

# EFFECTIVE REGULATION BY THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION: THE CIVIL PENALTY PROBLEM

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*[This article focuses on the Australian Securities and Investment Commission's ('ASIC's') original and primary role as the regulator of corporate laws to determine whether it is an effective regulator. 'Effective' regulation is defined as involving two aspects, namely, a proper structure and effective implementation of that structure. In 1993, fundamental reforms were made to the regime of sanctions concerning enforcement of the statutory duties of corporate officers in Australia when the civil penalty regime, currently found in part 9.4B of the Corporations Act 2001 (Cth), was introduced. By adopting this approach, it was hoped that ASIC could deal more effectively with corporate misconduct and that civil penalties would be the major element of its overall enforcement structure. ASIC has had some success recently in using the civil penalty regime, especially against directors in high profile cases. Nevertheless, ASIC's ability to be an effective regulator is compromised. While Parliament has shown a preference for civil, not criminal, process, ASIC has been denied the opportunity to fully implement this objective. The author therefore calls for Parliament to enact legislation that will settle the procedures pertaining to civil penalties. Arguably, the need for this law reform has been made more urgent in view of the humiliating loss recently suffered by ASIC when the Supreme Court of New South Wales dismissed the civil penalty proceedings against One.Tel founder Jodee Rich and former finance director Mark Silbermann.]*

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## I INTRODUCTION

When the Australian Securities and Investments Commission ('ASIC'), an independent Commonwealth government body, commenced operating on 1 January 1991 as the Australian Securities Commission ('ASC'),<sup>1</sup> it was a specialist regulatory body with administrative and enforcement responsibility for the corporations legislation.<sup>2</sup> From 1998, however, when it was renamed 'ASIC',<sup>3</sup> it took on new responsibilities. In addition to being the 'company law watchdog',<sup>4</sup> it took on the administration of laws relating to consumer protection and the regulation of financial markets, products and services, such as superannuation, insurance and deposit-taking and, from 2002, credit.<sup>5</sup>

While today ASIC has other functions, this article will focus on its original, and arguably its primary, role — the administration and enforcement of the corporations legislation<sup>6</sup> — in assessing whether ASIC is an effective regulator. A consideration of ASIC's expanded role as Australia's corporate, markets and financial services regulator is relevant, however, to the extent that it raises

<sup>1</sup> See *Australian Securities and Investments Commission Act 2001* (Cth) s 8(1) (note) ('ASIC Act'), which provides that 'ASIC was established by section 7 of the *Australian Securities and Investments Commission Act 1989* and is continued in existence' under the present *ASIC Act* by virtue of s 261. The *Australian Securities and Investments Commission Act 1989* (Cth) was enacted as the *Australian Securities Commission Act 1989* (Cth): see *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth) sch 1, sch 5 item 7.

<sup>2</sup> *ASIC Act* s 11(1), which provides that 'ASIC has such functions and powers as are conferred on it by or under the corporations legislation'. Section 5(1) defines 'corporations legislation' to mean the current *ASIC Act* and the *Corporations Act 2001* (Cth) ('*Corporations Act*'), formerly the *ASIC Law* (see *Australian Securities and Investments Commission Act 1989* (Cth) s 1B(1)) and *Corporations Act 1989* (Cth) s 82 ('*Corporations Law*') respectively.

<sup>3</sup> *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth) s 2(2), sch 1, sch 5 item 7; Commonwealth, *Gazette: Special*, No S 316, 30 June 1998.

<sup>4</sup> ASIC, 'Your Company and the Law' (Information Sheet No 79, 10 May 2010).

<sup>5</sup> *ASIC Act* s 12A, which provides that ASIC has administrative responsibility for the regulatory regimes in relation to these matters under various statutes including the *Insurance Contracts Act 1984* (Cth), the *Superannuation (Resolution of Complaints) Act 1993* (Cth), the *Life Insurance Act 1995* (Cth), the *Retirement Savings Accounts Act 1997* (Cth) and the *Superannuation Industry (Supervision) Act 1993* (Cth). It should be noted that the recent failures of two large lenders, Opes Prime and Lift Capital, and the turmoil at stockbroker Tricom Securities have been behind the current Labor government's further expansion of ASIC's mandate to equip it with new powers to regulate financial products linked to some of these collapses. Margin loans, for example, became regulated as financial products under the *Corporations Act* in November 2009: *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Cth) sch 1. The changes to margin lending contained in this Act are part of the federal government's actions to regulate consumer credit nationally. In addition, the new *Australian Consumer Law*, which is a single, national consumer law dealing (inter alia) with unfair terms in consumer contracts, was enacted as sch 2 to the *Trade Practices Act 1974* (Cth) by *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth) sch 1 pt 1. Schedule 3 pt 1 amends the *ASIC Act*, inserting parallel provisions to those in the *Australian Consumer Law* in relation to financial products and services. From 1 July 2010, ASIC therefore assumed responsibility for administering this new law dealing with unfair terms in consumer contracts for financial products and services.

<sup>6</sup> See also *ASIC Act* s 1(2), which sets out the objectives that Parliament requires ASIC to seek to achieve in its role as corporate regulator. Taking action 'to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it' is merely one of the six objectives listed: s 1(2)(g). Significantly, this means that ASIC must face the challenge of balancing its statutory objectives with its limited resources.

questions about ASIC's ability to adequately carry out all, or indeed any, of these functions given that it operates in a limited-resource environment.

The regime of sanctions for enforcement of the duties of company officers<sup>7</sup> in Australia was fundamentally reformed in 1993 when the civil penalty regime was introduced.<sup>8</sup> This was aimed at reducing the role of the criminal law such that criminal sanctions applied only to the most serious contraventions.<sup>9</sup> The majority of cases attracted civil penalty sanctions.<sup>10</sup>

<sup>7</sup> The provisions relating to those duties are now found in *Corporations Act* ss 180–3, formerly *Corporations Law* s 232 and before that *Companies Code* s 229 (the 'Companies Code' was the *Companies Act 1981* (Cth), applied in each Australian state by application legislation: see, eg, *Companies (Application of Laws) Act 1981* (Vic) s 10(1), sch 1, providing for the *Companies (Victoria) Code*).

