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# Negotiating the third way: Developing effective process in civil penalty litigation

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*Civil penalties are a product of regulatory law and they fit uneasily within the civil-criminal procedural divide. Disputes about procedure in civil penalty litigation are frequently resolved by resort to criminal rather than civil analytical frameworks, due to conflation of the privilege against exposure to a penalty with the privilege against self-incrimination. Two recent cases, *Macdonald v Australian Securities and Investments Commission* [2007] NSWCA 304 and *Australian Securities and Investments Commission v Mining Projects Group Ltd* (2007) 164 FCR 32; [2007] FCA 1620, regarding the proper ambit of disclosure in a defence, demonstrate the further embrace of the criminal model and the concomitant complication of the plaintiff's case. The area is ripe for law reform, though incremental change is difficult to achieve in case law, where judges focus upon the individual rights of defendants. Instead, a paradigm shift is required which reconsiders the bifurcation of civil and criminal procedure to accommodate regulatory law and statutory remedies effectively.*

## INTRODUCTION

The author used to tell students that Pt 9.4B of the *Corporations Act 2001* (Cth)<sup>1</sup> is a boon to effective law enforcement because the regulators have the advantage of civil procedure rather than the constraints of criminal procedure. Having now revisited this issue, she is planning a drastic re-write of her lecture notes. Although civil penalty proceedings appear to allow flexibility and potentially reduce costs, the utility of the remedy is rapidly diminishing as the courts impose criminal procedural protections.

Knackstredt recently observed that although “civil penalty proceedings are exactly that: *civil*, the courts have begun to treat them in a different way from regular civil proceedings”.<sup>2</sup> An examination of the case law since 2000 reveals that the Australian Securities and Investments Commission (ASIC) has been on a slippery slope and courts are interpreting the civil penalty provisions in a manner which privileges criminal process values to the detriment of the overarching regulatory rationale of the provisions. Civil penalties are a remedial hybrid and the development of a hybrid process or a “third way”<sup>3</sup> necessarily involves a balance of civil and criminal procedure. Courts have recently been called upon to shape this hybrid procedure through case law, particularly in disputes about the ambit of the penalty privilege. It appears that shaping a hybrid procedure by this methodology is problematic. Judgments about the penalty privilege frequently conflate it with the privilege against self-incrimination. There can be no surprise about this since the penalty privilege is inadequately conceptualised in the case law. The penalty privilege tends to be understood as a weak form of the self-incrimination privilege which invites courts to interpolate the penalty privilege into the analytical framework of the criminal rather than the civil law. In combination with this, it is endemic to the judicial power and function to be zealous about fair procedure. Zealousness about fair procedure has led to the development of a gold standard which belongs to the criminal law rather than the negotiated standard which is characteristic of civil proceedings.

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<sup>1</sup> Unless otherwise stated, all references to legislation are to the *Corporations Act 2001* (Cth).

<sup>2</sup> Knackstredt J, “The Evolution in Civil Penalty Proceedings” in “Company Law” (2006) 24 C&SLJ 56 at 57 (emphasis in original).

<sup>3</sup> Rees A, “Civil Penalties: Emphasising the Adjective or the Noun” (2006) 34 ABLR 139 at 139.

If the courts adopt a gold standard of procedure to protect defendants with an ill-defined penalty privilege, certain process values will become too dominant and subvert substantive outcomes. Calls have been made by Rees<sup>4</sup> for the development of a hybrid procedure requiring either legislative intervention or court rules and by Middleton for a uniform civil code for civil penalty proceedings under the *Corporations Act* and the *Australian Securities and Investments Commission Act 2001* (Cth).<sup>5</sup> These proposals would be effective to uncouple the forensic inquiry from the exigencies of a particular case. This article examines *Macdonald v Australian Securities and Investments Commission* [2007] NSWCA 304 (*Macdonald*) and *Australian Securities and Investments Commission v Mining Projects Group Ltd* (2007) 164 FCR 32; [2007] FCA 1620 (*Mining Projects*) to demonstrate the tension between the disclosure policies underpinning civil and criminal procedure. The policy of the prevention of surprise has prevailed in civil procedure since the Judicature Acts and new court rules require not only disclosure of case strategy through pleadings but also evidence. Conversely, criminal procedure is predicated on the accused's right to silence; therefore disclosure is either non-existent or minimal.<sup>6</sup> Although legislation in a few State jurisdictions gives the court discretion to order pre-trial disclosure of defendants in certain criminal cases,<sup>7</sup> evidence from New South Wales indicates that such orders are rarely made,<sup>8</sup> demonstrating the entrenched aversion to disclosure by the defendant in criminal proceedings. The question is whether this aversion should be transplanted to civil penalty proceedings.

