good character that has enabled them to occupy the position of trust which they have ultimately breached. Indeed, it is their good character that is often used to facilitate the offence.

...At a general level, corporate crimes committed by prominent business people have a tendency to erode the moral base of the law and provide an opportunity for other offenders to justify their misconduct. At a more immediate level corporate crime is diffuse in its impact, is easily concealed with seemingly legitimate business transactions and is

⁶⁰Gobert and Punch, above n 55, 26.

⁶¹(2005) 145 FCR 57.

difficult to detect, control and punish. Corporate crimes are usually committed to accumulate wealth and power and are almost always the result of deliberate and calculated conduct. I have said in another context that, for this kind of offence, it is the nature of the offence rather than the character of the offender that should be the principal consideration for the punishment to be imposed: *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2)* (2002) 190 ALR 169. I continue to hold that view.⁶²

The significance of this passage is that Finkelstein J also expresses the concern that white collar crimes, although encompassing the elements of criminal wrongdoing, may be portrayed as a less serious offence, especially when convictions do not necessarily result in the offender having a criminal record. It seems then punishments for both white collar crimes and corporate crimes are focused on various aspects of moral wrongdoing as well as the economic consequences of such wrongs. A further differentiation between corporate crimes and white collar crimes is that focus is given on the nature of the offence rather than the individual culprit, and that allegations of corporate crimes are much more difficult to prove.

Hence the predicament of holding corporations responsible for corporate crimes will often arise as a result of failing to convict the individual offenders, based on one of the inherent elements associated with the criminal law, such as moral blameworthiness.⁶³ Despite the acknowledgment that a corporation exhibits the status of having a separate legal entity, the difficulty in attributing blame to this legal fiction is that if an organic theory approach is used to identify the person

⁶² Ibid 65-66 [36]-[37].

⁶³ Gobert and Punch, above n 55, 46.

responsible for the offence, it may seem to disseminate or decentralise the accountability of the corporation.⁶⁴ Therefore, to combat this drawback, Australia has adopted the concept of organisational blameworthiness whereby vicarious liability and ‘corporate culture and policy as expressing corporate intention or the fault element of the offence is embodied (to some extent) in the corporate criminal responsibility provisions of the *Criminal Code*’.⁶⁵ Although this appears to be somewhat a solution to the problem of attributing corporate blame, it does not address the issue of corporate punishment and the subject of deterrence.

On the subject of deterrence, Simpson has observed that there has been a lack of empirical research performed over the years to show that corporate legal sanctions actually produce a significant impact on the level of deterrence against corporate crime.⁶⁶ However, she noted that ‘corporate decisions appear to involve more than rational choices – they have moral components as well’, but ‘morality is situational, always in flux, changing along with social relations and networks within the organization’.⁶⁷ This view reflects the general difficulty in using moral blameworthiness in the course of justifying the punishment or sanctions applied to corporate crimes, which may not necessarily provide the effect of deterrence. Simpson subsequently presents the dilemma of what is perceived when a company faces unethical managers, who contravene the law not for their own personal gains but supposedly for the good of the company. Notwithstanding that their objectionable behaviours are viewed less harshly and often non punitive remedies

⁶⁴ Australian Law Reform Commission (ALRC), *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation – 16. Corporate Responsibility*, Discussion Paper No. 65, (2002) [16.24].

⁶⁵ Ibid [16.33].

⁶⁶ Sally S. Simpson, 'Corporate-Crime Deterrence and Corporate-Control Policies Views from the Inside' in Kip Schlegel & David Weisburd (ed), *White-Collar Crime Reconsidered* (Northeastern University Press, 1992) 290.

⁶⁷ Ibid 291.

are sought over criminal sanctions, ‘quizzing managers about the ethical choices they make while on the job leads one to conclude that managers do not think in deterrence terms...[but] when they do, it is only for traditional occupational offences like embezzlement, bribery, employee theft and not corporate offences’.⁶⁸ This line of thought suggests that using criminal law to punish corporate offences may not necessarily provide a deterrent effect against corporate crime as compared to deterring against an individual from committing a white-collar crime.

In contrast, if enforcement of corporate responsibility rests under the civil justice system and civil remedies are used to correct the detriment and possibly provide a form of deterrence against future harm, then it brings back the impression that wrongful acts by corporations are less culpable and less serious than a conventional crime. So again, similar to the analogy of Seipp’s crime/tort distinction,⁶⁹ the image it conveys to the public is that it is acceptable for a rich man, or a wealthy organisation in this case, to pay for their mistakes rather than suffer some form of punishment from the State, thus making corporate wrongdoings less blameworthy.

Given that the two diametrically opposing impositions of traditional criminal and civil sanctions appear to provide an unsatisfactory outcome against deterring against corporate wrongdoing, it is a logical step to evoke a hybrid form of sanction in order to serve a more meaningful approach in dealing with corporate liability. It is at this point that the introduction of a ‘civil penalty’, which exhibits the traits of both criminal and civil sanctions, seem more fitting in combating

⁶⁸ Ibid 303.

⁶⁹ Seipp, above n 36.

corporate misconduct and has proven to be a popular choice in Australia and the rest of the world.

2. The role of civil penalties as an enforcement regime in Australia

The use of civil penalties as a tool for regulators to exert compliance in the corporate world has been implemented under Part 9.4B of the *Corporations Act* since 1993. Prior to its introduction, only criminal sanctions and civil remedies were available for addressing corporate fault. When the Cooney Committee produced a report that strongly recommended the government enact civil penalty provisions as a necessary enforcement mechanism to provide effective regulation of corporate law,⁷⁰ it was based on the model of responsive regulation. The theory behind such regulation was attributed to Professor Braithwaite's proposal in that,

strategic regulation theory provides a broad perspective on the role of enforcement sanctions in securing regulatory compliance. The theory advocates regulatory compliance as best secured by persuasion rather than legal enforcement. The economic premise behind this view is that persuasive measures are less costly than enforcement measures. For persuasion to be effective, however, the threat of punishment must lie behind the regulator's conciliatory actions or gestures. This threat should consist of a set of integrated sanctions, which the regulator can enforce when a contravention occurs. The sanctions should escalate in severity in proportion to the nature of the contravention.⁷¹

⁷⁰ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia produced the report, commonly known as 'Cooney Report' on *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989).

⁷¹ Helen Bird and Ian Ramsay George Gilligan, 'Civil Penalties and the Enforcement of Directors' Duties' (1999) 22(2) *University of New South Wales Law Journal* 417, 425-426.

Effectively, this is seen as the ‘enforcement pyramid’ where the range of sanctions would start from ‘civil measures at the base of the pyramid...and criminal liability at the apex for the more exceptional instances of law-breaking’⁷² in the corporate world. It was argued that ‘the perceived harshness of the criminal penalties may have discouraged persons who would otherwise be competent directors from taking on that role...[thus] criminal liability should flow only when the conduct was genuinely criminal in nature’.⁷³ Naturally, this enabled civil penalties to sit in the middle of the two sanctions as an extra means to deter corporate wrongdoing. Gething also showed support for the need to have both criminal and civil penalties, so that ‘the court has ample scope to ensure that a proportionate sanction can be given in the circumstances of every contravention’.⁷⁴ He concluded that such an enforcement regime provided an ‘effective and just balance between the regulatory and business facilitation aims of the ASC’.⁷⁵

Although the introduction of civil penalty provisions was initially limited to the scope of directors’ duties, the extent of the regime has since grown to encompass a range of provisions in corporations’ law over the last few years.⁷⁶ However, recent empirical research has suggested that there has been a gap between the theory of responsive regulation and practice, as it was discovered that

ASIC does not consider whether or not a civil penalty application would be an adequate regulatory response prior to considering a

⁷² Cooney Report, above n 70, 190 – citing Professor Fisse.

⁷³ Michelle Welsh, ‘ASIC, Civil Penalties and Compensation Orders Under the Corporations Act 2001’ (2003) 17(4) *Commercial Law Quarterly* 13, 14.

⁷⁴ Michael Gething, ‘Do We Really Need Criminal and Civil Penalties for Contravention of Directors’ Duties?’ (1996) 24(5) *Australian Business Law Review* 375, 376.

⁷⁵ *Ibid* 390. ASC is the Australian Securities Commission, now known as ASIC, the Australian Securities and Investments Commission.

⁷⁶ Robert Baxt, ‘The Expansion of Civil Penalties under the Corporations Act’ (2002) 30 *Australian Business Law Review* 61, 61.

criminal prosecution and that ASIC does not initiate more civil penalty proceedings than criminal prosecutions in relation to the same types of contraventions.⁷⁷

In addition, there have been a growing number of concerns and criticism⁷⁸ over the lack of success in using civil penalties to deter and punish corporate wrongdoers especially when ASIC has failed to prove their case in a highly complex trial like *ASIC v Rich*⁷⁹. This leads one to speculate that perhaps civil penalties are not as desirable as an effective enforcement regime against corporate fault as it first appeared to be. Nevertheless, it is difficult to determine whether these unsuccessful cases, from the regulator's perspective, was due to any intrinsic defect aligned with the provision itself or if it is in fact due to the hybrid nature of the penalty that has subsequently posed undesirable outcomes when civil procedure is used to trial such proceedings. It is appropriate at this stage to consider the features of civil penalty in an attempt to understand the jurisprudence behind this novel sanction.

⁷⁷ Michelle Welsh, 'Civil Penalties and Responsive Regulation: The Gap between Theory and Practice' (2009) 33 *Melbourne University Law Review* 908,933.

⁷⁸ Vicky Comino, 'Effective Regulation by the Australian Securities and Investments Commission: The Civil Penalty Problem' (2009) 33 *Melbourne University Law Review* 82; Vicky Comino, 'Towards Better Corporate Regulation in Australia' (2011) 26 *Australian Journal of Corporate Law* 6.

⁷⁹ (2003) 45 ACSR 305. This case was appealed all the way to High Court and specifically dealt with the question of privilege against penalties. It subsequently led to the abrogation of this common law principle in 2007 when s 1349 was introduced. A detailed discussion of this case is discussed in Part III of this paper.

3. The hybrid characteristics of a civil penalty – having the best of both worlds?

In Australia, the use of civil penalty has originated since the enactment of the *Customs Act 1901*, with its main purpose being to regulate Customs prosecutions as a form of debt to the Crown.⁸⁰ However, since the expansion of its use towards the latter part of this century⁸¹ primarily in the Commonwealth jurisdiction, many academics have adopted the view of defining civil penalties as ‘punitive sanctions that are imposed otherwise than through the normal criminal process.’⁸² The ALRC has also classified three types of civil penalty processes:

1. civil penalties which sit alongside criminal penalties in legislation as additional or alternative enforcement options, often when the necessary fault element to prove a criminal offence (usually intention or knowledge) is not present, such as under the *Environmental Protection Biodiversity Conservation Act* and Part 9.4B of the *Corporations Act*,
2. separate civil penalty schemes which sit alone as the penalty for certain contraventions, such as Part IV of the *Trade Practices Act*; and
3. those which have a quasi-criminal status but use civil procedures, such as Customs prosecutions, and involve features of both criminal prosecution and civil penalty proceedings.⁸³

It is quite evident from observing these terms that a civil penalty displays the features of both criminal and civil sanctions in that they can adopt the characteristics of a punishment, not dissimilar to a criminal penalty, yet still use

⁸⁰ (ALRC), above n 2, 74 [2.53].

⁸¹ Matthew Lees, 'Civil Penalties and Procedural Protection' (2013) 87 *Australian Law Journal* 404, 405.

⁸² Michael Gillooly and Ni Lante Wallace-Bruce, 'Civil Penalties in Australian Legislation' (1994) 13 *University of Tasmania Law Review* 269, 269.