<sup>8</sup> The civil penalty regime now (as amended) in *Corporations Act* pt 9.4B was introduced by *Corporate Law Reform Act 1992* (Cth) s 17 and commenced on 1 February 1993 (Commonwealth, *Gazette: Special*, No S 25, 27 January 1993). Since it was introduced into the *Corporations Law* in 1993, the civil penalty regime has been amended several times. The most significant amendments were introduced by *Company Law Review Act 1998* (Cth) sch 2 item 238, amending *Corporations Law* s 1317DA, and *Financial Services Reform Act 2001* (Cth) sch 1 item 437, amending *Corporations Act* s 1317E(1), which both increased the number of provisions to which the civil penalty regime applied. These amendments demonstrate the preference for the use of civil and administrative penalties over criminal prosecutions in the enforcement of the Australian corporations legislation. For a fuller discussion of the civil penalty regime and the reasons for its introduction, see Vicky Comino, 'Civil or Criminal Penalties for Corporate Misconduct: Which Way Ahead?' (2006) 34 *Australian Business Law Review* 428, 431–3. See also Vicky Comino, 'The Challenge of Corporate Law Enforcement in Australia' (2009) 23 *Australian Journal of Corporate Law* 233, 234. See generally 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*' (2002) 15 *Australian Journal of Corporate Law* 137, who discusses ASIC's apparent tendency to use civil penalty proceedings in preference to criminal prosecutions in response to alleged breaches of the corporations legislation. As the present author has further observed:

In March 2007, the Federal Treasury undertook a review ... inviting discussion on the issue of the greater use of civil ... rather than criminal sanctions for breaches of corporate law ... More recently, the Corporations and Markets Advisory Committee (CAMAC) has proposed civil penalties for market manipulation and for securities dealers to record all phone calls and text messages after the then Minister for Superannuation and Corporate Law, Nick Sherry, had asked it to look into charges that some short sellers were deliberately spreading damaging rumours about stocks — or engaging in rumourtrage — following the stock market carnage in late 2008. ASIC also wants civil penalties introduced for rumourtrage in addition to existing criminal penalties to provide 'access to the full range of regulatory options' and ensure that rumourtrage is 'met by a scalable response' ...

Comino, 'The Challenge of Corporate Law Enforcement in Australia', above n 8, 234–5 fn 12, citing Treasury, Australian Government, *Review of Sanctions in Corporate Law* (2007) and quoting Patrick Durkin, 'ASIC Worried over Margin Loan Disclosure', *The Australian Financial Review* (Sydney), 16 March 2009, 7.

<sup>9</sup> Previously, a contravention of a civil penalty provision constituted a criminal offence where the provision was contravened 'knowingly, intentionally or recklessly' and the person who committed the contravention either (i) did so dishonestly and with the intention 'to gain ... an advantage for' themselves or another person or (ii) 'intend[ed] to deceive or defraud someone': *Corporations Law* s 1317FA, later amended by *Corporate Law Economic Reform Program Act 1999* (Cth) sch 1 item 6. Such a criminal contravention could result in a maximum fine of 2000 penalty units (approximately \$200 000), imprisonment of at most five years or both: *Corporations Law* s 1311, sch 3 ('Subsection 1317FA(1)'). Currently, the criminal penalty regime (now in *Corporations Act* pt 9.4, previously in *Corporations Law* pt 9.4B) is applicable to *Corporations Act* provisions providing that contravention constitutes an offence: see *Corporations Act* s 1311(1)(d). An example of such a provision is s 184 of the *Corporations Act*, which defines the situations in which breaches of corporate officers' statutory duties will result in criminal liability. Additionally, ss 1311(1), (3) and sch 3 of the *Corporations Act* continue to make it an offence to contravene other provisions of the Act (except where the provision contravened specifies that

Prior to the introduction of the civil penalty regime, the directors' duties provisions were enforceable by the criminal law.<sup>11</sup> ASIC, like its forerunner (the National Companies and Securities Commission ('NCSC')), however, had problems in enforcing these provisions because of the difficulties associated with the use of the criminal law, including the need to satisfy the criminal rules of evidence and higher standard of proof, with the result that these provisions were not seen as providing an effective enforcement regime.<sup>12</sup>

The current civil penalty regime was introduced to reduce reliance on the criminal process in the hope that ASIC could more effectively deal with corporate misconduct and that civil penalties would constitute a significant part of the overall enforcement mechanism.<sup>13</sup> This article argues that, notwithstanding that Parliament has armed ASIC with the civil penalty structure since 1993 and that, in recent years, ASIC has succeeded in obtaining many of the civil penalties it has sought,<sup>14</sup> ASIC has been hampered in its work by the failure of

contravention is not an offence). They make such an offence punishable by fines and/or imprisonment. See Comino, 'The Challenge of Corporate Law Enforcement in Australia', above n 8, 235 fn 13.

<sup>10</sup> As the author has noted in a previous article:

Where a civil penalty provision was breached, the consequences could include the court prohibiting the person from managing a corporation for a specified period of time and/or imposing a pecuniary penalty of up to \$200,000 upon that person [(Corporations Law ss 1317EA(3)(a)–(b), inserted by *Corporations Law Reform Act 1992* (Cth) s 17)]. The available orders continue to be pecuniary penalties and management disqualification orders. [Corporations Act pt 9.4B] now, however, deals only with the imposition of pecuniary penalties [(in ss 1317G(1)–(1B))]. The imposition of management banning orders is dealt with under s 206C of Pt 2D.6 of the *Corporations Act*, entitled 'Disqualification from managing corporations'. Part 2D.6 prescribes all methods by which a person 'can be disqualified from management', which includes contravention of a civil penalty provision [(s 206C(1)(a)(i))].

Comino, 'The Challenge of Corporate Law Enforcement in Australia', above n 8, 235 fn 14.

<sup>11</sup> As noted, the criminal sanctions which could be imposed were a fine, imprisonment for up to five years or both under *Corporations Law* s 1311, sch 3 ('Subsection 1317FA(1)'), formerly *Companies Code* s 570.

<sup>12</sup> Comino, 'Civil or Criminal Penalties for Corporate Misconduct', above n 8, 431–2.

<sup>13</sup> *Ibid* 432–3.

<sup>14</sup> This has occurred particularly against directors in high profile cases, such as those of HIH Insurance ('HIH') and, to a lesser extent, One.Tel. In *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 ('*Adler (First Instance)*'), ASIC proved contraventions of the *Corporations Act* by Rodney Adler, a former director of HIH, Ray Williams, its former Chief Executive Officer, and Dominic Fodera, its former Chief Financial Officer. In *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80, 111–12, 114, 118, 121–2, 124–6 (Santow J), ASIC obtained pecuniary penalties, banning orders and compensation orders against Adler and Williams, as well as a pecuniary penalty against Fodera. On appeal, the New South Wales Court of Appeal upheld the disqualifications, pecuniary penalties and compensation orders against the defendants: *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1, 162–3, 167–71 (Giles JA) ('*Adler (Appeal)*'). Adler and Williams were subsequently prosecuted and convicted. Adler received a sentence of four and a half years' imprisonment with a two and a half year nonparole period: *R v Adler* (2005) 53 ACSR 471, 482 (Dunford J). Williams similarly received a sentence of four and a half years' imprisonment, but his nonparole period was two years and nine months: *R v Williams* (2005) 216 ALR 113, 145 (Wood CJ at CL). In the One.Tel matter:

in December 2001 ASIC commenced civil penalty proceedings in the Supreme Court of New South Wales against John David (Jodee) Rich and Bradley Keeling, its former Joint Managing Directors, Mark Silbermann, its former Finance Director[,], and John Greaves, its former Chairman, seeking declarations that they had breached their duties, including the duty to exercise the standards of care and diligence required by company officers .... orders that each