The civil penalty dilemma provides an opportunity to radically re-think procedure and to shift it beyond the instrumental. In the light of this opportunity, this article discusses a radical proposal to "cut the Gordian knot binding substance to procedure"<sup>9</sup> and to replace the current civil-criminal procedural regime with a model running along two axes – the balance of power between the litigating parties and the severity of the potential sanction or remedy. Regardless of whether radical or incremental change is effected, it is clear that change is necessary. Legislation which abrogates the penalty privilege for proceedings involving, inter alia, disqualification, banning orders, cancellation or suspension of licences, etc, has recently been passed,<sup>10</sup> but the issue remains live in relation to other civil penalty sanctions.

## THE NATURE AND JUDICIAL INTERPRETATION OF CIVIL PENALTIES

The distinction between civil and criminal law is based on the dichotomy between a private right of action by an individual for a civil remedy and enforcement action or punishment by the state in criminal law. The civil penalty is, however, a statutory remedy, a product of regulatory legislation where the focus is upon compliance. Promoting compliance requires a balancing of deterrent and

<sup>4</sup> Rees, n 3.

<sup>5</sup> Middleton T, "The Difficulties of Applying Civil Evidence and Procedure Rules in ASIC's Civil Penalty Proceedings under the Corporations Act" (2003) 21 C&SLJ 507 at 509.

<sup>6</sup> Middleton, n 5 at 511.

<sup>7</sup> The *Criminal Procedure Act 1986* (NSW), s 136, provides that a court may order pre-trial disclosure in complex criminal trials if satisfied, inter alia, that the accused is represented by a legal practitioner. Pre-trial disclosure follows a similar pattern to pleadings – the prosecutor must give the accused notice of the case for the prosecution. The defendant must then give notice of the defence response, followed by a reply by the prosecutor (s 137). The notice of the defence response must indicate certain things, eg a proposal to adduce evidence of defences such as provocation, insanity, automatism etc, copies of expert witnesses' reports, names and addresses of character witnesses and the accused person's response to particulars raised in the notice of the prosecution case (s 139). Similarly, pursuant to the *Crimes (Criminal Trials) Act 1999* (Vic), s 7, the accused must, in response to the prosecution's summary of its opening, file and serve a response and if necessary identify the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken. The accused must also serve expert witness reports. In New South Wales the court has the power to refuse to admit evidence in the event of non-compliance with these requirements under the *Criminal Procedure Act*, s 148, but the sanctions in the *Crimes (Criminal Trials) Act* are directed at costs orders, including personal costs order against practitioners (ss 24, 25).

<sup>8</sup> New South Wales Legislative Council, Standing Committee on Law and Justice, *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*, Report 26 (2004) pp 12-13.

<sup>9</sup> Rosen-Zvi I and Fisher T, "Overcoming Procedural Boundaries" (2008) 94 *Virginia Law Review* 79 at 84.

<sup>10</sup> *Corporations Act 2001* (Cth), s 1349, inserted by the *Corporations Amendment Insolvency Act 2007* (Cth).

accommodative approaches and a tool-kit of sanctions to achieve responsive regulation. “Responsive regulation” is a term coined by Ayres and Braithwaite<sup>11</sup> to describe a method to achieve optimal compliance by users. The technique has developed in conjunction with the “regulatory pyramid” or “enforcement pyramid”<sup>12</sup> in which the regulator secures enforcement by accelerating the sanctions for non-compliance through various levels ranging from persuasion, warning letters, licence revocation, administrative remedies and civil penalties to criminal prosecution.<sup>13</sup> Enforcement pyramids and responsive regulation operate with a “tit for tat” strategy. If the regulated are being cooperative, the regulator should respond by being cooperative. Conversely, if the regulated are being uncooperative, the regulator should escalate up the pyramid.

This theory forms the policy background to Pt 9.4B of the *Corporations Act*. Fisse presented the model to the Cooney Parliamentary Committee that investigated the reform of directors’ duties in 1989, leading to the current regime. The report of the committee expressly stated that criminal sanctions, fines and imprisonment were at the apex of the pyramid<sup>14</sup> and that these sanctions provided the regulator with the necessary enforcement tools when the conduct was “genuinely criminal in nature”.<sup>15</sup> The Cooney Committee further stated that where a breach of the law does not involve criminality, a civil penalty may be appropriate as a “complementary approach”.<sup>16</sup> The Committee continued: “[p]roof of the breach would have to be established on the civil onus (that is, on the balance of probabilities) and there would be no stigma of criminal conviction attaching to the director.”<sup>17</sup> In each case the sanction would be commensurate with the wrong done.<sup>18</sup> Kirby J recognised this aspect of the civil penalty regime in *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 172; 50 ACSR 242; [2004] HCA 42, issuing a warning that the court “should avoid superimposing on the graduated statutory pyramid of sanctions and remedies any over-simplification inherent in past common law and equitable principles”.