⁸³ (ALRC), above n 2, 77-78 [2.63].

civil procedure as a basis for trial. Although not all legislation will specify the procedure for a trial concerning the contravention of a civil penalty provision, under common law principles, the Court retains the discretion in adapting the use of civil procedures if they see fit, despite the fact that civil penalty proceedings may typically resemble a ‘quasi-criminal’ trial.⁸⁴ Others have described civil penalty as an oxymoron, in that ‘it is really criminal. But this is to commit the fallacy of the undistributed middle – to assume something is either criminal or civil, with nothing in between’.⁸⁵

In the United States, Mann has coined the phrase ‘middleground jurisprudence’ in an attempt to describe the evolution of civil penalty as a ‘third arena of sanctioning law...developed simultaneously with the criminal and civil paradigms.’⁸⁶ This is further suggestive that such jurisprudence has been embraced by the Courts in response to justifying ‘the place of punitive civil sanctions in the constitutional structure of American law’.⁸⁷ If Australia follows in the footsteps of the United States, then establishing the legal theory behind the use of civil penalty may also fall upon the judiciary rather than the legislature or executive arm of our legal system. Undeniably, it is often the insightful interpretation of the law plus the historical analysis of the concept behind the law that reveal the philosophy behind the intention of the provisions. Accordingly, much of the discourse in Australian case law regarding the use of civil penalty has been focused on the subject of whether this form of sanction is considered as a civil or criminal matter and

⁸⁴ *Sidebottom v Commissioner for Taxation* (2003) 6 VR 302, 307 – Phillips JA citing *Witham v Holloway* (1995) 183 CLR 525.

⁸⁵ G Santow, ‘Corporations Law in a Federal System’ (Paper presented at Conference on the Future of Corporation Regulation, Sydney, 3 November 2000).

⁸⁶ Mann, above n 1,1813. Note that the term ‘punitive civil sanctions’ are used instead of civil penalty in his paper.

⁸⁷ *Ibid.*

whether procedural protections ought to apply if it presents with qualities of a criminal or quasi-criminal facts.⁸⁸ However, there appears to be a lack of discussion as to whether civil penalty can be considered as a third branch of law, emerging away from its previously recognised term of being just a form of hybrid sanction.

4. Can civil penalty provisions be substantive in nature?

If one is to question the legitimacy of using civil penalty as a means to curb corporate liability, it may be prudent to look at the theory behind the unique hybrid qualities which civil penalty possesses. It should be recognised that a civil penalty itself is there to determine the liability of a wrongful act and to provide an assessment of a justified penalty for that act, therefore ‘it does not relate to the nature of the wrongful conduct itself’.⁸⁹ The significance of this is that a civil penalty serves the purpose of enforcing some form of sanction against the wrongdoer, but on its face, it does not seem to give or define people’s rights as a form of substantive law, nor does it offer a ‘mode of proceeding by which a legal right is enforced’⁹⁰ as in procedural law. Hence it is difficult to envisage this growing area of law as anything but a development in the regulation of corporate conduct.⁹¹

⁸⁸ Lees, above n 81, 420.

⁸⁹ Richard Head, 'The Rise and Rise of Civil Penalties in Australia' (2008) 60(9) *Keeping Good Companies* 518, 518.

⁹⁰ *Poyser v Minors (1881)* LR 7 QBD 329, 333 per Lush J.

⁹¹ Welsh, above n 73, 13.

However, in terms of understanding and classifying what is substantive law, Gibbs CJ together with Aickin, Wilson and Brennan JJ cited *Salmond on Jurisprudence in Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc.*⁹²

Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated.⁹³

Alternatively, as more simplistically expressed by Mason CJ in *McKain v RW Miller & Co (South Australia) Pty Ltd*,⁹⁴ ‘the essence of what is procedural may be found in those rules which are directed to governing or regulating the mode or conduct of court proceedings’,⁹⁵ and as Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ concluded in *John Pfeiffer Pty Ltd v Rogerson*, ‘all other provisions or rules are to be classified as substantive’.⁹⁶

Interestingly though, according to *Salmond on Jurisprudence*, another distinguishing feature between substantive and procedural law is that when the ‘administration of justice is concerned with the application of remedies to violated rights, the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the applications of the one to the

⁹² (1981) 148 CLR 170, 176.

⁹³ P.J. Fitzgerald, *Salmond on Jurisprudence* (Sweet & Maxwell, 10th ed, 1947) 476.

⁹⁴ (1991) 174 CLR 1, 26-27.

⁹⁵ *Ibid*, at 26-27. This view was also affirmed in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503

⁹⁶ (2000) 203 CLR 503, 543-544 [99].

other'.⁹⁷ From this perspective, one could construe the enactment of civil penalty provisions as a form of substantive law as it offers a remedy when personal rights are violated as a result of corporate fault. It also serves the greater purpose of administering justice by providing a statutory remedy for the complainant but at the same time offering a form of punishment for corporate wrongdoers. Furthermore, if one adopts the views of the judiciary then civil penalty provisions ought to be classified as substantive law as they do not concern themselves with the manners of court procedure. Thus it would appear to be erroneous to categorise them as a form of procedural law. Even if one disagrees with the view that civil penalty is more affiliated with substantive law than procedure law, such a distinction, although largely drawn in theory, still has beneficial implications, as

many rules of procedure...are wholly or substantially equivalent to rules of substantive law. In such cases the difference between these two branches of law is one of form rather than of substance. A rule belonging to one department may by a change of form pass over into the other without materially affecting the practical issue.⁹⁸

In *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*,⁹⁹ Kenneth Martin J had cited Professor Dockray's article to express that,

procedural law can be described as subordinate or adjectival because it aims to give effect to substantive rules [it] should not conceal the truth that procedures can and do interfere with important human rights,

⁹⁷ P.J. Fitzgerald, *Salmond on Jurisprudence* (Sweet & Maxwell, 12 ed, 1966), 462-463. Another example used to explain the difference between substantive and procedural law is that the question of whether an offence is punishable by fine or by imprisonment would be considered as substantive law because the existence and measure of criminal liability are matters pertaining to the end and purpose of the administration of justice. But whether an offence is punishable summarily or only on indictment is a question of procedure.

⁹⁸ *Ibid.*

⁹⁹ [2011] WASC 1 [80].

while the means by which a decision is reached may be just as important as the decision which is made in the end. Where procedure is as important as substance, procedural change requires the same degree of political accountability and economic and social foresight as reform of an equivalent rule of substantive law. Major innovations in procedural law should therefore be recognised as an institutional responsibility, not a matter on which individual judges should respond to the pleas of particular litigants. Procedural revolutions should appear first in statutes or in the Rules of Court, not in the law reports.¹⁰⁰

This passage highlights two important aspects of substantive versus procedural law. Firstly, it draws attention to the fact that procedural law should not be dismissed as something that is trivial especially since it has the potential to affect a litigant's right to pursue justice. Secondly, it is apparent that Dockray's point of view, adopted with approval by Kenneth Martin J, advocates for Parliament to make appropriate procedural changes as opposed to relying on the inherent powers of the Court. Although this opinion differs from that of Professor Mann's analysis,¹⁰¹ it may be the time and place for Australia to make an innovative legislative change so that civil penalty can be proclaimed as a novel branch of law with its own set of procedure. Instead of relying on the use of existing civil procedure as a basis for trial, the enactment of a civil penalty procedure, that is specifically tailored to suit the intention behind the enabling statute, will provide a better protection against procedural hazards that have inadvertently occurred during civil penalty proceedings in the past.

¹⁰⁰ M.S Dockray, 'The Inherent Jurisdiction To Regulate Civil Proceedings' (1997) 113 *Law Quarterly Review* 120,131.

¹⁰¹ Mann, above n 1,1813. See earlier discussion on the development of 'middleground jurisprudence'.

C. *The growing need to establish a new civil penalty procedure*

1. The pitfalls of using civil procedure in civil penalty proceedings – a lesson learnt from the case of *Rich v ASIC*.

The main concerns surrounding the use of civil procedure for the contravention of civil penalty provisions in the *Corporations Act* relate to applying the rules of evidence. Granting that there are many types of procedural matters that may arise during trial such as prosecutorial fairness, which have been raised in the recent case of *ASIC v Hellicar*,¹⁰² and the availability of the rule in *Jones v Dunkel*,¹⁰³ discussed in *Adler v ASIC*,¹⁰⁴ it is beyond the scope of this paper to consider all of the questions relating to the difficulties in applying civil procedure in civil penalty proceedings. Instead, the focus will be on the issue of privilege and the standard of proof, which have caused a lot of disparity for ASIC in trying to prove their cases.

Perhaps the civil penalty case that stood out amongst the rest was the High Court's decision in *Rich v ASIC*,¹⁰⁵ which discussed the issue of privilege against exposure to penalties with an undertone of whether civil penalties can be classified as punitive or protective.¹⁰⁶ This case presented an interesting argument in that it demonstrated the uncertainties of applying procedural rules to civil penalties due to their hybrid nature. The heart of the argument was that ASIC wanted the appellants (Rich and Silbermann, who were directors of the collapsed company

¹⁰² (2012) 86 ALJR 522.

¹⁰³ (1959) 101 CLR 298.

¹⁰⁴ (2003) 179 FLR 1.

¹⁰⁵ (2004) 220 CLR 129.

¹⁰⁶ *Ibid* 141, [23] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

One.Tel Ltd) to provide discovery of documents in support of the three types of relief sought.¹⁰⁷ These were:

- a) a declaration under s 1317E of the *Corporations Act 2001* (Cth) (declaration of contravention);
- b) orders pursuant to s 1317H(1) of the Act (the 2001 Act) that the appellants pay One.Tel compensation (compensation orders); and
- c) orders pursuant to ss 206C and 206E of the 2001 Act disqualifying each appellant from managing a corporation for such period as the Court considers appropriate (disqualification orders).¹⁰⁸

Both the court of first instance and the New South Wales Court of Appeal acknowledged that the proceedings against the appellant were civil in nature, so the rules of evidence surrounding the privilege against penalties did not apply and ordered the appellants to make discovery of documents.¹⁰⁹ However, special leave to the High Court was granted and by majority (Gleeson CJ, Gummow, McHugh, Hayne, Callinan and Heydon JJ, with Kirby J dissenting) the High Court ruled in favour of the appellants. It was concluded that the disqualification orders, ‘when inflicted on account of a defendant’s wrongdoing, are penalties’,¹¹⁰ and so the original orders for discovery on the basis that privilege against exposure of penalties did not apply was discarded.

¹⁰⁷ *ASIC v Rich* [2003] NSWSC 328 [2], Austin J - Since the events of the case occurred between the years of 2000-2001, ASIC alleged that Rich and Silbermann had contravened s 180(1) of the *Corporations Law* (NSW), and sought civil penalty orders under Part 9.4B against the appellants. However, the NSW Supreme Court was able to hold the proceedings under the newly enacted Commonwealth statute (*Corporations Act 2001*) due to the transition in July 2001, as the provisions in Part 9.4B remained the same in both statutes.

¹⁰⁸ *Rich v ASIC* (2004) 220 CLR 129, 135 [1].

¹⁰⁹ *Ibid* 130-131.

¹¹⁰ *Ibid* 147 [37].