that structure to provide a solid foundation for its major regulatory efforts. The case law that has developed as a result of ASIC's use of civil penalty litigation, particularly since the High Court of Australia's decision in *Rich v Australian Securities and Investments Commission* ('*Rich*'),<sup>15</sup> has created procedural and enforcement problems for ASIC. This article contends that these developments require Parliament to act to settle the procedures in this area. Even though recent amendments have resulted in the removal of the penalty privilege in relation to disqualification proceedings,<sup>16</sup> thereby restoring the position for ASIC that existed prior to the *Rich* case, it is argued that those amendments do not go far enough. The procedural and evidential difficulties resulting from the *Rich* case remain for ASIC in civil penalty proceedings where it is seeking a pecuniary penalty, since these amendments to the *Corporations Act 2001* (Cth) ('*Corporations Act*') (the insertion of s 1349) did not abrogate the penalty privilege in relation to such proceedings. The problems that have developed from the case law generally also remain. Parliament should, at least, extend the operation of s 1349 such that it applies to all civil penalty proceedings. If this course were followed, the author believes that Parliament would also need to enact individual reforms to the relevant regulatory laws governing civil penalty proceedings initiated by other Australian regulators — such as the Australian Prudential Regulatory Authority ('APRA'), the Australian Competition and Consumer Commission ('ACCC') and the Australian Taxation Office ('ATO') — that are empowered to bring such proceedings in order to support a uniform approach, as

of the defendants be disqualified from managing a corporation [and orders that the defendants] pay \$93 [sic — \$92] million compensation ...

Comino, 'Civil or Criminal Penalties for Corporate Misconduct', above n 8, 430 fn 15. See *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, 15, 45 (Austin J). However, only proceedings against two defendants, Keeling and Greaves, were successful, resulting in banning, compensation and costs orders being made against these defendants. ASIC settled the matter insofar as it related to Keeling (in March 2003) and Greaves (in September 2004). Orders were entered by Bryson J, in *Re One.Tel Ltd (in liq); Australian Securities and Investments Commission v Rich* (2003) 44 ACSR 682, 692–3, which effected the settlement between ASIC and Keeling on the basis of a statement of facts agreed between them. Keeling admitted that he had breached his duty under s 180(1): at 685. He therefore agreed to orders 'requir[ing] him to pay compensation to One.Tel of \$92m' (as well as ASIC's costs of \$750 000) and orders that he 'be prohibited from managing corporations for 10 years': at 686. In *Australian Securities and Investments Commission v Rich* (2004) 50 ACSR 500, White J made orders giving effect to the settlement reached between Greaves and ASIC. Greaves admitted that he (also) had breached s 180(1): at 509. Orders were thus entered requiring Greaves to 'pay compensation to One.Tel Ltd (in liq) in an amount of \$20m' (as well as ASIC's costs, which totalled \$350 000) and disqualifying him from the management of any corporation for four years: at 501–2, 519–20. See also ASIC, 'ASIC Reaches Agreement with John Greaves in One.Tel Proceedings' (Media Release No 04-283, 6 September 2004). As far as *Rich* and Silbermann are concerned, ASIC's case against these defendants concluded on 18 November 2009, when the New South Wales Supreme Court dismissed the proceedings against them: *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, 160–1 (Austin J). See generally Vicky Comino, 'The Enforcement Record of ASIC since the Introduction of the Civil Penalty Regime' (2007) 20 *Australian Journal of Corporate Law* 183, 207.

<sup>15</sup> (2004) 220 CLR 129.

<sup>16</sup> *Corporations Act* s 1349, inserted by *Corporations Amendment (Insolvency) Act 2007* (Cth) sch 2 item 12, which commenced operation on 31 December 2007: Governor-General (Cth), *Proclamation — Corporations Amendment (Insolvency) Act 2007*, 26 September 2007.

suggested by Thomas Middleton.<sup>17</sup> According to Middleton, the adoption of a uniform approach

will bring order and cohesion where complexity now reigns; give the regulators, the regulated and the judiciary clear guidance as to the applicable rules and procedures in all regulatory matters; and would promote more timely and cost-effective regulatory outcomes and more effective regulation of the Australian economy.<sup>18</sup>

The ideal solution, however, would be the introduction of a 'new procedural road-map'<sup>19</sup> to govern the law and procedure of civil penalty proceedings. If this occurred, ASIC would be better placed to implement Parliament's objective and to be a more effective regulator. Arguably, this call for Parliament to enact legislation to settle the procedures relating to civil penalties has been made more urgent in view of the resounding loss ASIC recently suffered in its long-running case against Rich and Silbermann in the One.Tel proceedings.<sup>20</sup> To add insult to injury, in addition to its own costs of more than \$20 million, ASIC is also 'liable for the majority of the defendants' \$15 million in costs.'<sup>21</sup>

## II WHAT IS 'EFFECTIVE' REGULATION?

An assessment of the effectiveness of ASIC as a regulator cannot be made without first establishing what is 'effective' regulation.

### A 'Good Regulatory Practice'

Dominant ideas of what has constituted 'good regulatory practice' may be helpful in providing some perspectives concerning effective regulation. Key themes in good regulatory practice have been well summarised by Fiona Haines and David Gurney thus:

Good regulatory practice focuses on the outcomes of regulatory aims, not obsessive concern about compliance with prescriptive rules. Flexibility in

<sup>17</sup> Thomas Middleton, 'The Privilege against Self-Incrimination, the Penalty Privilege and Legal Professional Privilege under the Laws Governing ASIC, APRA, the ACCC and the ATO — Suggested Reforms' (2008) 30 *Australian Bar Review* 282. But note that the author and Middleton have different views on what that uniform approach to resolving the enforcement problems in relation to the penalty privilege should be: see below n 95 and accompanying text.

<sup>18</sup> Middleton, 'The Privilege against Self-Incrimination', above n 17, 282–3.

<sup>19</sup> Peta Spender, 'Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation' (2008) 26 *Company and Securities Law Journal* 249, 257; see also at 258. Spender's views are discussed below in Part III(D). Middleton has made similar calls for a 'uniform civil code' for civil penalty proceedings under the corporations legislation: Tom Middleton, 'The Difficulties of Applying Civil Evidence and Procedure Rules in ASIC's Civil Penalty Proceedings under the Corporations Act' (2003) 21 *Company and Securities Law Journal* 507, 509.

<sup>20</sup> *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1. On 17 December 2009, ASIC lodged a notice of intention to appeal this decision: ASIC, 'ASIC Lodges Notice of Intention to Appeal' (Advisory No 09-259AD, 17 December 2009). However, an appeal was ultimately not pursued: ASIC, 'ASIC Not to Appeal One.Tel Decision' (Advisory No 10-34AD, 26 February 2010).