Therefore civil penalties were developed on a regulatory model which facilitates responsive regulation by allowing graduated sanctions to fit the wrong. Civil penalties are an important element in the enforcement pyramid as they may be sufficiently serious to act as a deterrent, if imposed at a high enough level,<sup>19</sup> but do not result in a loss of liberty by imprisonment<sup>20</sup> or other draconian consequences of criminal enforcement such as a criminal record or the stigma of a criminal conviction. The sanctions embedded in civil penalties are modelled on civil remedies, eg disqualification orders, pecuniary penalties and compensation orders. Theoretically, proceedings for a civil penalty should have lower transaction costs than criminal proceedings due to a streamlined procedure – but they will nevertheless procure effective enforcement which, in turn, will achieve deterrence.

In Australia the main statutes where civil penalties are found are the *Corporations Act*, the *Trade Practices Act 1974* (Cth), the *Customs Act 1901* (Cth) and the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).<sup>21</sup> However, in an inquiry conducted in 2002, the Australian

<sup>11</sup> Ayres I and Braithwaite J, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

<sup>12</sup> Fisse B and Braithwaite J, *Corporations, Crime and Accountability* (Cambridge University Press, 1993).

<sup>13</sup> Assaf F, “What Will Trigger ASIC’s Civil Enforcement Strategies?” (2002) 40(4) L Soc J 60.

<sup>14</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors’ Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (AGPS, Canberra, 1989) at [13.13], quoting Fisse.

<sup>15</sup> Senate Standing Committee on Legal and Constitutional Affairs, n 14 at [13.12], discussed by Comino V, “High Court Relegates Strategic Regulation and Pyramidal Enforcement to Insignificance” (2005) 18 AJCL 48.

<sup>16</sup> Senate Standing Committee on Legal and Constitutional Affairs, n 14, p 191 fn 17, quoting Fisse.

<sup>17</sup> Senate Standing Committee on Legal and Constitutional Affairs, n 14 at [13.14].

<sup>18</sup> Senate Standing Committee on Legal and Constitutional Affairs, n 14 at [13.16].

<sup>19</sup> The Treasury, *Review of Sanctions in Corporate Law*, at [2.27], <http://www.treasury.gov.au>, viewed 7 November 2007.

<sup>20</sup> Australian Law Reform Commission, *Securing Compliance*, Discussion Paper 65 (2002) at [17.39].

<sup>21</sup> Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002) at [2.16].

Law Reform Commission (ALRC) found some 72 federal statutes that impose some form of civil or administrative penalty.<sup>22</sup> There appears to be an increasing number of civil penalty proceedings under the *Workplace Relations Act 1996* (Cth).<sup>23</sup> The focus of this article, however, is upon the *Corporations Act*.

The statutes provide varying degrees of guidance to the court as to the procedure to be adopted.<sup>24</sup> Section 1317L of the *Corporations Act* is an example of a directive provision which states that the court “must apply the rules of evidence and procedure for civil matters when hearing proceedings for (a) a declaration of convention or (b) a pecuniary penalty order”. Most of the cases which flesh out the practical interpretation of this provision deal with the operation of the penalty privilege.

The penalty privilege or the privilege against exposure to a penalty is distinct from, though often associated in conversation with,<sup>25</sup> the privilege against self-incrimination. Each privilege operates to excuse a person from being compelled to answer a question or produce a document if to do so would tend to expose that person in the latter case directly or indirectly to a criminal charge and in the former case to a penalty.<sup>26</sup> Traditionally, the two privileges have been associated, demonstrated by the oft-quoted statement of Bowen LJ in *Redfern v Redfern* [1891] P 139 at 147 that a “party cannot be compelled to discover that which, if answered, would subject him to any punishment, penalty, forfeiture or ecclesiastical censure”. This characterisation has led some judges to portray the privileges as two interlocking parts of a single column<sup>27</sup> and others to doubt that the rationales of the two privileges can be distinguished.<sup>28</sup>

The rationales of the two forms of privilege are difficult to disentangle and overall the penalty privilege is inadequately conceptualised in the case law but the High Court has ruled that the two privileges are conceptually distinct<sup>29</sup> and operate independently. Historically, the penalty privilege is said to have arisen from judicial hostility to suits by common informers<sup>30</sup> for penalties.<sup>31</sup> This rationale no longer applies to modern civil penalties and in the corporate law context only the regulator – ASIC – may apply for a declaration of contravention or a pecuniary penalty order.<sup>32</sup>

More fundamentally, the privilege against self-incrimination is seen as “too fundamental a bulwark of liberty to be categorized simply as a rule of evidence applicable to judicial and quasi-judicial proceedings”<sup>33</sup> and has been held by the High Court to be a substantive rule of law<sup>34</sup> which may not be abrogated by the courts and only expressly by statute.<sup>35</sup> Conversely, the penalty

<sup>22</sup> Rees, n 3.