The implications from this ruling meant that the High Court endorsed the fact that ‘the privilege against exposure to penalties is one of a trilogy of privileges that bear some similarity with the privilege against incrimination,¹¹¹ something that is already established in the criminal jurisdiction. In the Court of Appeal decision, McColl JA (although in dissent) examined the history of penalty privilege and

reveals it to be a general privilege which developed in tandem with the development of the privilege against self-incrimination...[as] can be seen from *R v Sorby* (1983) 152 CLR 281 at 317-319, in which Brennan J traced the historical development of the privilege against self-incrimination through the abolition of the Court of Star Chamber and the Court of High Commission in 1641 which had administered the *ex officio* oath. The privilege was also extended not only to protect accused at a criminal trial but also to protect persons obliged to give discovery in proceedings to recover a penalty or in other civil proceedings.¹¹²

Members of the High Court respectfully disagreed with the reasoning given by the primary judge (Austin J) and the majority in the Court of Appeal (Spigelman CJ and Ipp JA) on the premise that ‘a distinction between “punitive” and “protective” proceedings was possible and useful and that, when applied to the present proceedings, it led to the conclusion that the present proceedings have a protective not punitive purpose’.¹¹³ The rationale used to reject this proposition was that,

[f]irst, adopting such a classification diverts attention from the relevant question which is whether the privilege against exposure to penalties applies...

¹¹¹ Ibid 141 [23].

¹¹² *Rich v ASIC* (2003) 183 FLR 361, 339 [195].

¹¹³ *Rich v ASIC* (2004) 220 CLR 129, 144 [30].

Secondly, the supposed distinction between “punitive” and “protective” proceedings or orders suffers the same difficulties as attempting to classify all proceedings as either civil or criminal...[which is at best] elusive...

Thirdly, not only does the supposed distinction between punitive and protective procedures find no sure footing in the course of decision concerning the application of the privilege against exposure to penalties, it is inconsistent with the principles revealed by those authorities.¹¹⁴

This passage underlines the difficulty in classifying whether civil penalties could solely belong to the civil jurisdiction given that the penalty aspect of the provision can resemble a punishment in criminal law. This element of criminality was further emphasized in the judgement of McHugh J, where he stated that

[d]espite frequent statements by the judges who administer the legislation that the purpose of the disqualification provisions is protective, what the judges actually do in practice is little different from what judges do in determining what orders or penalties should be made for offences against the criminal law. Elements of retribution, deterrence, reformation and mitigation as well as the objective of the protection of the public inhere in the orders and periods of disqualification made under the legislation.¹¹⁵

It is evident that McHugh J alludes to the fact that disqualification orders cannot be purely protective given that the purpose of disqualifying a person from managing a company can be seen as a form of retribution and deterrence, which

¹¹⁴ Ibid 144-145 [31] – [33]. The cited authorities include: *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161; *Rich v ASIC* (2003) 183 FLR 361 and *Veen v The Queen [No2]* (1988) 164 CLR 465.

¹¹⁵ Ibid 148 [41] – McHugh J.

also happens to be the main constituents of criminal law. By analogy, McHugh J also compared the disqualification order to the suspension of a driver's licence, and suggested that both types of prohibition provided facets of punishment instead of mere protection for the public.¹¹⁶ It appears then by classifying the civil penalty disqualification order as punitive, the order itself has shifted from the perspective of being in a civil regulatory environment towards a form of criminal sanction whereby criminal procedural protections are allowed over the simple application of civil procedural rules. In effect, this reinforces the argument that civil penalties itself cannot be complacently placed in either categories of law, whether it be civil or criminal, and using civil procedure in these proceedings have undoubtedly caused ambiguity when applying the rules of evidence.

However, the dissenting judgement from Kirby J presented an interesting point of view in relation to the characterisation of the disqualification orders as being either punitive or protective in that he indicates that such a distinction may lead to imposition of a 'false dichotomy'.¹¹⁷ He claims,

[g]iven that the relevant part of the Act provides separately for *criminal* and *civil* sanctions, it is erroneous to conflate the two or to approach disqualification orders, classified by the Parliament as civil, in the same way as if they imposed criminal sanctions...

The Act obliges consideration to be given to "conduct in relation to the management, business or property of any corporation" ... But it does so not, as such, to measure any criminal punishment on the officer concerned. It does so to judge the likely future conduct of the officer if disqualification is refused. It protects the investing public, shareholders and others by immobilising the proved contravener and

¹¹⁶ Ibid 149 [42].

¹¹⁷ Ibid 165 [85].

depriving him or her, for the specified period, of the position of trust and power that office in a corporation involves. Of course, the order has a serious economic and reputational consequence for the officer who is disqualified. But its purpose is not, as such, to impose criminal punishment. If it were punitive, it would say so and it would have been placed in a different part of the Act.

Admittedly, Kirby J points out that there are distinct criminal sanctions in the *Corporations Act* and draws attention to Parliament's intention behind the purpose of establishing these civil penalty provisions as a deliberate form of regulatory control under the 'pyramid of enforcement containing a hierarchy of sanctions'.¹¹⁸ It is true that whilst the Act does not expressly state that civil penalties ought to be thought of as a form of punishment, the fact that it entails disqualification orders as well as compensatory orders suggest that it is there to provide more than simple protection for the public. Even if these orders are a form of civil redress for the harm caused by private individuals, the consequences of such orders mimic the effect of criminal sanctions in that, not only are they there to produce a deterrent and protective effect, these trials are also initiated by ASIC, a government regulator, and thus a State representative. Notwithstanding that the State regulatory watchdog does not sound as vicious as a State prosecutor, the crux of this argument is that the proceedings are also there to serve a public interest, which is correspondingly a fundamental principle under the criminal justice system. This view is likewise reflected in the Court of Appeal's decision by McColl JA, where she states that,

¹¹⁸ Ibid 173 [111]. The model of pyramid of enforcement was introduced in the 1992 Corporations Law reforms recommended by the Cooney Committee. See Australia, Parliament, *Corporate Law Reform Bill 1992: Draft Legislation and Explanatory Paper* (1992), p50-51 [178].

[t]he statutory scheme of which s 206C forms part bears all the hallmarks of a scheme intended to impose disqualification as a punishment, or a consequence in the nature of punishment, albeit in a civil framework. These features are sufficient to attract penalty privilege. Although structured as a civil case both in terms of the procedures to be applied (s 1317L) and the onus of proof (s 1332), the proceedings are, in effect brought by the State and “accuse” the defendant of a contravention of a public law - just as, in the criminal context the defendant is accused of a breach of a statute. The civil penalty scheme pivots around the declaration of contravention which operates in the same sense as a finding of guilt and leads, in turn, to the imposition of one or other of the available civil penalty orders. It is not a suit which is purely of a civil nature.¹¹⁹

It is apparent from this reasoning that McColl J appreciates the fact that civil penalty provisions exhibit more complexity than what meets the naked eye. It seems that using existing civil procedure to try these cases can oversimplify and misplace the importance of the penal properties of these contraventions.

Acknowledging that civil penalties sit in the middle of the pyramid of enforcement regime, perhaps the use of this novel invention is there to give an illusion or false comfort to those who commit corporate wrongs so that it is perceived as though they are receiving a lesser penalty. If civil penalties are perceived and accepted as a form of punishment, then it presents itself as a unique creature of the law whereby its quasi-criminal penalties are tried in a civil jurisdiction instead of a criminal court. This is acknowledged in Justice Kirby’s judgement, where he accepts that sometimes there are difficulties when attempting to classify a statutory proceeding as either civil or criminal even though he concludes that in the case of

¹¹⁹ *Rich v ASIC* (2003) 183 FLR 361, 434 [379].

penalty privilege in civil penalty hearings, the remedies provided is civil and not criminal.¹²⁰ In addition, he discusses the use of the phrase ‘civil penalty’, and submitted that, in his opinion, the emphasis should not be placed on the noun (penalty) compared to the adjective (civil) when read within the context of the Act.¹²¹ Consequently, this has led to an influx of academic discussion of whether Parliament should provide clearer instructions and ‘expressly abrogate [such procedural] protections if they are not to be available to defendants in such hearings’.¹²²

Following in line with the need to address this issue of privilege against penalties, Parliament introduced the *Corporations Amendment (Insolvency) Act 2007* which expressly nullified the effect of the High Court’s decision in the Rich case. Hence the privilege against exposure to a penalty for disqualifications orders under the contravention of civil penalty provisions was abrogated by inserting a new provision into the *Corporations Act*. Under this amendment, the Act now stipulates that:

- s1349(3) Statutory requirement A person is not entitled to refuse or fail to comply with a requirement under this Act or the ASIC Act:
- (a) to answer a question or give information; or
 - (b) to produce a book or any other thing; or
 - (c) to do any other act whatever;

¹²⁰ *Rich v ASIC* (2004) 220 CLR 129, 168 [95] – [97].

¹²¹ *Ibid* 169 [98].

¹²² Rees, above n 3, 154-155. Other academics have also presented similar arguments in terms of advocating for procedural protections with the introduction of new procedural rules for civil penalty proceedings. See Lees, above n 81; Peta Spender, 'Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation' (2008) 26 *Company and Security Law Journal* 249.

on the ground that the answer or information, production of the book or other thing, or doing that other act, as the case may be, might tend to make the person liable to a penalty by way of:

(d) a disqualification under Part 2D.6 of this Act; or...¹²³

The scope of this provision extends to both civil and criminal proceedings of a court and any tribunal proceedings that arise out of the *Corporations Act* or the ASIC Act. Although this amendment appears to have resolved this particular issue of privilege, the fact remains, pursuing litigation under civil penalty provisions is inherently awkward as it appears to be an artificially created medium to deal with corporate misconduct.

In the final determination of the *ASIC v Rich* saga, Austin J handed down the decision in 2009 indicating that ASIC has failed to prove its case due to a number of reasons.¹²⁴ One cannot help but wonder if some of the reasons for its failure were attributed to the inadequacies of using civil procedural rules for running a case that consisted of civil penalty contraventions. In particular, Austin J observed the polarity between criminal and civil proceedings with civil penalty contraventions belonging to neither division. He noted that,

[t]he measure of similarity that civil penalty proceedings have to criminal proceedings arises from the fact that civil penalty proceedings are concerned with allegations of contravention of statute and the protagonists are a Commonwealth agency and individual subjects of the Crown. Successful prosecution of civil penalty proceedings leads to a determination of contravention of a public law, and may lead to a declaration of contravention which itself involves public opprobrium

¹²³ *Corporations Act 2001* (Cth) – This provision specifically relates to the Court power of disqualification – contravention of civil penalty provision (s 206C).

¹²⁴ *ASIC v Rich* (2009) 236 FLR 1.

and condemnation, and the imposition of a penalty by way of pecuniary penalty or disqualification order. ASIC as plaintiff is acting as an agency of the Commonwealth and not as a private litigant, and like the prosecutor in criminal proceedings, is the guardian of the public interest with a responsibility to ensure that justice is done. There is the same kind of imbalance of power and resources that one finds in criminal prosecution, and in particular, in the preparation of its case, ASIC can take advantage of the very substantial investigatory powers that it has under the ASIC Act, as well as in voting the search warrant powers under the Crimes Act 1914 (Cth), and is right to require assistance under s 1317R.¹²⁵

These remarks go to the core of the predicament in surmising whether civil penalty provisions can accurately be depicted as anything but a new branch of law, being substantive in nature and thus deserving its own procedural rule to complement its hybrid qualities.

¹²⁵ Ibid 134 [533].