<sup>21</sup> Marsha Jacobs and Angus Grigg, 'ASIC Slated in One.Tel Court Defeat', *The Australian Financial Review* (Sydney), 19 November 2009, 1. See *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, 162 (Austin J).

process should be allowed where it can demonstrate superior outcomes. Regulation should advance self-regulation. Further, a culture of compliance where commitment to regulatory goals is evident should be promoted, with strong leadership that avoids strategic use of regulations. Compliance experts, too, are useful to marry regulatory aims with business goals.<sup>22</sup>

These ideas have been based on the ‘shifts towards “flexible” regulation that emphasise the potential within the market and systems of self-regulation to control corporate behaviour.’<sup>23</sup> The latter have been called into question by recent events. In particular, the collapse of Lehman Brothers in September 2008 was followed by the controversial US\$700 billion (A\$840 billion) emergency bailout to buy mortgage debt from troubled banks,<sup>24</sup> in an unprecedented effort to avoid a deepening of the financial crisis in the United States and a resulting global financial meltdown. As the world stood precariously on the brink of recession, there were press reports daily condemning the free market<sup>25</sup> and either calling for improved regulation/re-regulation or commenting on the latest measures by governments around the world as they attempted to restore confidence.<sup>26</sup> The message seems to be that, without proper regulation, people don’t trust the market.

Whether future regulation will see a return to the old, state-centred model relying on ‘command and control’ as the only way of securing compliance,<sup>27</sup> or whether the strategies of the ‘new regulatory state’<sup>28</sup> — where regulation

<sup>22</sup> Fiona Haines and David Gurney, ‘Regulatory Conflict and Regulatory Compliance: The Problems and Possibilities in Generic Models of Regulation’ in Richard Johnstone and Rick Sarre (eds), ‘Regulation: Enforcement and Compliance’ (Research and Public Policy Series No 57, Australian Institute of Criminology, 2004) 10, 11 (citations omitted).

<sup>23</sup> Ibid 13, citing Clifford D Shearing, ‘A Constitutive Conception of Regulation’ in Peter Grabosky and John Braithwaite (eds), *Business Regulation and Australia’s Future* (1993) 67; P N Grabosky, ‘Beyond the Regulatory State’ (1994) 27 *Australian and New Zealand Journal of Criminology* 192.

<sup>24</sup> *Emergency Economic Stabilization Act of 2008*, Pub L No 110-343, § 115, 122 Stat 3765, 3780–3 (2008). See also Robert Guy, ‘Why Bail-Outs Are Not Working’, *The Weekend Australian Financial Review* (Sydney), 11–12 October 2008, 19–21.

<sup>25</sup> See, eg, Geoff Kitney, ‘UK Pays Price of Free Market’, *The Australian Financial Review* (Sydney), 30 October 2008, 15. In the wake of what Kitney describes as the British economy ‘crumpl[ing] in the face of the twin horrors of a financial market crash and a housing market implosion’, he reported that the free-market liberalism at the heart of the ‘Thatcher–Blair orthodoxy’ was being ‘seen as responsible for the [current] economic pain’. He also reported on the Labour government being encouraged by ‘the old warriors of the left-of-centre ... to seize the moment and promote the case for government intervention in the economy and re-regulation, not only as an emergency response to the crisis but as the long-term alternative to a failed ideology.’ See also Mikhail Gorbachev, ‘Mr Capitalism, Tear Down That Immorality’, *The Australian Financial Review* (Sydney), 31 October 2008, 65, as an example of the very dramatic tone of many of the articles appearing in the press condemning the free market.

<sup>26</sup> See, eg, Kitney, above n 25, 15; Guy, above n 24, 19–21; Anthony Hughes, ‘“Whatever It Takes” Is Simply Not Enough’, *The Weekend Australian Financial Review* (Sydney), 11–12 October 2008, 21. But note that there were also some articles warning of the dangers of a regulatory overreaction to the causes of the crisis: see, eg, Richard Epstein, ‘Strident and Wrong’, *The Australian Financial Review* (Sydney), 31 October 2008, 66 (emphasis in original), who states: ‘we recognise that the spectre of bank runs, illiquidity and credit freezes *might* justify some regulation ... [but] we are equally adamant that bad regulation can wreck credit markets.’

<sup>27</sup> See Shearing, above n 23, 69.

<sup>28</sup> John Braithwaite, ‘The New Regulatory State and the Transformation of Criminology’ (2000) 40 *British Journal of Criminology* 222, 223.

becomes a layered web, with strands contributed by public authorities such as ASIC, professional, non-government and community organisations and, increasingly, international organisations as part of globalised regulatory networks<sup>29</sup> — continue to be influential in guiding regulatory practice, remains to be seen. It is the author's view that, as time passes and uncertainty hopefully subsides, some strategies, notwithstanding that they are 'premised upon a neo-liberal combination of market competition, privatized institutions, and decentred, at-a-distance forms of state regulation',<sup>30</sup> will continue to have a significant role. Although Neil Gunningham makes this argument in relation to environmental regulation, the author agrees that 'command and control' regulation will often be an important part of the regulatory solution (or 'regulatory mix'), usually as a safety net under more flexible regulatory measures, applying when those measures fail.<sup>31</sup>

#### B *Mann's Views*

'Effective' corporate regulation according to Michael Mann, a former director of the US Securities and Exchange Commission, involves two aspects, namely, a proper structure and effective implementation of that structure. As Mann states: 'There are two aspects of any effective regulatory regime: its legal and structural framework (the rules), and the implementation of that framework (the regulation).'<sup>32</sup> Further, the rules 'must be easily understandable and the application of the rules must be done in a predictable manner.'<sup>33</sup>

This article contends that ASIC's ability to be an effective regulator is compromised. Even though Parliament has armed ASIC with the civil penalty 'structural framework' since 1993, it has failed to give ASIC the chance to properly implement this framework by failing to settle the procedures concerning civil penalty proceedings.

### III EMERGING DIFFICULTIES WITH CIVIL PENALTY PROCEEDINGS

In the years immediately following the introduction of the civil penalty regime, very few applications for civil penalty orders were made by ASIC. Research has shown that in the six years from 1993 to 1999, ASIC commenced a mere '14 civil penalty applications relating to 10 case situations'.<sup>34</sup> In recent

<sup>29</sup> See generally John Braithwaite and Peter Drahos, *Global Business Regulation* (2000); see especially at 12.

<sup>30</sup> See Braithwaite, above n 28, 222. See also above n 23 and accompanying text.

<sup>31</sup> See Neil Gunningham, 'Beyond Compliance: Next Generation Environmental Regulation' in Richard Johnstone and Rick Sarre (eds), 'Regulation: Enforcement and Compliance' (Research and Public Policy Series No 57, Australian Institute of Criminology, 2004) 49, 50.

<sup>32</sup> Michael D Mann, 'What Constitutes a Successful Securities Regulatory Regime?' (1993) 3 *Australian Journal of Corporate Law* 178, 180.