<sup>23</sup> See eg *Hadgkiss v CFMEU* (2005) 146 IR 106; [2005] FCA 1453; *A & L Silvestri Pty Ltd v CFMEU* (2005) 226 ALR 247; [2005] FCA 1658.

<sup>24</sup> See Rees, n 3.

<sup>25</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 152 CLR 328 at 337.

<sup>26</sup> *Australian Securities and Investments Commission v Mining Projects Group Ltd* (2007) 164 FCR 32; [2007] FCA 1620 at [7].

<sup>27</sup> *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96 at 129; 14 ACSR 359.

<sup>28</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 547; 12 ACSR 452; [1993] HCA 74.

<sup>29</sup> *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 559; 43 ACSR 189; [2002] HCA 49, citing *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 152 CLR 328 at 336, 345, 350.

<sup>30</sup> A common informer is “a person who provides information concerning a breach of the provisions of a penal statute and sues to recover the penalty to which they are entitled as a reward under that statute”: *Encyclopaedic Australian Legal Dictionary* (LexisNexis).

<sup>31</sup> McNicol SB, *The Law of Privilege* (Law Book Co, 1992) p 189. As stated by the court in *Orme v Crockford* (1824) 13 Price 376: “[i]t would be a monstrous thing if we were obliged to give an informer the advantage of ... discovery in aid of an action for such penalties, partly for the benefit of himself”, cited in *Martin v Treacher* (1886) 16 QBD 507 at 511.

<sup>32</sup> *Corporations Act 2001* (Cth), s 1317J.

<sup>33</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 152 CLR 328 at 340.

<sup>34</sup> *Reid v Howard* (1995) 184 CLR 1 at 11; [1995] HCA 40.

<sup>35</sup> *Reid v Howard* (1995) 184 CLR 1 at 12-14; [1995] HCA 40.

privilege is not a “substantive rule of law”<sup>36</sup> but merely a procedural rule that applies in judicial proceedings to require a plaintiff to prove his case without the assistance of the defendant.<sup>37</sup> It serves the purpose of ensuring that those who allege illegal conduct should prove it.<sup>38</sup>

A successful claim of privilege against exposure to penalty has a profound effect on civil penalty proceedings. For example, a request for discovery by the plaintiff must be refused,<sup>39</sup> the defendant may be excused from filing witness statements ahead of trial,<sup>40</sup> and the defendant may argue that the standard of prosecutorial fairness should apply to the proceedings,<sup>41</sup> thereby potentially placing further obligations on the plaintiff to call material witnesses<sup>42</sup> or to exclude unfairly prejudicial documentary evidence.<sup>43</sup> Due to the serious nature of the allegations against the defendant, the formulation of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362-363 will generally apply so the fact-finder must be *reasonably satisfied* that facts have occurred in determining whether the plaintiff has proved its case on the balance of probabilities.<sup>44</sup>

The issue of the application of prosecutorial fairness also raises the question whether the plaintiff should be permitted to split its case in civil penalty proceedings and if so, whether the court should apply the criminal or civil rules about splitting. A party is not normally permitted to adduce fresh evidence after its case is closed; it may not “split its case”.<sup>45</sup> The rule is based on fairness. It is undesirable for the defence case to be sandwiched between the prosecution/plaintiff cases and if rebuttal evidence were extensively admitted, “trials would meander on, with the new evidence in turn being rebutted after adjournments had been granted”.<sup>46</sup> The court has discretion to allow further evidence in criminal matters after the prosecution case has closed but the power is “exercised very sparingly”<sup>47</sup> since the defendant may readily establish unfairness. The dynamics were explained by Dawson J in *R v Chin* (1985) 157 CLR 671 at 685-686:

The accused is entitled to know the case which he has to meet so that he may have adequate opportunity to determine what questions he may wish to ask in cross-examination, what evidence, if any, he may wish to call and what objections, if any, he may wish to raise in the case against him ... The whole

<sup>36</sup> *Daniels v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 559; 43 ACSR 189; [2002] HCA 49.

<sup>37</sup> *Daniels v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 559; 43 ACSR 189; [2002] HCA 49.

<sup>38</sup> *Daniels v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 559; 43 ACSR 189; [2002] HCA 49.

<sup>39</sup> *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 147-148, citing *R v Associated Northern Collieries* (1910) 11 CLR 738 at 747.