2. Is it appropriate to apply the civil standard of proof in civil penalty contraventions?

It is well known that the standard of proof in a civil proceeding has always been based on the balance of probabilities.¹²⁶ This is established in common law and is routinely used in Australia unless stated otherwise by the governing statute. For example, the perception of the phrase itself, ‘on the balance of probability’, has often been misguided by equating it to a mathematical quantity of greater than 50%. The problem with using this type of language to determine whether alleged conduct did or did not occur is that it portrays a quantitative analysis as opposed to a qualitative one. Ligertwood and Edmond have attempted to explain this process of determination by suggesting that

[t]he fact-finder is confronted with conflicting hypothesis and must, on the basis of experience of the ordinary course of events, determine with which hypothesis or hypotheses all the evidence is consistent. If, on this basis, there is evidence inconsistent with a particular hypothesis, that hypothesis will be rejected altogether. If the evidence is more consistent with one hypothesis rather than another, that former hypothesis will be favoured. The more information consistent with a particular hypothesis, the more probable that hypothesis becomes until it reaches, by weight of evidence, a stage of acceptance by the fact-finder as *the* likely explanation of all the available evidence. At this stage, the hypothesis is described as proved on the balance of probabilities. One might say that the fact-finder is persuaded or believes that hypothesis probably occurred.¹²⁷

¹²⁶ *Rejtek v McElroy* (1965) 112 CLR 517. A fact is proved to be true on the balance of probabilities if its existence is more probable than not, or if it is established by a preponderance of probability.

¹²⁷ Andrew Ligertwood and Gary Edmond, *Australian Evidence A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis Butterworths, 5th ed, 2010) 107.

This type of psychoanalysis of decision making was also explored by Mahoney JA in *Fabre v Arenales*.¹²⁸

It is, in my opinion, important that the fact finding process not be over-formalised or, a fortiori, ritualised. To do that would be to misunderstand the nature of that process. There are, as I have suggested, at least two aspects of any fact finding process: the psychological process whereby the fact finder concludes that Z exists; and the process or processes by which that conclusion is scrutinised or tested, to determine whether, for the instant purpose, it should be accepted and acted upon. The inference or conclusion that Z exists may psychologically be arrived at in many ways. It may be arrived at formally by inference or deduction according to the rules of logic.¹²⁹

It appears then, in order for the court to be satisfied that a fact has been proven on the balance of probabilities, that satisfaction must arrive by a ‘combination of both mental and bodily sensations, and also possibly [by] the participation of emotion. [This is consistent with] both mental and physical components of the decision-making process.’¹³⁰ This type of assessment in the decision-making process can be used to rationalise the possible internal conflicts that a judge may experience when presiding over civil penalty cases under the *Corporations Act*, especially when the nature of the allegations by ASIC are already highly complex and difficult to prove. Furthermore, since a Court must apply civil evidence and procedural rules when presiding over the declarations of contravention of civil penalties under the Act,¹³¹ there has been widespread concern and dissatisfaction

¹²⁸ (1992) 27 NSWLR 437.

¹²⁹ Ibid 448-449.

¹³⁰ Hayley Bennett and G A (Tony) Broe, 'The Civil Standard of Proof and the "Test" in Briginshaw: Is there a Neurobiological Basis to Being "Comfortably Satisfied"?' (2012) 86 *Australian Law Journal* 258, 275.

¹³¹ *Corporations Act 2001* (Cth) – s 1317L.

by the general public that the defendants have been given procedural protections, such as the penalty against privilege which was explored in the *Rich v ASIC* case discussed previously. This is analogous to those in criminal trials, despite it being a civil case.¹³² These rules of evidence to which civil penalty proceedings are to adhere by are found under s 140 of the *Uniform Evidence Act 1995*, which states:

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
 - (a) the nature of the cause of action or defence; and
 - (b) the nature of the subject-matter of the proceeding; and
 - (c) the gravity of the matters alleged.¹³³

Notably, subsection (2) in the statute takes into account the principle established in *Briginshaw v Briginshaw*,¹³⁴ which is now commonly known as the Briginshaw standard of 'reasonable satisfaction'. This term is explained by leading judgement of Dixon J in that,

[r]easonable 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 where the issue has been proved to the reasonable satisfaction of the tribunal. In such matters

¹³² Refer to articles by: Lees, above n 81; Tom Middleton, 'The Difficulties of Applying Civil Evidence and Procedure Rules in ASIC's Civil Penalty Proceedings under the Corporations Act' (2003) 8 *Company and Security Law Journal* 507, 517; Rees, above n 3,117.

¹³³ *Evidence Act 1995* (Cth) – Chapter 4, Part 4.1 – Standard of proof.

¹³⁴ (1938) 60 CLR 336.

“reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences.¹³⁵

This reasoning was contemplated in the High Court decision of *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*,¹³⁶ a case that involved the allegation of deceit by Neat Holdings against Karajan Holdings over the purchase of a family amusement centre whereby the respondent had misrepresented the turnover of the business. The relevance of this case is that it gave rise ‘on appeal to an issue as to the degree of proof required of the appellant to make good that cause of action, which in turn led the judgment being set aside’.¹³⁷ It is interesting to note that Toohey J also mentions the term ‘degree of proof’ rather than the ‘standard of proof’ given that the majority of the High Court (Mason CJ, Brennan, Deane and Gaudron JJ) stated that,

[t]he ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud...the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary “where so serious a matter as fraud is to be found”. Statements to that effect should not, however, be understood as directed to the standard of proof.¹³⁸

The implication here appears to be that there is a noticeable difference between degree and standard of proof, where the degree takes into account the magnitude

¹³⁵ Ibid 362.

¹³⁶ (1992) 110 ALR 449.

¹³⁷ Ibid 454 – Toohey J.

¹³⁸ Ibid 449.

and seriousness of the allegations as depicted under the Briginshaw standard, while the standard of proof is always on the balance of probability for civil proceedings. Similarly, in the Court of Appeal decision, Murray J (although in dissent) discussed the ground of appeal in relation to the standard of proof and concluded that the plaintiff's submission was 'merely an acceptance of onus [of proof and that]... the degree of persuasion required will vary according to the gravity of the fact at issue'.¹³⁹

The High Court eventually reversed the decision from the Court of Appeal, as it was held by majority that such 'generalisations about the need for clear and cogent evidence to prove matters of the gravity of fraud or crime are, even when understood as not directed to the standard of proof, likely to be unhelpful and even misleading.'¹⁴⁰ This suggests that in cases which have elements of criminal offences, despite being dressed up as a civil suit, the cogency of proof does not necessarily assist in providing a reasonable satisfaction in persuading the court to find an adverse judgment for the defendant. If one uses the imagery of loading up the scale of justice with extra weight against the plaintiff who is trying to lumber the defendant with a serious allegation, then the court will require a greater degree of persuasion from the evidence before they can be convinced that the scales will tip in favour of the plaintiff. In essence, the Briginshaw standard is represented by the extra weight on the balance scale so that a higher degree of certainty is required before the balance of probability can fall in favour of the plaintiff.

¹³⁹ *Karajan Holdings Pty Ltd v Neat Holdings Pty Ltd* (Unreported, Supreme Court of Western Australia, Court of Appeal, Seaman, Nicholson, Murray J, 19 December 1991) p11.

¹⁴⁰ *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 450.

A typical example of when the Briginshaw standard is used is when a civil case bears resemblance to a criminal case or the allegations are so severe that it is quasi-criminal in nature. If only circumstantial evidence is available at trial, then having nine or ten circumstances which point together in the direction of an adverse judgment for the defendant will be much more persuasive than having five or six pieces of evidence against the defendant. In comparison to a criminal case, in order to move the scale to the ultimate point where the court will hand down a guilty verdict, there must be so many circumstances which point towards guilt that their existence is simply incompatible with the innocence of the accused. This type of reasoning was reflected in the case of *ASIC v Healey*,¹⁴¹ where Middleton J made clear references to the use of the civil standard of proof involving circumstantial evidence in a civil penalty trial. He explains,

...this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence while the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture...But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise.¹⁴²

¹⁴¹ (2011) 278 ALR 618; (2011) 83 ACSR 484.

¹⁴² Ibid 507-509.

Therefore, at this stage, in relation to civil penalty proceedings, the *Briginshaw* standard appears to be an appropriate vehicle in allowing the court the flexibility to place greater emphasis on the penalty aspect of the proceeding, so that it reflects on the severity of the allegations, such as when pecuniary penalties or disqualification orders are sought by ASIC. But a downside to using the *Briginshaw* standard of approach is that if the allegations of the civil penalties are so severe that it mimics the features of a criminal offence. For example, when the interest of the state and the community are being affected more so than the private individual, or when the breach of directors duties are purported to stem from a set of fraudulent conducts. Then the court may require a much stricter standard of proof in order to tip the balance of the scale in favour of the plaintiff, even if it is still below the criminal standard.¹⁴³

Ultimately though, it must be emphasized that the *Briginshaw* standard does not override the existing civil standard of proof which is still on the preponderance of probability and it is not to be held as a third standard of proof since there has been no such development in Australia's common law history.¹⁴⁴ Hence, it is not meant to be reckoned as 'an intermediate between the criminal and the civil standard'.¹⁴⁵ Nevertheless, it is interesting to note that in the case of *Witham v Holloway*,¹⁴⁶ which was concerned with a contempt of court matter, McHugh J discusses the concept of 'clear and convincing' proof which is accepted in the United States as a third standard of proof, but concludes that it not the same as the *Briginshaw* standard in Australia.

¹⁴³ Middleton, above n 132, 518.

¹⁴⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361 and 363 – Dixon J.

¹⁴⁵ C R Williams, 'Burdens and Standards in Civil Litigation' (2003) 25(2) *Sydney Law Review* 165, 175.

¹⁴⁶ (1995) 183 CLR 525.

In the United States, the standard of proof is determined by the nature of the proceedings. In criminal contempt, proof must be established beyond reasonable doubt [citation omitted]. In civil contempt, proof must be "clear and convincing" which is a standard that lies between the ordinary civil and criminal standards. The standard of proof in civil contempt appears to derive from *Oriel v Russell* [citation omitted], a case relating to the enforcement of an order for production of certain business records in a bankruptcy case.

...It is difficult to determine whether the "clear and convincing proof" standard formulated in *Oriel* is the United States equivalent of proof in accordance with *Briginshaw v Briginshaw*. However, since it is a standard that lies between the ordinary civil standard and the criminal standard of proof, it would appear most unlikely that it is.

That being so, it would be undesirable to adopt the United States test for civil contempt and introduce a third standard of proof into Australian jurisprudence.¹⁴⁷

The judgment of McHugh J indicates that the *Briginshaw* standard is not an alternate standard of proof, but it might be premature to completely abandon the idea of introducing a third standard of proof especially for civil penalty litigations in the future. This is because if civil penalties are to be embraced as a separate entity of law which is comprised of an amalgamation of civil and criminal law, then it should not rely on the same parameters used in a civil procedure to govern the framework of its trials. Undoubtedly, establishing a third standard of proof from common law jurisprudence is perhaps an unrealistic expectation due to the intrinsic difficulties in quantifying such a new standard, but it may be plausible for Parliament to intervene by descriptively providing a different set of conditions for

¹⁴⁷ Ibid 546-547.

an acceptable standard of proof in civil penalty proceedings, if a civil penalty procedure is to be developed in the future.

3. Proposed models of a civil penalty procedure

Idealistically, if Parliament introduces a civil penalty procedural rule that is specifically designed for proceedings of contraventions of civil penalty provisions in the *Corporations Act*, then it should alleviate some of the variable aspects procedural conflicts observed in ASIC cases as discussed previously. It may also bring the proceedings more in line with the intention behind the strategic regulation theory, so that civil penalties are truly seen as a middle-ground sanction which sits in between criminal punishment and civil compensation. It may also enforce the view that civil penalties ought to be recognised as a branch of substantive law rather than a form of regulatory law due to its unique hybrid qualities, which prevents it from being classified into either of the existing categories of law. I now present some of the discourse pertaining to proposals for an alternate procedure for civil penalty proceedings.