<sup>33</sup> *Ibid.*

<sup>34</sup> George Gilligan, Helen Bird and Ian Ramsay, 'Regulating Directors' Duties — How Effective Are the Civil Penalty Sanctions in the Australian *Corporations Law*?' (Research Report, Centre for Corporate Law and Securities Regulation, The University of Melbourne, 1999) vii; see also at 23–4.



years, however, ASIC has made greater use of civil penalty litigation and, since 2000, has experienced success in obtaining civil penalties, especially against directors involved in high profile corporate collapses.<sup>35</sup> Nevertheless, in spite of this and s 1317L of the *Corporations Act* (where Parliament has mandated that the court apply the civil rules of evidence and procedure in civil penalty proceedings), an examination of the case law reveals the tendency of the courts to treat such proceedings more like criminal proceedings. Defendants are afforded enhanced procedural protections, which, this article argues, undermines ASIC's ability to rely on the civil penalty regime in part 9.4B as an effective law enforcement option.

As Joshua Knackstredt has noted, although 'civil penalty proceedings are exactly that: *civil*, the courts have begun to treat them in a different way from regular civil proceedings.'<sup>36</sup> This Part will look specifically at corporate regulation and the problems ASIC faces in civil penalty proceedings that are undermining its efforts to be an effective regulator.

#### A *The Nature of Civil Penalties*

The courts' difficulty with applying civil evidence and procedure rules in civil penalty proceedings appears to arise from two related factors. The first is that civil penalties are a statutory remedy, a product of regulatory law which, arguably, cannot easily be accommodated in the traditional criminal–civil dichotomy. The second factor concerns the 'hybrid' nature of civil penalties. As a civil penalty case is a civil action that may result in the imposition of penalties on the defendant, courts have shown special concern for the rights of defendants in such cases. On the other hand, there is the important deterrence role played by civil penalties to deal with serious, albeit non-criminal, contraventions of the corporations legislation.

##### 1 *A Statutory Remedy: A Product of Regulatory Law*

Focusing on civil penalties contained in part 9.4B of the *Corporations Act*, Peta Spender highlights that, unlike actions in civil and criminal law (the distinction between which is founded on the difference 'between a private right of action by an individual for a civil remedy [in civil law] and enforcement action or punishment by the state in criminal law'), civil penalties are 'a statutory remedy, a product of regulatory legislation where the focus is upon compliance.'<sup>37</sup> As such, since civil penalties were developed as part of a regulatory model of graduated sanctions, aimed at securing compliance under strategic regulation theory and pyramidal enforcement (which underpinned the

<sup>35</sup> See above n 14 and accompanying text.

<sup>36</sup> Joshua P Knackstredt, 'The Evolution in Civil Penalty Proceedings' (2006) 24 *Company and Securities Law Journal* 56, 57 (emphasis in original).

<sup>37</sup> Spender, above n 19, 250.

recommendations of the *Cooney Committee Report*,<sup>38</sup> the policy source leading to the enactment of part 9.4B),<sup>39</sup> the author agrees with Spender that civil penalties ‘fit uneasily within the civil–criminal procedural divide.’<sup>40</sup>

It is noteworthy that Kirby J recognised this in his dissenting judgment in the *Rich* case.<sup>41</sup> His Honour considered that the majority of the High Court’s holding<sup>42</sup> that the penalty privilege is available in civil penalty proceedings<sup>43</sup> was ‘out of harmony with the introduction of a “pyramid” of statutory responses’<sup>44</sup> and issued a warning that

this Court should avoid superimposing on the graduated statutory pyramid of sanctions and remedies any oversimplification inherent in past common law and equitable principles reflected in the penalty privilege. That privilege developed in an earlier time of less legislation and simpler provisions. To graft it now on to every statutory provision that casts a burden on an individual and to describe that burden as a ‘penalty’ may risk undermining legislative attempts to develop graduated sanctions and remedies that go beyond the strict civil/penal paradigm.<sup>45</sup>

## 2 *Civil Penalties: A ‘Hybrid’ between the Civil and the Criminal Law*

Civil penalties are regarded as ‘a hybrid between the civil and the criminal law’<sup>46</sup> and have been described as ‘punitive civil sanctions’.<sup>47</sup> Perhaps Middleton explains this best, when pointing out that:

civil penalty proceedings ... are like criminal proceedings in that they have a punitive purpose; they involve a contest between the state (represented by a public regulator with vast resources) and the individual; and they are concerned with public wrongs and moral culpability, and not merely conduct causing damage.<sup>48</sup>

<sup>38</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors’ Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989) 190–1 (*‘Cooney Committee Report’*).

<sup>39</sup> For a more detailed discussion of this point, see *ibid* 188–94; Comino, ‘Civil or Criminal Penalties for Corporate Misconduct’, *above n 8*, 433–5; Vicky Comino, ‘High Court Relegates Strategic Regulation and Pyramidal Enforcement to Insignificance’ (2005) 18 *Australian Journal of Corporate Law* 48, 56–60.

<sup>40</sup> Spender, *above n 19*, 258.

<sup>41</sup> See (2004) 220 CLR 129, 172.

<sup>42</sup> *Ibid* 147–8 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ), 157 (McHugh J).

<sup>43</sup> But see *Corporations Act* s 1349, which has since abrogated the penalty privilege for proceedings involving, *inter alia*, disqualification, banning orders, and cancellation or suspension of licenses, as noted *above* in *n 16* and accompanying text.

<sup>44</sup> *Rich* (2004) 220 CLR 129, 170.

<sup>45</sup> *Ibid* 172.

<sup>46</sup> John Farrar, *Corporate Governance: Theories, Principles and Practice* (3<sup>rd</sup> ed, 2008) 245. See also Spender, *above n 19*, 249.

<sup>47</sup> Kenneth Mann, ‘Punitive Civil Sanctions: The Middleground between Criminal and Civil Law’ (1992) 101 *Yale Law Journal* 1795, 1798. See also John C Coffee Jr, ‘Paradigms Lost: The Blurring of the Criminal and Civil Law Models — And What Can Be Done about It’ (1992) 101 *Yale Law Journal* 1875.