<sup>40</sup> *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (1999) 163 ALR 465; [1999] FCA 672; *Australian Competition and Consumer Commission v J McPhee & Son (Australia) Pty Ltd (No 2)* (1997) 77 FCR 217; *Australian Securities and Investments Commission v Plymin* (2002) 4 VR 168; [2002] VSC 56; *Australian Competition and Consumer Commission v FFE Building Services Ltd* (2003) 130 FCR 37; [2003] FCAFC 132, cited by Rees, n 3 at 147. Note, however, that the Victorian Court of Appeal held in *Sidebottom v Commissioner of Taxation* (2003) 6 VR 302; 173 FLR 335; [2003] VSCA 2 that witness statements may be delivered before trial in proceedings under the *Excise Act 1901* (Cth).

<sup>41</sup> In *Australian Securities and Investments Commission v Loiterton* [2004] NSWSC 172 at [370] ASIC accepted that the proceedings attracted an obligation of prosecutorial fairness although it submitted that the content of that obligation in civil penalty proceedings is uncertain. The defendants in that case were unrepresented. However, two recent decisions of the Federal Court (*Visy Industries Holdings Pty Ltd v Australian Competition and Consumer Commission* (2007) 161 FCR 122 at 147; [2007] FCAFC 147 and *Standen v Feehan* [2007] FCA 1761) have stated emphatically that prosecutorial fairness does not apply in civil penalty proceedings.

<sup>42</sup> *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1 at 149; 46 ACSR 504; [2003] NSWCA 131; *Australian Securities and Investments Commission v Plymin* (2003) 175 FLR 124; 46 ACSR 126; [2003] VSC 123.

<sup>43</sup> *Australian Securities and Investments Commission v Rich* (2005) 191 FLR 385; [2005] NSWSC 417.

<sup>44</sup> *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171; *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 at 343-344; 41 ACSR 72; [2002] NSWSC 171; *Vines v Australian Securities and Investments Commission* (2007) 62 ACSR 1; [2007] NSWCA 75; *Australian Securities and Investments Commission v PFS Wholesale Mortgage Corp Pty Ltd* (2006) 57 ACSR 553; [2006] VSC 192.

<sup>45</sup> *Cross on Evidence* at [17620].

<sup>46</sup> *Cross on Evidence* at [17700], citing *R v Day* [1940] 1 All ER 402; *R v Smith* (1948) 48 SR (NSW) 268 at 272.

<sup>47</sup> *Cross on Evidence* at [17625].

procedure would be undermined if the prosecution were permitted, save in exceptional circumstances, to call evidence in support of its case after the close of the case for the defence.

The general rule against splitting is the same in civil cases but the court's discretion is more likely to be liberally exercised, so that a plaintiff is often permitted to resolve "a deficiency" after its case is closed.<sup>48</sup> A court is more likely to allow the evidence if the issue is unforeseeable, that is where the plaintiff has been surprised.<sup>49</sup>

How is this issue dealt with in civil penalty proceedings? In *Australian Securities and Investments Commission v Rich* [2005] NSWSC 1187 at [3], Austin J applied the civil rule, commenting upon the uncertainty engendered by ASIC "conducting its case without direct knowledge of the nature and content of the evidence upon which the defendants will rely to make out the defences that they have filed and served". However, in *Re HIH Insurance Ltd* (2001) 40 ACSR 214 at 216-217; [2001] NSWSC 1168, Santow J stated that the rule against splitting had a public interest dimension related to prosecutorial fairness and that, while the court's discretion could be exercised more liberally than in a criminal case, nonetheless there must be "proper regard for the seriousness of the civil penalties involved".

### PLEADING A DEFENCE IN CIVIL PENALTY PROCEEDINGS: TWO RECENT CASES

In an unreported decision in the *Water Wheel* civil penalty case<sup>50</sup> in 2001 Mandie J in the Victorian Supreme Court ordered ASIC to file its case against the directors and refused to grant ASIC's application that the directors file an early defence.<sup>51</sup> Arguably, this decision fully embraces the criminal procedure model of disclosure. Two recent cases have elaborated on this issue with varying degrees of clarity.

In *Australian Securities and Investments Commission v Mining Projects Group Ltd* (2007) 164 FCR 32; [2007] FCA 1620, the defendants were Mining Projects Group Ltd (MPG), a minerals exploration company, and two of its directors, Mr Frost and Mr Revelins. ASIC contended that, in breach of s 1041H, MPG made misleading public announcements by overstating the mineralisation and exploration potential for uranium mining on Niue Island in the South Pacific. The directors were alleged, inter alia, to have knowingly procured the breach and thereby contravened ss 180 and 181 and engaged in insider trading under s 1043A. ASIC sought pecuniary penalties against the directors<sup>52</sup> and an order that they be disqualified from managing a corporation.<sup>53</sup>

ASIC delivered a statement of claim and each defendant filed a defence though ASIC contended in this application that the defences were deficient and therefore sought further and better particulars. The directors argued that they could not be compelled to provide any further information due to the operation of the penalty privilege or the privilege against self-incrimination.