According to Middleton, a uniform civil code should be enacted which aims to provide ‘greater uniformity in relation to the applicable rules of evidence and civil procedure’.¹⁴⁸ The goal of passing such a code is that it would eliminate the uncertainties associated with any evidential immunities, such as the variable civil standard of proof; prosecutorial fairness; penalty privilege and privilege against self-incrimination and cross examination during civil penalty trials.¹⁴⁹ Although

¹⁴⁸ Middleton, above n 132, 528.

¹⁴⁹ Although certain issues have already been settled when Parliament introduced amendments into the *Corporations Act*, such as the abrogation of privilege against penalties under s 1349.

Middleton does not share the enthusiasm of developing a complete set of rules for civil penalty proceedings, due to the danger that ‘it may produce unintended effects on judicial behaviour in the sense that the hybrid principles may subsequently influence the courts in enlarging the scope of the criminal law beyond its traditional boundaries’.¹⁵⁰ He nevertheless does point out the pragmatic problems that may occur if a new civil penalty procedural rule is formulated. He claims that they will ‘add an extra layer of complexity to ASIC’s proceedings and may discourage ASIC from commencing civil penalty proceedings’.¹⁵¹ Undeniably, this is an accurate reflection of the dilemma one faces, especially since most ASIC trials that involve a declaration of a contravention of civil penalty provisions are already quite complicated and drawn out to start with. However, the ‘uniform code’ model fails to address the root of the problem which is that civil penalties possess qualities that are not completely civil in nature. Thus if a separate procedure can be drafted to precisely avoid the ambiguities that caused the setback in previous cases, then it may provide a superior solution than having a uniform code that only removes the inconsistencies between current civil procedural rules and the rules of evidence.

A different approach discussed by Rees in her campaign for a more appropriate procedure for civil penalty proceedings is to propose a

hybrid set of rules that acknowledge on the one hand that civil proceedings do not result in a criminal conviction so preserving that important distinction, but which recognise on the other that civil penalties may be punitive especially where the monetary exaction is

¹⁵⁰ Middleton, above n 132. Middleton acknowledging the views of John Coffee Jnr in his article, see Coffee, above n 44.

¹⁵¹ Middleton, above n 132, 528.

large or there is a loss of office consequent on a finding of wrongdoing.¹⁵²

Rees' analytical research of the current problems associated with using civil procedure in civil penalty trials presented a valuable insight into the difficulties of balancing the hybrid qualities of this statutory remedy in a modern day context of the acceptance of a criminal-civil divide. In particular, the issues surrounding the privilege against exposure to a penalty, the standard of variable proof and prosecutorial fairness were discussed to extend the view that if 'civil evidence and procedure is being developed on a case-by-case basis [for] civil penalty proceedings, [then] the courts have considerable capacity to tailor proceedings to meet the justice of a case'.¹⁵³ However such a flexible approach has led to various uncertainties and Rees has put forward the same view as the ALRC, which recommended a 'Regulatory Contravention Statute [that would] bring about a uniform approach'¹⁵⁴ to all civil penalty proceedings. This type of proposal appears to take into account the source of the conundrum which is that civil penalties have both civil and criminal aspects of a remedial action and thus using existing civil procedures to oversee the proceedings will run into the expected, but obvious, difficulties like procedural fairness and the variable standard of proof. Therefore, it seems to be a good starting point in advocating for a civil penalty procedural rule for the benefit of simplifying some of the existing Australian law that contains civil penalty provisions so that future litigation on such matters may be resolved with fewer procedural difficulties.

¹⁵² Rees, above n 3, 117, 155.

¹⁵³ Ibid 154-155.

¹⁵⁴ Ibid 155. Rees citing ALRC recommendation from the article *Principled Regulation: Federal Civil & Administrative Penalties in Australia* – see (ALRC), above n 2, 263 [6.204].

Perhaps the most radical suggestion in law reform for civil penalty proceedings was suggested by Spender, who took on the same view as Rosen-Zvi and Fisher,¹⁵⁵ in that

the current bifurcated civil-criminal regime should be replaced with a procedural model that is more compatible with the actual goals of our justice system where procedures are developed along two parallel axes, namely, the balance of power between the parties and the severity of the sanction or remedy.¹⁵⁶

Spender argues that ‘judicial determinations about civil penalty procedure frequently resort to criminal models’¹⁵⁷ which creates an imbalance of power for the defendant in terms of a lack of resources that is attainable by them compared to ASIC’s wide range of powers, and hence a reflection of ‘unequal adversaries’¹⁵⁸. Furthermore, the situation is examined to reveal that

[t]he civil-criminal dichotomy is a proxy for the balance of power between respective parties. Therefore the enhanced protections of criminal procedure are intended to redress the imbalance of power in favour of the prosecution which has greater access to resources, enhanced information gathering powers and sophisticated investigative and prosecutorial apparatuses. However, in the civil sphere there is an assumption of structural equality and power between the parties which results in a neutrality of safeguards, eg by requiring the same disclosure by both parties.¹⁵⁹

¹⁵⁵ Rosen-Zvi and Fisher, above n 44.

¹⁵⁶ Spender, above n 122, 257.

¹⁵⁷ Ibid 258.

¹⁵⁸ Ibid 257.

¹⁵⁹ Ibid.

Although this evaluation may have a theoretical basis of justification, it, however, lacks the empirical data to support such a claim. According to Welsh, ASIC's choice of enforcement for a breach of the directors' duty provisions are leaning more towards the use criminal sanctions as opposed to civil penalties,¹⁶⁰ even though these breaches can attract both types of punishment. This conveys the image that ASIC's use of civil penalties in regulating corporate wrongs are not as 'fearful' as a proceeding issued by the Commonwealth Director of Public Prosecution (CDPP) in seeking a criminal sanction against the defendant. This imagery, coupled with the fact that ASIC's trials for recent civil penalty contraventions have not had a convincing success rate, prompts the question of whether the imbalance of power does play a significant role in the proceedings.

In addition, Spender does not specify what the new model for civil penalty proceedings ought to be like, for example, how does the imbalance of power become resolved? Does the defendant receive more leeway when being pursued by ASIC under the contravention of civil penalty provisions based on the presumption that they are a lesser adversary? What threshold would be set in order to objectively view the defendant as a lesser opponent compared to ASIC? Would the size of a corporation be a determinative factor because a 'large' corporation is supposedly assumed to be more resourceful than a 'small' corporation? These questions raise the concern that such a model can only be viable if there are strict guidelines in defining the parameters used to assess the imbalance of power.

¹⁶⁰ Michelle Welsh, 'The Regulatory Dilemma: The Choice Between Overlapping Criminal Sanctions and Civil Penalties for Contraventions of the Directors' Duty Provisions' (2009) 27 *Company and Security Law Journal* 370, 383-384.

These three Australian models each present an intriguing view of promoting the need to have an alternative procedure for civil penalty proceedings under the *Corporations Act*. Of the three models presented, Rees' concept appears to be most logical next step forward in the search for a statutory intervention to reduce the erratic effects of court procedure, given that it is also in congruence with the ALRC's recommendation of a Regulatory Contravention Statute.¹⁶¹ It should also be emphasized that the reason behind such a push for law reform is likely to be due to the current inadequacies of resolving legal disputes using existing civil procedure to preside over civil penalty contraventions. Because there is still a constant struggle in classifying civil penalties under the existing dichotomy of criminal and civil law, the continuous evolution of civil penalties may eventually overcome this type of dialogue if it becomes formally recognised as substantive law in the future. Although it is beyond the scope of this paper to devise a new model for a civil penalty procedure, the discourse surrounding the literature justifies the need for parliament to intervene in this area of law, and further exploration in light of this debate may be warranted.

This concludes Part I of the thesis which leads to Part II of the thesis where the issue of constitutional challenge to the provisions in the *Corporations Act* will be explored on the basis of infringing Chapter III of the *Constitution*. Although there is limited case law which examines the constitutional validity of the current civil

¹⁶¹ (ALRC), above n 2, 262-263. Recommendation 6-7. A Regulatory Contraventions Statute of general application should be enacted to cover various aspects of the law and procedure governing non-criminal contraventions of federal law in accordance with the Recommendations in this Report. Recommendation 6-8. The Regulatory Contravention Statute is not intended to be a comprehensive code but rather should be express: (a) to contain certain principles of responsibility that apply to any non-criminal breach of any law of the Commonwealth; (b) to prevail over any inconsistent Commonwealth law to the extent of that inconsistency unless that other law expressly excludes or modifies the operation of the Regulatory Contraventions Statute by express reference to that statute (or the portion of it, the operation of which is to be excluded).

penalties provisions of the *Corporations Act*, an attempt is made to try and predict the effect of future constitutional challenges to these provisions if a mandatory imposition of penalties were introduced into the legislation.

III. PART II – EXPLORING THE CONSTITUTIONAL VALIDITY OF THE
CORPORATIONS ACT

A. *Defining constitutional invalidity*

1. *Infringing Chapter III of the Constitution*

Under constitutional theory, the doctrine of separation of powers enables the executive, legislative and judicial bodies to remain as distinct governing bodies, each pertaining to have their own legal power to perform its accepted function.¹⁶² Focusing on the aspect of judicial independence, Wheeler has suggested that ‘the High Court is now taking a stricter approach to the separation of powers than 20 or 30 years ago’.¹⁶³ This is stated in the context of having reviewed the development of Chapter III jurisprudence from cases like *Polyukhovic v Commonwealth*,¹⁶⁴ *Chu Kheng Lim v Minister for Immigration*,¹⁶⁵ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*¹⁶⁶ and *Kable v Director of Public Prosecution (NSW)*,¹⁶⁷ which all centred on the issue of legislative intervention and the usurpation of judicial power. In particular, Brennan, Deane and Dawson JJ expressed a compelling view that

¹⁶² *The Wheat Case* (1915) 20 CLR 54. Issac J clearly describes the principle of the separation of powers that separates the functions of each governing body, as laid out under Chapter I, II and III of the *Constitution*, see p88-90 of the judgment.

¹⁶³ Fiona Wheeler, 'The Rise and Rise of Judicial Power under Chapter III of the Constitution' (2001) 20(3) *Australian Bar Review* 283, 285.

¹⁶⁴ (1991) 172 CLR 501.

¹⁶⁵ (1992) 174 CLR 455.

¹⁶⁶ (1996) 189 CLR 1.

¹⁶⁷ (1996) 189 CLR 51.

[o]urs is a Constitution "which deals with the demarcation of powers, leaves to the courts of law the question of whether there has been any excess of power, and requires them to pronounce as void any act which is ultra vires"... All the powers conferred upon the Parliament by s 51 of the Constitution are, as has been said, subject to Ch. III's vesting of that judicial power in the courts which it designates, including this Court. That judicial power includes the jurisdiction which the Constitution directly vests in this Court in all matters in which the Commonwealth or a person being sued on behalf of the Commonwealth is a party... or in which mandamus, prohibition or an injunction is sought against an officer of the Commonwealth (s 75(v)). A law of the Parliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this Court. Such a law manifestly *exceeds* the legislative powers of the Commonwealth and is *invalid*. Moreover, even to the extent that s 54R [of the *Migration Act* 1958 (Cth)] is concerned with the exercise of jurisdiction other than this Court's directly vested constitutional jurisdiction, it is *inconsistent* with Ch. III.

In terms, s 54R is a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch. III itself, entrusts to the Parliament. The latter constitutes an *impermissible intrusion* into the judicial power which Ch. III vests exclusively in the courts which it designates.¹⁶⁸

¹⁶⁸ *Chu Kheng Lim v Minister of Immigration* (1992) 176 CLR 1, 36-37 (emphasis added). s 54R provided that 'a court is not to order the release from custody of a designated person'.