<sup>48</sup> Middleton, ‘The Privilege against Self-Incrimination’, *above n 17*, 310 (citations omitted). Middleton also states that ‘[t]he object of the civil pecuniary penalty in s 1317G of the *Corporations Act* is to punish the offender’: at 310 *fn* 133, citing *Australian Securities Comm-*

This last point is borne out by comments made by Finkelstein J in *Australian Securities and Investments Commission v Vizard* ('Vizard')<sup>49</sup> in his discussion of the contravention of *Corporations Law* s 232(5)<sup>50</sup> by celebrity businessman Stephen Vizard when he was a director of Telstra Corporation ('Telstra'):

[Section 183] seek[s] to establish a norm of behaviour that is necessary for the proper conduct of commercial life and so that people will have confidence that the running of the marketplace is in safe hands. For this reason a contravention of [s 183] carries with it a significant degree of moral blameworthiness. There is moral blameworthiness because a contravention involves a serious breach of trust.<sup>51</sup>

Accordingly, even though Vizard did not benefit as a result of his insider trading activities, civil penalties were imposed on him:

The defendant was a director of Telstra, one of Australia's largest companies. He owed his position to the belief that he was honest and capable. Highly confidential information came his way in his capacity as a director. He used that information for the purposes of benefiting himself and his family. This was both dishonest and a gross breach of trust. Not only that, the defendant well knew that what he was doing was wrong. His breach of trust was carefully concealed and was only discovered by chance. Everything was done for personal gain. ... It was only because of the vagaries of the marketplace that the defendant did not realise his gain.<sup>52</sup>

On the other hand, Middleton suggests that because

Parliament has given ... regulators [like ASIC] the power to commence civil penalty proceedings where there has been a contravention of the 'physical elements' of the legislation, rather than the 'fault elements' of a criminal offence ... the courts should observe parliament's mandate ... and treat such proceedings as civil ...<sup>53</sup>

*ission v Donovan* (1998) 28 ACSR 583, 608 (Cooper J); *Australian Securities and Investments Commission v Whitlam [No 2]* (2002) 42 ACSR 515, 518–19 (Gzell J); *Australian Securities and Investments Commission v Forge* [2002] NSWSC 760 (Unreported, Foster AJ, 28 August 2002) [155]; *Australian Securities and Investments Commission v Parker* (2003) 21 ACLC 888, 917–19 (Drummond J); *Australian Securities and Investments Commission v Plymin [No 2]* (2003) 21 ACLC 1237, 1241 (Mandie J); *Adler (Appeal)* (2003) 179 FLR 1, 147 (Giles JA); *Australian Securities and Investments Commission v Vines* (2006) 58 ACSR 298, 316 (Austin J). In this regard, see below nn 55–60 and accompanying text. In addition, although the author does not agree that ASIC has vast resources, the issue that is relevant here is that discussed in Spender, above n 19, 257. Spender notes the argument that:

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.

This is in contrast to civil proceedings, where there is 'an assumption of structural equality and power between the parties which results in a neutrality of safeguards, [for example] by requiring the same disclosure by both parties': at 257 (citations omitted).

<sup>49</sup> (2005) 145 FCR 57.

<sup>50</sup> Now *Corporations Act* s 183. This provision deals with the duty of company officers not to misuse information.

<sup>51</sup> (2005) 145 FCR 57, 64.

<sup>52</sup> *Ibid* 67–8 (Finkelstein J).

<sup>53</sup> Middleton, 'The Privilege against Self-Incrimination', above n 17, 310 (citations omitted). An example of a fault element is the 'dishonesty' required under *Corporations Act* s 184 to commit

He notes, however, that:

This suggestion can be criticised on the grounds that conventional civil procedural rules should not apply to such an unconventional civil law and that it promotes form (parliament's direction to apply civil evidential and procedural rules) over substance (the punitive nature of pecuniary penalties and disqualification orders).<sup>54</sup>

While the author maintains that imposition of civil penalties does not suggest the same level of moral culpability as results from criminal sanctions,<sup>55</sup> and consequently civil penalties do not give rise to the same level of deterrence,<sup>56</sup> their punitive nature cannot be denied. Despite the criticism surrounding ASIC's decision not to institute criminal proceedings and to bring only civil penalty proceedings against Vizard,<sup>57</sup> ASIC succeeded in *Vizard*: Vizard was banned for 10 years from managing a corporation and ordered to pay pecuniary penalties of \$390 000.<sup>58</sup> It had been argued that 'the damage to his (the defendant's) reputation (which for so long had been one of his principal assets) has been public and complete'.<sup>59</sup> On the issue of disqualification, even though ASIC had requested a five-year ban in the light of Vizard's admission of his wrongdoing and the contrition he expressed, Finkelstein J found that

a disqualification for five years is not sufficient. I appreciate that I need not be too concerned with specific deterrence. The defendant's very public disgrace suggests that it is unlikely that he will be given the opportunity of again becoming a director of a sizeable publicly listed company. In any event, it is common ground that he is unlikely to offend again. My real concerns here are with punishment for retributive purposes and general deterrence, but principally the latter.

Indeed general deterrence is of primary importance in cases of this kind. A message must be sent to the business community that for white collar crime

an offence. In this regard, the legislation adopts the recommendations of the *Cooney Committee Report*, above n 38, 190–1. Civil penalties with the benefit of the civil standard of proof and without the 'draconian consequences of criminal enforcement such as a criminal record or the stigma of a criminal conviction' (Spender, above n 19, 251), were introduced to enable ASIC to take enforcement action in relation to misconduct where no criminality is involved (for example, for non-criminal contraventions of the statutory duties of directors, now found in *Corporations Act* ss 180–3): *Cooney Committee Report*, above n 38, 191. On the other hand, criminal sanctions, fines and imprisonment, at the apex of the enforcement pyramid, have been retained to provide ASIC with the necessary enforcement tools to deal with the most serious contraventions — those 'genuinely criminal in nature': at 190. For further discussion, see Comino, 'Civil or Criminal Penalties for Corporate Misconduct', above n 8, 433–5.

<sup>54</sup> Middleton, 'The Privilege against Self-Incrimination', above n 17, 310, citing Kenneth Mann, above n 47, 1798, 1820.

<sup>55</sup> In Comino, 'The Challenge of Corporate Law Enforcement in Australia', above n 8, 248, the author argued that 'civil penalties ... do not deliver the same element of moral culpability as arises' from a criminal conviction.

<sup>56</sup> *Ibid* 249–50.

<sup>57</sup> See, eg, Jennifer Sexton, 'Vizard Was "Too Well Connected" for Jail', *The Australian* (Sydney), 6 July 2005, 1.

<sup>58</sup> (2005) 145 FCR 57, 69 (Finkelstein J).

<sup>59</sup> *Ibid* 66.

‘the game is not worth the candle’, to use the language of a Canadian judge, McDermid JA, in *R v Jaasma* [1976] 1 AR 553 at 555.<sup>60</sup>

### B Case Law Developments since 2000

It is no wonder, then, that the courts have been seeking to develop a hybrid process or a ‘third way’ for civil penalties through case law.<sup>61</sup> This approach, which ‘involves a balance of civil and criminal procedure’, has been and continues to be ‘problematic’.<sup>62</sup> Indeed, as the author argued when the *Rich* case was decided,<sup>63</sup> the majority decision that the penalty privilege is available in civil penalty proceedings, being a default to criminal procedure, seemed ‘to ensure that ASIC [would] continue to challenge its “enemies” with one hand tied behind its back’ and ignored the reasons for enacting a civil penalty regime.<sup>64</sup>

<sup>60</sup> Ibid 68.

<sup>61</sup> Anne Rees, ‘Civil Penalties: Emphasising the Adjective or the Noun’ (2006) 34 *Australian Business Law Review* 139, 139, cited in Spender, above n 19, 249.