Finkelstein J considered that both the privilege against self-incrimination and the penalty privilege applied since the allegations of insider trading and breach of directors' duties exposed the defendants to criminal charges and the order sought for pecuniary and non-pecuniary penalties attracted the penalty privilege. The penalty privilege operates to require the plaintiff to prove its case without the assistance of the defendant and although in a civil action a defendant is obliged to deliver a defence (at [12]),

the penalty privilege operates to relieve a defendant from the need to deliver a defence that complies with the pleading rules if the rules would override the privilege. To the extent that pleading rules purport to impose such an obligation they must give way to the privilege.

<sup>48</sup> *Cross on Evidence* at [17720], citing *Wright v Wilcox* (1850) 137 ER 1047 at 1050.

<sup>49</sup> *Cross on Evidence* at [17720], citing *Wright v Wilcox* (1850) 137 ER 1047 at 1050.

<sup>50</sup> *Re Water Wheel Mills Pty Ltd* (unreported, Sup Ct, Vic, 22 June 2001, Mandie J).

<sup>51</sup> ASIC's consultation with the ALRC in the 2002 ALRC inquiry into penalties referred to this decision. See ALRC, n 20 at [17.73].

<sup>52</sup> *Corporations Act 2001* (Cth), s 1317G.

<sup>53</sup> Under the *Corporations Act 2001* (Cth), s 206C.

Finkelstein J stated that difficulties arise where the defendant wishes to run a positive case, since this must generally be raised in the defence. In his Honour's view, this is best dealt with by allowing the defendant to amend his defence after the plaintiff's case is concluded and in exceptional cases a short adjournment will be granted to allow the plaintiff time to prepare if he is taken by surprise (at [13]). His Honour did not indicate whether this latitude to the plaintiff extended to evidence in rebuttal.

In obiter comments Finkelstein J opined that regulators who bring a civil proceedings to recover a penalty should be under a prosecutor's duty of disclosure, obliging them to deliver to the accused all witness statements, notes of interviews with witnesses and evidence from experts. However, he acknowledged that the issue was not at large, citing the New South Wales Court of Appeal decision in *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1; 46 ACSR 504; [2003] NSWCA 131 where Giles J held that the legislature had clearly declined to pick up the degree of fairness and detachment required of a prosecutor when enacting the civil penalty provisions. Not to be deterred, Finkelstein J then queried whether the layperson would regard the distinction between civil penalty and criminal proceedings as "somewhat artificial" and suggested ironically (at [35]) that the courts may have rejected the prosecutorial duty of disclosure because "in a criminal proceeding a conviction may result in imprisonment whereas in a civil penalty proceeding the worst that can happen is that the defendant's career is ruined or his life is wrecked".

Therefore *Mining Projects* held that the obligation of defendants to particularise their defences in civil penalty proceedings is limited and strong comments were made in obiter about the desirability of applying the prosecutorial duty of disclosure to civil penalty proceedings.

The next step in the swing of the pendulum towards criminal procedure occurred in *Macdonald v Australian Securities and Investments Commission* [2007] NSWCA 304, where the defendant argued that the penalty privilege completely excused him from filing a defence. The defendant was one of 12 defendants in a civil penalty proceeding brought by ASIC for various breaches of the *Corporations Act* pertaining to the James Hardie asbestos fund. The statement of claim raised breaches of directors' duties which may be the subject of a defence based on the exculpatory provisions of the *Corporations Act*, eg the business judgment rule under s 180(2).

The defendant initially argued that he should not be obliged to file any defence but this argument was abandoned in oral submissions after Young CJ at first instance rejected the proposition that the penalty privilege operated so widely. His Honour ordered that the defendants file and serve an unverified defence and the defendant appealed to the New South Wales Court of Appeal. In the Court of Appeal the defendant's argument shifted to seeking directions that certain provisions of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) be dispensed with so that his defence would be limited to a bare pleading, ie one that admits, does not admit or denies an allegation in ASIC's amended statement of claim and that liberty be reserved to allow him to file an amended defence after ASIC has closed its case. The relevant UCPR rules require a party to specifically plead matters that will take the other party by surprise (r 14.14(2)(a)), render a claim or defence by the other side not maintainable (r 14.14(2)(b)) or raise matters not arising out of the pleading (r 14.14(2)(c)), as well as providing particulars sufficient to enable the other party to identify the case that the pleading requires him to meet (r 15.1(1)).