This passage distinctly identifies the framework of the *Constitution* in that emphasis is placed on the illegitimate interference by Parliament to seize some of the powers of the judiciary. Moreover, it reflects the view that provisions of any legislation which attempts to convert the court into an instrument of the state, by dictating what it should do or not do, will be held as constitutionally invalid. The logical consequence will be that if a person mounts a constitutional challenge to such a provision, the court is likely to have it struck down based on the infringement against Chapter III of the *Constitution*.

2. The rise and fall and possible revival of the *Kable* principle

The doctrine of separation of power was also accepted to be a federal doctrine and only plays a limited role in State Courts as indicated in the decision of *Kable v Director of Public Prosecution (NSW)*.¹⁶⁹ However, McHugh J did point out that

...although New South Wales has no entrenched doctrine of the separation of powers and although the Commonwealth doctrine of separation of powers cannot apply to the State, in some situations the effect of Ch III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of powers. This is because it is a necessary implication of the Constitution's plan of an Australian judicial system with State courts invested with federal jurisdiction that no government can act in a way that might undermine public confidence in the impartial administration of the judicial functions of State courts. If it could, it would inevitably result in a lack

¹⁶⁹ (1996) 189 CLR 51, 109. This case involved the enactment of the *Community Protection Act 1994* (NSW) which was challenged by *Kable* to be constitutionally invalid as it empowered the Supreme Court to make an order for the detention of a specified person in prison for a specified period if it was satisfied that the person was more likely than not to commit a serious act of violence for the protection of a particular person or the community generally. The provisions (s 5(1)) was held to be invalid by majority (Toohey, Gaudron, McHugh and Gummow JJ with Brennan CJ and Dawson J dissenting) as it was incompatible with Ch III of the Commonwealth Constitution and affected the integrity, independence and impartiality of the Supreme Court as a court in which federal jurisdiction which had been invested under Ch III.

of public confidence in the administration of invested federal jurisdiction in those courts. State governments therefore do not have unrestricted power to legislate for State courts or judges. A State may invest a State court with non-judicial functions and its judges with duties that, in the federal sphere, would be incompatible with the holding of judicial office. But under the Constitution the boundary of State legislative power is crossed when the vesting of those functions or duties might lead ordinary reasonable members of the public to conclude that the State court as an institution was not free of government influence in administering the judicial functions invested in the court.¹⁷⁰

The significance of this dictum clearly suggests that by relying on the doctrine of incompatibility rather than the separation of powers, the State parliament is still adequately restrained from interfering with the judiciary. Hence the State courts remain independent and impartial and public confidence is undisturbed. In effect, this proposition of incompatibility between exercising non-judicial and judicial functions of the State court became the heart of the *Kable* principle. According to Associate Professor Carney, ‘the Court must be protected in the exercise of both its state and federal jurisdiction given that any impairment of its independence and integrity in the exercise of either jurisdiction will impact on the other. Viewed in this light, the independence and integrity of a court is indivisible.’¹⁷¹

In addition, Gaudron J described the invalid provisions of the Act in *Kable* as an ‘antithesis of the judicial process’.¹⁷² Her Honour perceived that s 5(1) of the Act would ultimately undermine public confidence of the Court and their criminal

¹⁷⁰ Ibid 118-119.

¹⁷¹ Gerard Carney, 'Wilson & Kable: The Doctrine of Incompatibility - An Alternative to Separation of Powers?' (1997) 13 *Queensland University of Technology* 175, 191-192.

¹⁷² *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 106.

processes especially when, ‘the courts are required to deprive persons of their liberty, not on the basis that they have breached any law, but on the basis that an opinion is formed, by reference to material which may or may not be admissible in legal proceedings, that on the balance of probabilities, they may do so’.¹⁷³ This is because the provisions took on the peculiar nature of having the power to instruct the Court in finding a person guilty based on the likelihood of whether the person would commit an offence of violence in future during a civil proceeding. It is as though the Act is dressing up the proceedings to be like a criminal trial, even though the criminal rules of evidence do not apply. Yet the Act allows a person to be deprived of their liberty if an opinion is formed to suggest that he/she is likely to commit a serious act of violence.¹⁷⁴ The implications arising from this is that the Act appears to exert a quasi-criminal status in that it has the power to order the finding of criminal guilt of a person without the need for trial by jury. This is because s 14 claims that proceedings are held under the civil jurisdiction with the balance of probabilities as the standard of proof (s 15). In some ways, this law resembles the hybrid qualities of civil penalties as it attempts to capture the punishment aspects of criminal law whilst using civil procedures as a basis for trial.¹⁷⁵

Nevertheless, the *Kable* principle offered an unsettling precedent in that it had limited applications in subsequent case law and is even described by Kirby J to be a ‘constitutional guard dog that barks but once’.¹⁷⁶ In the case of *Fardon v*

¹⁷³ Ibid 107.

¹⁷⁴ Ibid.

¹⁷⁵ This line of thought is further discussed by Weinberg JA in *ASIC v Ingleby* [2013] VSCA 49 and will be examined in section III of this part of the thesis.

¹⁷⁶ *Baker v The Queen* (2004) 223 CLR 513, 535.

Attorney-General (Qld),¹⁷⁷ the majority of the High Court (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ with Kirby J dissenting) decided that the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) was valid ‘as it did not impair the institutional integrity of the Supreme Court of Queensland in such a fashion as to be incompatible with the Court’s constitutional position as potential repository of federal judicial power’.¹⁷⁸ This judgment provided a contrasting outcome to *Kable* in that the Queensland Act allowed judicial discretion in making different kinds of orders¹⁷⁹ and it had a broader application of the protection order for the community against dangerous sex offenders. Therefore the Queensland Act did not have an *ad hominem* operation like the New South Wales Act in *Kable* where the legislation specifically targeted Mr Kable alone.

Yet the appellants in *Fardon* attempted to use the *Kable* principle to mount a constitutional challenge to the Queensland Act by suggesting that

[t]he determination of criminal guilt by the judiciary cannot, in a manner consistent with Ch III, be diluted by legislation purporting to authorise a Ch III court to imprison a person under the guise of civil commitment. It is also inconsistent with Ch III to order imprisonment without any fresh crime, trial and finding of criminal guilt. This breaks the nexus between crime and punishment which is part of the fundamental logic of the system of law... The rule of law does not permit punishment in advance. Judicial power is characterised by the application of the law to past events or conduct ... Sections 8 and 13

¹⁷⁷ (2004) 223 CLR 575. This case involved a constitutional challenge to the validity of ss 5, 8 and 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) on the basis that it offended Chapter III of the *Constitution* by applying the *Kable* principle.

¹⁷⁸ *Ibid* 575.

¹⁷⁹ *Ibid*. See Gleeson CJ 57 [19]-[20]; McHugh J 60-62 [34], Gummow J 78-79 [100]-[104].

imprison for something which might be done in the future. The prediction is unreliable.¹⁸⁰

This argument was rejected by Gleeson CJ. He reasoned that

[i]t might be thought that, by conferring the powers in question on the Supreme Court of Queensland, the Queensland Parliament was attempting to ensure that the powers would be exercised independently, impartially, and judicially. Unless it can be said that there is something inherent in the making of an order for preventive, as distinct from punitive, detention that compromises the institutional integrity of a court, then it is hard to see the foundation for the appellant's argument....the existence of legislation of that kind makes it difficult to maintain a strict division between punitive and preventive detention'¹⁸¹

Both Callinan and Heydon JJ also expressed that the Queensland Act in *Fardon* is a 'protective law authorising involuntary detention in the interest of public safety.

Its proper characterisation is as a protective rather than a punitive enactment'.¹⁸²

This line of thought from the High Court poses an interesting rationale for justifying imprisonment terms in a piece of legislation that is primarily civil in nature¹⁸³ but claims to have protective and preventative functions. It also provided an alternate view to the traditional opinion that imprisonment of an individual is deemed to be punitive and can only be ordered by a court after a criminal trial.¹⁸⁴

Although the High Court recognises that there are exceptions to civil commitments

¹⁸⁰ Ibid 577. S R Southwood QC with P D Keyzer for the Appellant.

¹⁸¹ Ibid 592 [20].

¹⁸² Ibid 654 [217] – Callinan and Heydon JJ.

¹⁸³ Ibid 636 [162] – Kirby J. The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) allows the Supreme Court of Queensland to order the indefinite detention of a person under civil commitment, without a fair trial or a finding of guilt in a criminal matter.

¹⁸⁴ *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161, 178-179.

for imprisonment,¹⁸⁵ Kirby J emphasizes in his dissenting judgment that this Act ‘hardly makes any effort to pretend to a new form of “civil commitment” [and] it fails to disguise its true character, namely punishment.’¹⁸⁶ He contends that

by Australian constitutional law, punishment as such is reserved to the judiciary for breaches of the law. An order of imprisonment as punishment can therefore only be made by a court following proof of the commission of a criminal offence, established beyond reasonable doubt ... where the charge is contested,... in a fair trial at which the accused is found guilty by an independent court of the offence charged. Here there has been no offence; no charge; no trial. Effectively, the presumption of innocence has been removed ... Instead, because of a prisoner’s antecedents and criminal history, provision is made for a new form of additional punishment utilising the courts and the corrective services system in a way that stands outside the judicial process hitherto observed in Australia. Civil commitment to prison of persons who have not been convicted of a crime is inconsistent with, and repugnant to, the exercise of the judicial power as envisaged by the *Constitution*...¹⁸⁷

As a result, the *Fardon* judgment was highly criticised by various academics to have abandoned the *Kable* principle as it violated the institutional integrity of the courts by ‘undermining the logic of the criminal justice system’.¹⁸⁸ It appears to endorse the fact that imprisonment can be non-punitive if Parliament says so, and that involuntary detention of a person can be based on the commission of a prior offence without the need for actual determination of criminal conduct.¹⁸⁹ This

¹⁸⁵ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 634 [155].

¹⁸⁶ *Ibid* 636 [162].

¹⁸⁷ *Ibid*.

¹⁸⁸ Patrick Keyzer, 'Preserving Due Processes or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth' (2008) 30 *Sydney Law Review* 100,111.

¹⁸⁹ Peter Johnston, 'State Courts and Chapter III of the Commonwealth Constitution: Is *Kable's* Case Still Relevant' (2004) 32 *University of Western Australia Law Review* 211,220.

presents yet another example of the blurring between the criminal and civil positions of law. It is as though the punishment aspects of the criminal law have been “borrowed” by the civil jurisdiction in order to exert a retributive effect. This could lead to a dangerous misconception of identifying the true nature of punishment, which ought to rest in the criminal justice system. According to Fitzgerald, ‘the notion of punishment entails the actual or supposed commission of an offence. This is one side of the retributive nature of punishment: punishment in the abstract is meaningless; punishment can only be inflicted for an offence’.¹⁹⁰ If punishments are to emerge in civil legislation without the basis of an offence then it may lose the meaning and value of its penalty, not to mention that it could be subjected to a constitutional challenge as being inconsistent to the exercise of judicial power under Chapter III of the *Constitution*.

More recently, the High Court has further developed the jurisprudence on the constitutional invalidity of legislation that contained provisions which have a mandatory imposition of orders and penalties. It is seen as a revitalisation of the *Kable* principle. This principle was reiterated and applied in the case of *South Australia v Totani*,¹⁹¹ where it was decided by the majority of the High Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ with Heydon J dissenting) that s 14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA) (or the SOOC Act) was invalid. In applying the *Kable* doctrine, Hayne J held that the SOCC Act is repugnant to the institutional integrity of the courts

¹⁹⁰ Patrick John Fitzgerald, *Criminal Law and Punishment* (Clarendon Press, 1962), 199.