<sup>62</sup> Spender, above n 19, 249.

<sup>63</sup> For a discussion of the *Rich* case and its consequences, see Vicky Comino, ‘High Court Relegates Strategic Regulation and Pyramidal Enforcement to Insignificance’, above n 39. The author concluded that the decision affording defendants the protection of the penalty privilege in civil penalty proceedings created significant procedural and enforcement difficulties for ASIC under the corporations legislation: at 67. See also Middleton, ‘The Privilege against Self-Incrimination’, above n 17, 283, 313–15, where Middleton discusses the *Rich* case and reaches similar conclusions as the author. One such difficulty Middleton discusses relates to examinees in ASIC’s oral examinations having the benefit of ‘use’ evidential immunity, which he argues prejudices ASIC’s ability to obtain a disqualification order from the court (under *Corporations Act* ss 206C or 206E) or to make an administrative disqualification or banning order (including orders suspending or cancelling an Australian Financial Services License) (under *Corporations Act* ss 206F, 853D(4)(b), (5)(a), 913B(5), 914A(3), 915C(4), 920A(2) or 920D(3)): Middleton, ‘The Privilege against Self-Incrimination’, above n 17, 313–14. Prior to the *Rich* case, the predominant view established by the case law was that proceedings seeking to disqualify a person from managing a corporation, or proceedings seeking to ban a person from participating in a particular industry, were more like civil proceedings because they were ‘preventative’ or ‘protective’ rather than ‘penal’ or ‘punitive’ in nature: *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80, 97–9 (Santow J); *Adler (Appeal)* (2003) 179 FLR 1, 147 (Giles JA); *Australian Securities Commission v Kippe* (1996) 67 FCR 499, 506–7 (von Doussa, Cooper and Tamberlin JJ); *Felden v Australian Securities and Investments Commission* (2003) 45 ACSR 111, 194–5 (Member A L Limbury); *Re Saxby Bridge Financial Planning Pty Ltd and Australian Securities and Investments Commission* (2003) 46 ACSR 286, 293, 371, 373 (R P Handley DP). As Middleton, ‘The Privilege against Self-Incrimination’, above n 17, 313–14, has observed:

This meant that where an examinee claimed the penalty privilege before answering a question at [an] oral examination, those answers would be admissible (that is, not excluded by the ‘use’ evidential immunity in ss 68(3)(b) and 76(1)(a) of the *ASIC Act*) against that examinee in subsequent proceedings in which a disqualification or banning order was sought. ... [T]he majority of the High Court [in the *Rich* case] held that civil penalty proceedings for disqualification orders under s 206C of the *Corporations Act* were proceedings that exposed a person to a penalty and therefore attracted the operation of the penalty privilege. ...

[This] meant that, where the examinee claimed the penalty privilege at ASIC’s oral examination, the oral evidence given by that examinee ... which may expose that examinee to the risk of either the court making a ‘punitive’ disqualification order ... or ASIC making a ‘punitive’ administrative disqualification order or banning order ... would not be admissible (because of the ‘use’ evidential immunity in ss 68(3)(b) and 76(1)(a) of the *ASIC Act*) against that examinee in any ... subsequent proceedings.

<sup>64</sup> Comino, ‘High Court Relegates Strategic Regulation and Pyramidal Enforcement to Insignificance’, above n 39, 48.

Spender makes a similar argument about the case law generally since 2000. She states that an analysis of that case law shows that 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.’<sup>65</sup>

The case law since 2000 has frequently involved disputes concerning the scope of the penalty privilege. Spender contends that the judgments pertaining to this privilege confuse it with the privilege against self-incrimination.<sup>66</sup> Although distinct from it, Spender correctly points out that the penalty privilege is ‘often associated in conversation with ... the privilege against self-incrimination.’<sup>67</sup> She explains that:

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 [of privilege against self-incrimination] directly or indirectly to a criminal charge and in the former case [of penalty privilege] to a penalty.<sup>68</sup>

Spender also points out that:

Traditionally, the two privileges have been associated, [as] demonstrated by the oft-quoted statement of Bowen LJ in *Redfern v Redfern* that a ‘party cannot be compelled to discover that which, if answered, would [tend to] subject him to any punishment, penalty, [forfeiture,] or ecclesiastical censure’. This characterisation has led some judges to portray the privileges as two interlocking parts of a single column and others to doubt that the rationales of the two privileges can be distinguished.<sup>69</sup>

The author agrees with Spender’s analysis that the penalty privilege has not been conceptualised properly in the case law<sup>70</sup> and that it has tended to be viewed as ‘a weak form’ of the privilege against self-incrimination, ‘which invites courts to interpolate the penalty privilege into the ... framework of the criminal rather than the civil law.’<sup>71</sup> This is notwithstanding that ‘the High Court has ruled that the two privileges are conceptually distinct’<sup>72</sup> and that they each have an independent operation.<sup>73</sup> Further, unlike the privilege against self-

<sup>65</sup> Spender, above n 19, 249.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid 252, citing *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 337 (Mason ACJ, Wilson and Dawson JJ).

<sup>68</sup> Spender, above n 19, 252, citing *Australian Securities and Investments Commission v Mining Projects Group Ltd* (2007) 164 FCR 32, 36 (Finkelstein J) (‘Mining Projects’).

<sup>69</sup> Spender, above n 19, 252, quoting *Redfern v Redfern* [1891] P 139, 147 and citing *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96, 129 (Burchett J); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 547 (McHugh J).

<sup>70</sup> Spender, above n 19, 252.

<sup>71</sup> Ibid 249; see also at 252.

<sup>72</sup> Ibid 252, citing *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 559 (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (‘Daniels’); *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 152 CLR 328, 336 (Mason ACJ, Wilson and Dawson JJ), 345 (Murphy J), 350 (Brennan J).

<sup>73</sup> Spender, above n 19, 252. Spender, citing Suzanne B McNicol, *The Law of Privilege* (1992) 189, states: ‘Historically, the penalty privilege is said to have arisen from judicial hostility to suits by common informers for penalties.’ A ‘common informer’ is a ‘person who provides information

incrimination, which is regarded ‘as too fundamental a bulwark of liberty to be categorized simply as a rule of evidence applicable to judicial and quasi-judicial proceedings’<sup>74</sup> and a ‘substantive common law right’<sup>75</sup> which may not be abrogated by the courts, only expressly by statute,<sup>76</sup> the penalty privilege is not a ‘substantive rule of law’.<sup>77</sup> It is merely a procedural rule that requires a plaintiff to prove their case without the assistance of the defendant.<sup>78</sup> As Gleeson CJ, Gaudron, Gummow and Hayne JJ explained in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (‘*Daniels*’), the penalty privilege now ‘serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it.’<sup>79</sup>