All judges in the New South Wales Court of Appeal agreed that the penalty privilege operates although, with respect, there was some conflation of the operation of the privilege against self-incrimination per se and the penalty privilege in the judgments.<sup>54</sup> Although ASIC had argued that there should be no relaxation of the pleading rules (at [59]) and that the information required to be

<sup>54</sup> For example, Mason P stated (at [39]) that "the law of privilege confers substantive rights to which procedural rules must yield unless there is clear statutory authority to the contrary". As stated above, this contradicts the High Court's reasoning in *Daniels* which found that the penalty privilege does not confer substantive rights.

disclosed was more likely to be exculpatory than incriminating,<sup>55</sup> the court expressed concern that the defendant's compliance with the UCPR provisions would be likely to either directly or derivatively assist ASIC to establish part of its case (at [10]).

In the result, Mason P, with whom Giles JA agreed, considered that the defendant should plead his intention to invoke statutory defences and other "positive defences" (at [59]) and Mason P provided a form of pleading which formed the basis of his orders.<sup>56</sup> However, Spigelman CJ stated (at [30]) that Mason P's suggested form of pleading did not fulfil the requirements of the UCPRs and that he could not see that there "would be any practical significance to such a pleading" (at [31]). Instead, he dispensed with the requirements of the UCPRs regarding any matters that arise pursuant to the exculpatory provisions of the *Corporations Act*.<sup>57</sup>

Both judgments reserved the right of the defendant to file a further amended defence after ASIC had closed its case and Mason P made soothing comments about the likelihood that ASIC may need to split its case (at [59], [74]).

The judgments discussed above provide a spectrum of approaches to the issue of disclosure, from the absolute refusal of Mandie J in *Water Wheel*, to the dispensation from the obligation to plead positive defences by Finkelstein J and Spigelman CJ to the approach of Mason P (Giles J concurring) which attempts to impose a requirement to plead positive defences while manoeuvring around the penalty privilege. While the attempt to negotiate the third way is to be applauded, it is hard to disagree with Spigelman CJ that the attempt lacked utility and it seems highly likely that further litigation will follow on the point. Both decisions put ASIC at risk in conducting its case since the judgments acknowledge that diminished disclosure by the defendant increases the likelihood that ASIC may need to split its case and the discretion to allow ASIC to present evidence in rebuttal may only be exercised by a trial judge after examination of the material sought to be admitted. If the criminal standard is applied,<sup>58</sup> the tender of evidence may be refused. This necessarily requires ASIC to engage in some crystal ball gazing, though Finkelstein J was confident that "by the time the plaintiff has closed his case the nature of the defence will usually be apparent. That is the experience of those who prosecute criminal cases."<sup>59</sup>

Again the prosecutorial model is the point of reference.

## WHERE TO FROM HERE?

This area is ripe for law reform. As stated above, the *Corporations Act* has recently been amended to abrogate the penalty privilege for proceedings involving disqualification, banning orders and cancellation or suspension of licences.<sup>60</sup> The ALRC reference on penalties in 2002 recommended the passage of a regulatory contraventions statute to govern the law and procedure of non-criminal

<sup>55</sup> Sexton E, "Hardie Accused Seeks Defence Protection", *Sydney Morning Herald* (20 October 2007), <http://www.smh.com.au> viewed 7 November 2007.

<sup>56</sup> "If, which is denied, the matters alleged in para X constitute a contravention of s Y of the Corporations Law, the defendant says that the matters alleged by ASIC also establish that the claimant relied upon information or professional or expert advice (etc) / acted honestly (etc). The defendant reserves the right to advance in his case additional material in support of his defence, the details whereof will be disclosed by amending this paragraph after the close of ASIC's case." See *Macdonald v Australian Securities and Investments Commission* [2007] NSWCA 304 at [72], [75].

<sup>57</sup> The direction stated: "With respect to the first Defendant, the requirements of Rule 14.14 and 15.1 are dispensed with, with respect to any matters that arise pursuant to the provisions of s 180(2), s 189, s 1317S, s 1318, s 206C or s 206E of the *Corporations Act 2001* (Cth)."

<sup>58</sup> It is submitted that Santow J applied the stricter criminal standard in *Re HIH Insurance Ltd* (2001) 40 ACSR 214; [2001] NSWSC 1168 in relation to the first affidavit of Mr Carter, stating that the affidavit confirmed ASIC's case on liability "which necessarily must be part of ASIC's case, 'strictly proved'" (at [17]). His Honour stated that although a less strict approach was applicable in civil cases, the case was "essentially a civil prosecution brought by a party required to act with prosecutorial fairness in the public interest" (at [27]).