¹⁹¹ (2010) 242 CLR 1. This case involved a constitutional challenge to the *Serious and Organised Crime (Control) Act 2008* (SA) which had the objective to (a) to disrupt and restrict the activities of (i) organisations involved in serious crime, and (ii) the members and associates of such organisations; and (b) to protect members of the public from violence associated with such criminal organisations. This case applied the *Kable* doctrine and distinguished the principles applied in *Fardon v Attorney-General (Qld)*(2004) 223 CLR 575.

because it gave the Executive the power to order the Magistrates Court in making a control order against a person. This is done ‘without inquiring how, if at all, that order will contribute to the legislative object of disrupting the criminal activities of identified groups, or the criminal activities of any individual. The obligations which are created by the Court’s order are not imposed on account of what the person against whom the order is directed has done, will do, or may do.’¹⁹² In effect, ‘the Court cannot refuse the Executive’s application... [and] is acting at the behest of the Executive.’¹⁹³

In agreement with the majority of the High Court, French CJ explained the constitutional invalidity of the SOCC Act in terms of the infringement against Chapter III of the *Constitution*. He stated that

[t]he SOCC Act thereby requires the Magistrates Court to carry out a function which is inconsistent with fundamental assumptions, upon which Ch III of the *Constitution* is based, about the rule of law and the independence of courts and judges. In that sense it distorts that institutional integrity which is guaranteed for all State courts by Ch III of the *Constitution* so that they may take their place in the integrated national judicial system of which they are part.¹⁹⁴

It is worthwhile to note that French CJ uses the ideology from the ‘rule of law’ to accentuate and rationalise the importance of maintaining the independent status of courts and judges so that the institutional integrity can be assured by the implied rights under Chapter III of the *Constitution*.¹⁹⁵ This is because the impartiality and

¹⁹² Ibid 89 [228].

¹⁹³ Ibid 89-90 [229].

¹⁹⁴ Ibid 21 [4].

¹⁹⁵ Ibid 49 [73] – French CJ made further references to the rule of law, to which the *Constitution* was based on, and highlighted the fact that its application does not discriminate any individual or

independence of a court remain as a central element of the rule of law whereby ‘the idea rests upon the reasonable understanding that whenever the power of the state becomes too highly concentrated in the hands of an individual or political agency, the risk of arbitrariness subsequently increases. A truly independent judiciary may, therefore, compel public authorities to respect the proper limits of legality.’¹⁹⁶ In addition, this stance affirms the doctrine of the separation of powers which aims to deliberately prevent the accumulation and concentration of power in any single institution so that a form of competitive interdependence is set up within the government.¹⁹⁷

Given the continual development on the jurisprudence surrounding the *Kable* principle, McCunn argues that the scope of this principle remains uncertain due to the ‘multiple formulations of standards that have been adopted when parties have sought to invoke the principle’.¹⁹⁸ He describes the standards to be (i) procedural fairness; (ii) the judicial process and (iii) the institutional integrity of the relevant court,¹⁹⁹ and concludes that ‘repugnance to the judicial process should be adopted as the sole standard for determining the validity of legislation according to *Kable* principle’.²⁰⁰ Although McCunn derives the basis of his analysis from doctrinal research which focused on the case of *Totani* and *International Finance Trust Co v NSWs Crime Commission*,²⁰¹ it may be prudent to draw a wider application of the *Kable* principle under the separation of judicial power and its impact on State

group ‘according to the measure of public or official condemnation, however justified, of that individual or that group.’

¹⁹⁶ Augusto Zimmermann, 'The Rule of Law as a Culture of Legality: Legal and Extra-Legal Elements for the Realization of the Rule of Law in Society.' (2007) 14 *eLaw Journal* 10,21.

¹⁹⁷ *Ibid*, citing Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004),35.

¹⁹⁸ Ayowande A McCunn, 'The Search for a Single Standard for the *Kable* Principle' (2012) 19 *Australian Journal of Administrative Law* 93,110.

¹⁹⁹ *Ibid* 100.

²⁰⁰ *Ibid* 110.

²⁰¹ (2009) 240 CLR 319.

courts. According to Associate Professor Stellios, there are jurisdictional issues to which the Commonwealth Parliament may have the power to control the law that is applied in a State court which is exercising federal jurisdiction.²⁰² He suggests that constraints are placed on the Commonwealth Parliament

when prescribing the kinds of powers and functions that might be conferred on a court. They can operate to frustrate experimentation and innovation with judicial functions when they do not comfortably fit the classic paradigm of judicial power. Furthermore, despite the absence of a separation of powers at the State level, these federal limitations limit the choices of State Parliament when their courts exercise federal jurisdiction.²⁰³

This observation is meaningful when considering the constitutional challenges to the *Corporations Act* especially since this legislation is federal in nature but State-based claims can be initiated in the Supreme Court as seen in *Saraceni v Jones*.²⁰⁴ This leads me to explore some of the constitutional challenges to the *Corporation Act*, starting with an analysis of the *Saraceni* case which was based in Western Australia.

²⁰² James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22 *Public Law Review* 113,125.

²⁰³ *Ibid* 126.

²⁰⁴ (2012) 24 WAR 518.

B. *Examples of Constitutional challenges to the Corporations Act*

1. The case of *Saraceni v Jones*

This case involved a constitutional challenge to the validity of ss 596A and 597 of the *Corporations Act* as to whether the legislation had the power to order a court in summoning a person for mandatory examination.²⁰⁵ The facts of the case involved the applicant (Mr Saraceni), who was the director of the companies Newport Securities Pty Ltd (Newport), Mayport Nominees Pty Ltd (Mayport) and Seaport Pty Ltd (Seaport), in an attempt to invalidate the Supreme Court orders for the issue of examination summonses under s 596A of the *Corporations Act*. The respondents were receivers appointed by BankWest which held various securities over the assets of Newport, Mayport and Seaport. In essence, this was a contest to determine whether the legislature had gone beyond its authority by conferring the powers of examination on a Chapter III court, which may be characterised as outside the scope of judicial powers.²⁰⁶

Although the result was a unanimous decision that held the provisions to be constitutionally valid, different reasons were given for the judgment from Martin CJ and Mcclure P with Newnes JA in agreement. According to Martin CJ,

when a question arises as to whether the Commonwealth Parliament has exceeded its legislative powers by purporting to confer non-judicial powers or functions upon a court, a number of considerations

²⁰⁵ *Corporations Act 2001* (Cth) – Part 5.9 – Division 1: Examining a person about a corporation. s 596A has a heading of ‘Mandatory examination’. It requires a court to summon a person to appear before it for examination about a corporation’s examinable affairs.

²⁰⁶ *Saraceni v Jones* (2010) 42 WAR 518, 526 [23] – Martin CJ.

support the view that a broader, rather than a narrower approach should be taken to the characterisation of judicial power.²⁰⁷

In characterising judicial power, Martin CJ acknowledges the principles established in *Kable* where it ‘denies the parliaments of the States the power to confer functions or powers upon State courts which are inconsistent with the integrity of those courts as repositories of Commonwealth judicial power’.²⁰⁸ However, he states that there is no exhaustive definition of judicial power but Parliament may occasionally confer powers upon a court that are not ‘peculiarly or distinctly legislative, executive or judicial, [which] may take its character from the character of the body in which the power is reposed (the “chameleon” principle)’.²⁰⁹ In a dissection of the examination powers under the *Corporations Act*, Martin CJ concluded that the provision was valid as it did not abrogate the role of the court in deciding whether to order such an examination and thus it does not turn the court into ‘an instrument of injustice or oppression’.²¹⁰

In contrast, McLure P suggested that ‘the real issue in this case is whether the exercise of the examination power ...is incidental to the mere existence of the court’s general control and supervisory powers’. She concluded that the provisions in question are valid because it is ‘within the judicial power of the Commonwealth... as the examination power ... is analogous to the examination power historically conferred on courts in relation to corporations in liquidation.’²¹¹

²⁰⁷ Ibid 523 [6].

²⁰⁸ Ibid [5].

²⁰⁹ Ibid [10].

²¹⁰ Ibid 534 [65].

²¹¹ Ibid 563 [237]. McLure P explains that the examination power in the current provisions is ‘simply a reflection of developments in the law providing for and regulating modern forms of external administration in much the same way as the historical examination powers in bankruptcy

It is interesting to recognise that McLure P did not centre her judgment on the *Kable* principle.²¹² Perhaps it is because the reliance on using the *Kable* principle to instigate a successful constitutional challenge has passed its use-by date,²¹³ especially since previous challenges based on this claim have been unpredictable. Nevertheless, this marks yet another failed attempt in mounting a successful constitutional challenge to a provision of the *Corporations Act*.

2. The case of *Visnic v ASIC*

Given the lack of cases that pursue a constitutional challenge to provisions of the *Corporations Act*, *Visnic v ASIC*²¹⁴ is perhaps one of the few High Court cases so far that presents an argument on the constitutional validity of a provision in the *Corporations Act* which relates to the contravention of a civil penalty provision. The facts of the case are that ASIC served the plaintiff (Mr Visnic, who was director of fourteen corporations) with a notice of disqualification from managing corporations for five years under s 206F of the *Corporations Act*. Mr Visnic sought special leave from the High Court to challenge the constitutional validity of s 206F,²¹⁵ claiming that the disqualification decision by ASIC should be null

were extended to developments in the law relating to the existence and winding up of the newly created separate, artificial, corporate personality with limited liability. It is an appropriate power to confer on a court'. [at 236].

²¹² Ibid 536 [81]. Although McLure P did repeat the well-established separation of powers principle in that the 'Commonwealth Parliament cannot confer upon a State court when exercising federal jurisdiction any function that is not within the judicial power of the Commonwealth or not ancillary to the exercise of judicial power' – citing *Gould v Brown* (1998) 193 CLR 346 at [59],[61],[115]-[116].

²¹³ *Forge v ASIC* (2006) 228 CLR 45, 125 at [203] – Kirby J contends that '... so far, the *Kable* doctrine, although often invoked, has not resulted in the invalidation of many State laws. Apart from in *Kable* itself, the only other instance in which the principle has been applied was in Queensland ...'

²¹⁴ (2007) 231 CLR 381.

²¹⁵ s 206F of the *Corporations Act (2001)* (Cth) states that: subsection(1) ASIC may disqualify a person from managing corporations for up to 5 years if: (a) within 7 years immediate before ASIC

and void. It was argued by the plaintiff that s 206F of the *Corporations Act* conferred a judicial power on the Australian Securities and Investments Commission in order to allow the Commission in making a disqualification order. He claimed that this is an infringement of Chapter III of the *Constitution* given that the Commission is not a Court but has the ability to make a disqualification order, which is considered to be a penalty and thus such punitive power should remain exclusively in the domains of a court.²¹⁶

In reply, the defendant (ASIC) submitted that the disqualification power is not punitive by reference to the High Court decision of *Rich v ASIC*.²¹⁷ Additionally, ASIC claimed that the power to disqualify is intended to address ‘an obvious public policy issue ... [as to] whether the community needs protection from the business practices of that director. It does not suggest any wrongdoing but it may invoke the reasonable belief that that director is not good at conducting business.’²¹⁸ The High Court’s decision was a unanimous rejection to the plaintiff’s claim that s 206F was invalid by virtue of the fact that the exercise of

gives a notice under paragraph (b)(i): (i) the person has been an officer of 2 or more corporations; and (ii) while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1) about the corporation’s inability to pay its debts; and (b) ASIC has given the person: (i) a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and (ii) an opportunity to be heard on the question; and (c) ASIC is satisfied that the disqualification is justified. Subsection (2): In determining whether disqualification is justified. ASIC: (a) must have regard to whether any of the corporations mentioned in subsection (1) were related to one another; and (b) may have regard to: (i) the person’s conduct in relation to the management, business or property of any corporation; and (ii) *whether the disqualification would be in the public interest*; and (ii) any other matters that ASIC considers appropriate. (Emphasis added).

²¹⁶ Ibid 382. Submission by plaintiff’s counsel: A W Street SC (with G D Wendler and J S Emmett). The arguments presented in this case mirrors those in *Albarran v Companies Auditors and Liquidators Disciplinary Board; Gould v Magarey* (2007) 231 CLR 350, where it was argued that s 1292(2) of the *Corporations Act* conferred power on the Companies Auditors and Liquidators Disciplinary Board in that it possessed a power to impose a penalty or otherwise to punish a person, which was exclusively part of the judicial power of the Commonwealth and thus cannot be exercised by the Board.

²¹⁷ (2004) 220 CLR 129. Previously discussed in detail of Part I of this thesis.

²¹⁸ Ibid. Submission by defendant (HC Burmester QC with G M Aitken for the Attorney-General for the Commonwealth).

such a power by ASIC is seen to be for the purpose of ‘maintaining professional standards in the public interest’²¹⁹ and not as an exercise of the judicial power of the Commonwealth.

The reasons given by Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ centred on rejecting the plaintiff’s submission because ‘the criteria stipulated for the exercise of power by ASIC and by the courts differ and do so to a significant degree.’²²⁰ The court cited the decision from *Precision Data Holdings Ltd v Wills*,²²¹ and suggested that by analogy, the powers given to ASIC can be compared to those given to tribunals, which have the function of making orders and creating new rights and obligations, but do not pertain to the exercise of judicial power.²²² Although Kirby J agreed with the majority decision, he gave more merit to the plaintiff’s argument in that s 206F may contravene the fundamental constitutional principle because:

- 1) it left the decision on whether the jurisdiction of Ch III courts was engaged at all to a regulatory body which was scarcely neutral as to the outcome of its own determinations;
- 2) it allowed the regulatory body...to bypass the courts completely, thereby depriving the officer of the corporation ... concerned of the facilities afforded by the courts, including the determination of controversies by an independent and impartial decision-maker...
- 3) it allowed the executive government regulator to become the effective decision-maker of its own accusation without permitting the officer of the corporation affected the privilege of having such a

²¹⁹ Ibid 381.

²²⁰ Ibid 385 [13].

²²¹ (1991) 173 CLR 167,191.

²²² *Visnic v ASIC* (2007) 231 CLR 381, 386.

significant public “punishment” determined by a decision-maker distinct and removed from the regulator...

- 4) the “disqualification” which ASIC was permitted to determine was in the nature of an injunction forbidding the person disqualified from continuing to earn his or her living as an officer of corporations. Determinations of that character were, so the plaintiff submitted, judicial in their essential character. They could not be vested in an executive government body such as ASIC.²²³

With good reason, these points raised by the plaintiff illustrate the issue of whether s 206F ought to give such wide powers of disqualification to ASIC, which appears to act like an injunction order from a court. However, as Kirby J went on to reason, given that ASIC is meant to be the corporate ‘watchdog’, it would be difficult for it to show impartiality and independence like a court, but this element in itself may not be enough to constitute a sufficient ground to signify constitutional invalidity.²²⁴ He thus concludes that the legislation is valid because ‘ASIC’s decision is not conclusive or enforceable...but forms a basis...for curially enforceable rights and liabilities; and that ASIC’s powers could not fairly be characterised as determining “basic legal rights” of the kind that must always be reserved to a Ch III court.’²²⁵ Hence the constitutional challenge in this case raised a different point to that of the *Kable* principle, as it presented an unusual kind of interference by parliament into the role of the judiciary by conferring a power onto an executive body which had some elements of judicial control. Nevertheless, Kirby J describes this as a feature of ‘contemporary public

²²³ Ibid 392.

²²⁴ Ibid 394.

²²⁵ Ibid 395 [46].

administration’,²²⁶ rather than an exercise of judicial power, and thus the constitutional validity of the legislation is narrowly preserved.

C. Potential dangers for future drafting or amendments to civil penalty provisions in the Corporations Act

It is important to understand the theories used to identify the constitutional restraints that are placed on drafting a piece of legislation. If parliament is to amend or draft more civil penalty provisions in the *Corporations Act*, it must take care not to offend Chapter III of the *Constitution* by violating the separation of powers doctrine and turning the court into an instrument of the executive. So far, the actual civil penalty provisions in the *Corporations Act*²²⁷ have not been challenged constitutionally. This could be due to the fact that the current provisions allow the court the discretion to make a pecuniary penalty order without any mandatory imposition.²²⁸ It should be highlighted that the Act also confers powers to the court to order pecuniary penalties (s 1317G) as well as disqualification orders (s 206C), which appears on its face to be punitive in nature.

In *ASIC v Ingleby*,²²⁹ Weinberg JA took the liberty to explore the meaning of the term ‘penalty’ within the context of the civil penalty provisions and suggested that they

²²⁶ Ibid.

²²⁷ s 1317E of the *Corporations Act 2001* (Cth) lists all the subsections which are considered to be civil penalty provisions.

²²⁸ s 1317G(1) of the *Corporations Act 2001* (Cth) states that: A court *may* order a person to pay the Commonwealth a pecuniary penalty of up to \$200,000 ... (emphasis added).

²²⁹ [2013] VSCA 49.

operate as sanctions [and] represent an exercise of state power. They differ from what might be termed ‘criminal penalties’ in that they are normally imposed by courts applying civil, rather than criminal, court processes. In practical terms, however, they closely resemble fines, and other punishments imposed upon criminal offenders. ... [Although they] have been described as a ‘hybrid between the criminal and the civil law’. They are founded on the notion of preventing or punishing public harm. Often, the contravention that they are intended to meet is itself similar to a criminal offence, and many of the ordinary principles that govern sentencing for such offences are equally applicable to such civil penalties... There is, however, a fundamental distinction between criminal and civil penalties. There are no federal civil penalty provisions that include a term of imprisonment as an aspect of the penalty. It is doubtful that any such penalty would withstand constitutional scrutiny.²³⁰

This passage draws attention to the fact that, conceptually, civil penalties are different to criminal penalties even though they can still have a punitive effect. Yet they are still civil in nature and will not withstand the test of a constitutional challenge if a harsher form of punishment, such as imprisonment, were to be incorporated into its regime. In comparison, the disqualification orders by the court have been described to provide a protective effect on the public as it disallows the individual to run a corporation that is contrary to commercial standards.²³¹ The question then arises if civil penalties are accepted as a form of civil redress for corporate wrongdoing only then amendments to the existing civil penalty provisions is unlikely to survive a constitutional challenge if a punitive order is imposed mandatorily.

²³⁰ Ibid 50 [5]-[6].

²³¹ *ASC v Donovan* (1998) 28 ACSR 583; *Rich v ASIC* (2004) 220 CLR 129.

The theme that ruminates through some of the judgements like *Visnic* and *Albarran and Gould* is that the determination of guilt, as well as the existence of rights and obligations, is an exclusive judicial function. But there is a substantive difference between a disciplinary action and the proceedings of a criminal court.²³² Hence creating an argument to suggest that a disqualification order is punitive, much like that of an imprisonment term for committing an offence, would most likely fail the test of constitutional scrutiny. For example, if civil penalties are viewed as a form of quasi-criminal provision, then mandatory imposition of a disqualification order by the court will undoubtedly be challenged under the separation of powers doctrine as unconstitutional. It would be as though there is a mandatory 'sentencing' of a punishment by taking away the individual's right to act as a director for a corporation. Supposedly, the 'unconstitutionality of particular mandatory sentencing arrangements is their denial of a meaningful role for the judiciary in the sentencing process. This, it is argued, subverts the rule of law and is an example of the legislature requiring the courts to act in a manner which is incompatible with the judicial process.'²³³ However, could the same be said if civil penalties are viewed as entirely civil? In that case, a disqualification order may be seen as a protective and preventative order (similar to the arguments raised by the Attorney-General in *Fardon*²³⁴) and not as a form of personal punishment. The issue then becomes whether the mandatory disqualification orders are seen to protect the community and should be allowed for the sake of public interest (like the arguments raised by ASIC in *Visnic*²³⁵).

²³² *Albarran v Companies Auditors and Liquidators Disciplinary Board; Gould v Magarey* (2007) 231 CLR 350, 358 [16]-[17]; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361,374-375.

²³³ Peter A Sallmann, 'Mandatory Sentencing: A Bird's-Eye View' (2005) 14 *Journal of Judicial Administration* 177,184.

²³⁴ *Fardon v Attorney-General (Qld)*(2004) 223 CLR 575. See discussion in IIA about the case.

²³⁵ *Visnic v ASIC* (2007) 231 CLR 381. See discussion in IIB about the case.

Finally, if civil penalties are to be recognised as a substantive branch of law due to their unique hybrid characteristics, this prevents them from being classified as neither civil nor criminal. Then it should not matter whether the penalties are defined as punitive or not, as the jurisprudence should develop to enable a new classification in due course. However, drafting or amending future civil penalty provisions will need to be strictly scrutinised under the rule of law and the separation of powers doctrine. This is so that it can withstand the test of constitutional challenges as discussed previously and hopefully avoid the pitfalls of being declared invalid by a court.

IV. CONCLUSION

By examining how civil penalties have emerged as a result of the blurring between the criminal and civil positions of law, it is envisaged that the jurisprudence surrounding civil penalties will continue to evolve and play a major role in the future of Australian law. However, the effectiveness of civil penalties as a type of mid-range sanction for the regulation of corporate behaviour is at best questionable. This is especially so when ASIC has failed to prove some of its major cases under civil penalty proceedings. Notwithstanding that most civil penalty trials are inherently highly complex in nature, the unsuccessful attempts of ASIC in securing a declaration from the court could be attributed to the fact that civil procedures were used to try these cases. It is argued that civil procedure lacks the ability to balance the quasi-criminal effects of the ‘penalty’ element of the civil penalties. This is particularly evident when it becomes difficult to classify whether the statutory proceedings fall into civil or criminal procedure.²³⁶ Arguably, this difficulty could be due to the fact that civil penalties exhibit hybrid qualities of both criminal and civil law. The argument further perpetuates as to whether the penalties orders, such as disqualification orders, are deemed as punitive or protective in nature.

Nevertheless, it appears that such a discussion is unproductive. Hence proposing to re-identifying civil penalties as a unique branch of law given its substantive effect, instead of being just a regulatory tool, could prompt parliament into enacting a new set of procedures for civil penalty proceedings under the *Corporations Act*. If drafted with sufficient care, such a procedural rule could

²³⁶ *Rich v ASIC* (2004) 220 CLR 129, 168 [95].

eliminate the procedural issues which have plagued some of the civil penalty cases in the past. This could involve the proposition of a new standard of proof which is designed to reflect the seriousness of the contravention of civil penalties. Or it could simply be a further development on the jurisprudence surrounding the *Briginshaw* standard to the point where it could be considered as a third standard of proof.

In any event, if parliamentary intervention does occur to amend or reclassify civil penalties in the *Corporations Act* as a form of substantive law, then there is always the potential danger of creating an unconstitutional provision if it removes the discretion from the courts to exercise judicial power. On this note, it is important to recognise that the High Court is re-developing the jurisprudence surrounding the *Kable* doctrine and the separation of powers. It appears that this area of law is highly unsettled and the decision as to whether the legislation becomes constitutionally invalid could depend on various other principles that infringe upon Chapter III of the *Constitution*. Ultimately though, any mandatory imposition of penalties should automatically fail the test of constitutionality in theory, as it would disregard the rule of law and breach one of the fundamental objectives implied in our *Constitution*.

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