<sup>59</sup> *Australian Securities and Investments Commission v Mining Projects Group Ltd* (2007) 164 FCR 32; [2007] FCA 1620 at [13].

<sup>60</sup> *Corporations Act 2001* (Cth), s 1349.



contraventions of federal law.<sup>61</sup> Similarly the federal Treasury undertook a review of sanctions in corporate law in March 2007.<sup>62</sup> Weaving through these inquiries is the recognition that negotiating an effective civil penalty procedure on a case-by-case basis is difficult. For example, the ALRC considered that a responsive regulatory approach directly conflicts

with the judicial approach, which must apply principles and procedural protections to the facts of specific cases and values individual rights over efficient regulation. Ideally, these two approaches should operate as checks and balances, but this may be difficult if they represent fundamentally different ways of seeing a crucial matter.<sup>63</sup>

The danger is that the case-by-case approach will lead to indeterminacy or default to criminal procedure.

Perhaps what is needed is a new procedural road-map in the form of a statute, code or court rules and the opportunity now exists for radical change. For some time academic writers have challenged the rationale of the civil-criminal divide, arguing that its bipolarity obscures the complex characteristics of a modern legal system. For example, Resnik has argued that the delineation between civil and criminal procedure is artificial and much is to be learned from thinking about the two forms of procedure together. She states:

[T]he thesis is not that the rules are or ought to be the same in all instances but that the theoretical questions addressed by the two sets of rules are the same and that different resolutions merit analysis.<sup>64</sup>

Similarly, procedures inevitably follow on from substantive law choices, particularly choices about remedies. This is the premise of the High Court's reasoning in *Australian Securities and Investments Commission v Rich* when it held that the nature of the orders sought in a proceeding determines whether the penalty privilege applies.<sup>65</sup> The rise of the statutory remedies has created a plethora of remedial choices, some of which may be accommodated into the traditional criminal-civil spectrum but others elude the categorisation. Dietrich and Middleton have commented on the limitations of our "map of the law" which was formed perhaps 100 years ago, after the Judicature Acts but before the revolution in legislation.<sup>66</sup>

Rosen-Zvi and Fisher argue 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.<sup>67</sup> The severity of the sanction criterion forms part of the traditional jurisprudence in this area but the balance of power axis is more controversial. The argument is that the existing procedural regime is said to respond to the reality of unequal adversaries. The 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.<sup>68</sup> The authors contend that the existing model of criminal procedure ignores many cases in which a structural symmetry exists between the prosecution and the defence.

When the state prosecutes Microsoft or Citigroup, there is a good basis for contesting any claim of a power disparity between the parties. In these situations, granting defendants sweeping procedural

<sup>61</sup> ALRC, n 21, p 25.

<sup>62</sup> The Treasury, n 19.

<sup>63</sup> ALRC, n 20 at [17.4]

<sup>64</sup> Resnik J, "The Domain of Courts" (1989) 137 *University of Pennsylvania Law Review* 2219 at 2222.

<sup>65</sup> *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 145-146; 50 ACSR 242; [2004] HCA 42.

<sup>66</sup> Dietrich J and Middleton T, "Statutory Remedies and Equitable Remedies" (2006) 28 ABR 136 at 169.

<sup>67</sup> Rosen-Zvi and Fisher, n 9.

<sup>68</sup> Rosen-Zvi and Fisher, n 9 at 135.

safeguards could actually tilt the scales in their favour and upset the balance required for obtaining accurate results, thus distorting justice to the detriment of the government (and to the detriment of the public at large). The probable result would be that powerful organizations would be let off the hook, with all that this implies in terms of optimal deterrence.<sup>69</sup>

The model proposed by the authors would allow a dilution of the power of the party currently enjoying a built-in advantage in litigation. The model is difficult to operationalise, but it is a useful starting point for a paradigm shift which may be necessary to achieve law reform in this area.

## CONCLUSION

This article has examined the recent evolution of procedure in civil penalty litigation. Civil penalties are an example of the new statutory remedies developed by regulatory law. They fit uneasily within the civil-criminal procedural divide and judicial determinations about civil penalty procedure frequently resort to criminal models. Most of the disputes about procedure emanate from the operation of the privilege against exposure to a penalty which the courts often conflate with the privilege against self-incrimination. Two recent cases regarding the proper ambit of disclosure in a defence demonstrate the further embrace of the criminal model and the concomitant complication of the plaintiff's case. The area is ripe for law reform, though incremental change is difficult to achieve in case law where judges focus upon the individual rights of defendants. Instead, a paradigm shift is required which reconsiders the bifurcation of civil and criminal procedure to effectively accommodate regulatory law and statutory remedies.

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<sup>69</sup> Rosen-Zvi and Fisher, n 9 at 136.