However, the author has argued, relying on the reasoning of Kirby J in the *Rich* case,<sup>80</sup> that the majority decision in that case, in holding that the penalty privilege applies in civil penalty proceedings, went too far, resulting in what Kirby J called ‘[t]he over-reach of “prove it”’.<sup>81</sup> The author previously called for Parliament to change the law in view of the procedural difficulties created in cases where ASIC has sought to rely on civil penalty provisions.<sup>82</sup> Defendants in such proceedings can refuse a request for discovery and are not required to file witness statements before the trial.<sup>83</sup> These difficulties are clearly evidenced in ASIC’s failed case against Rich and Silbermann.<sup>84</sup>

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’: Peter E Nygh and Peter Butt (eds), *Butterworths Australian Legal Dictionary* (1997) 220. Spender, above n 19, 252 fn 31, quotes the statement of Garrow B in *Orme v Crockford* (1824) 13 Price 376, 391; 147 ER 1022, 1026–7, itself quoted in *Martin v Treacher* (1886) 16 QBD 507, 511 (Lord Esher MR), that ‘[i]t would be a monstrous thing, if we were obliged to give an informer the advantages of ... discovery in aid of an action for such penalties, partly for the benefit of himself’. It should be noted that this rationale is not relevant to modern civil penalties and that, in the corporate law context, only ASIC may apply for civil penalties under *Corporations Act* s 1317J: see Spender, above n 19, 252. See also below nn 77–9 and accompanying text on the role of the penalty privilege today.

<sup>74</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 152 CLR 328, 340 (Mason ACJ, Wilson and Dawson JJ).

<sup>75</sup> *Reid v Howard* (1995) 184 CLR 1, 11 (Toohey, Gaudron, McHugh and Gummow JJ).

<sup>76</sup> *Ibid* 12–14.

<sup>77</sup> *Daniels* (2002) 213 CLR 543, 559 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>78</sup> *Ibid*.

<sup>79</sup> *Ibid* (citations omitted).

<sup>80</sup> (2004) 220 CLR 129, 170.

<sup>81</sup> *Ibid*, quoted in Comino, ‘High Court Relegates Strategic Regulation and Pyramidal Enforcement to Insignificance’, above n 39, 67.

<sup>82</sup> Comino, ‘High Court Relegates Strategic Regulation and Pyramidal Enforcement to Insignificance’, above n 39, 67. In reaching their decision, the majority in *Rich* relied on the fact that Parliament had not excluded the common law rights of company officers in relation to discovery from the procedures governing civil penalty proceedings: *Rich* (2004) 220 CLR 129, 142–3 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). See also below n 83. The author argued that Parliament should act to remedy the position by removing this common law right: Comino, ‘High Court Relegates Strategic Regulation and Pyramidal Enforcement to Insignificance’, above n 39, 67.

<sup>83</sup> Comino, ‘Civil or Criminal Penalties for Corporate Misconduct’, above n 8, 437; Spender, above n 19, 253 (citing *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (1999) 163 ALR 465; *Australian Competition and Consumer Commission v J McPhee & Son (Australia) Pty Ltd* (1997) 77 FCR 217; *Australian Securities and Investments Commission v Plymin* (2002) 4 VR 168; *Australian Competition and Consumer Commission v FFE Building Services Ltd* (2003) 130 FCR 37); Rees, above n 61, 147. As

As the author has previously observed, ‘Rich and Silbermann, by not having to comply with the usual requirement to make discovery and file witness statements’ until the conclusion of evidence by ASIC’s witnesses, ‘were placed in a position where they could refuse any demands that ASIC might have made for discovery when the proceedings against them resumed in the New South Wales Supreme Court.’<sup>85</sup> Indeed, as a consequence of this, ASIC’s task in the proceedings against Rich and Silbermann was made more difficult than envisaged,<sup>86</sup> as evidenced by both the length of time it took to finalise the proceedings as well, of course, as the adverse outcome. ‘Despite the expectation that the hearings in front of Austin J in the New South Wales Supreme Court, which [resumed] in September 2004’ following the appeal to the High Court in the *Rich* case on the penalty privilege point, ‘would have concluded by Christmas of that year’,<sup>87</sup> the hearing of the substantive issue against these defendants was only concluded in August 2007, with more than 60 separate rulings required from Austin J on evidence and procedure.<sup>88</sup> It then took another two years before the judgment, which runs to an incredible 3015 pages, was finally handed down in November 2009.<sup>89</sup> No doubt there will be a flurry of writing as academics and lawyers try to come to grips with Austin J’s decision in *Australian Securities and Investments Commission v Rich*,<sup>90</sup> but set out below is some of what he had to say about the consequences of the High Court appeal in the *Rich* case<sup>91</sup> on the penalty privilege point:

the consequences of the [High Court’s] decision for ASIC’s presentation of its case at the trial, and the court’s management of the trial, and preparation of my judgment, were very difficult and added significantly to the length of the hearing and to the length of some periods of adjournment.

One problem was that although the court and ASIC had the defendants’ Defences, they did not have anything that would indicate the nature or content of the defendants’ evidentiary case. That meant, for example, that ASIC had been unable to prepare evidence to meet the defendants’ evidence before the trial. When there were glimpses of what the defendants’ evidentiary case might be, revealed during the course of cross-examination of ASIC’s witnesses, ASIC had

Spender, above n 19, 253, has observed, it is noteworthy that, in contrast to the above decisions, the Victorian Court of Appeal in *Sidebottom v Federal Commissioner of Taxation* (2003) 6 VR 302, 313–15 (Phillips JA), 315 (Batt JA), 316 (O’Byrne AJA), held that statements of evidence may, prior to trial, be ordered where a defendant elects to give evidence in matters pursuant to the *Excise Act 1901* (Cth).

<sup>84</sup> *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1.

<sup>85</sup> Comino, ‘Civil or Criminal Penalties for Corporate Misconduct’, above n 8, 437.

<sup>86</sup> See also below nn 90–2 and accompanying text.

<sup>87</sup> Comino, ‘Civil or Criminal Penalties for Corporate Misconduct’, above n 8, 437 fn 76. See generally ‘Days of Their Lives: One.Tel, the Book’, *The Australian Financial Review* (Sydney), 6 February 2007, 46.

<sup>88</sup> See *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, 22, 29 (Austin J).

<sup>89</sup> See *ibid* 29–30.

<sup>90</sup> (2009) 236 FLR 1. The reported judgment omits several chapters; the complete judgment has been published as *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229 (Unreported, Austin J, 18 November 2009).

<sup>91</sup> (2004) 220 CLR 129.



to consider whether its evidence was adequate to meet what was likely to come from the defendants. ...

The defendants' reliance on the penalty privilege also seems to me to have affected the content of ASIC's evidence in reply, some of which might have been put on in chief, or at least made available to the defendants before the trial so they could prepare to deal with it then. Predictably, there was an issue, fully contested, as to whether ASIC should be allowed to present a case in reply, a matter that I dealt with in *Australian Securities and Investments Commission v Rich* (2006) 235 ALR 587 ..., allowing ASIC's case in reply to be presented. That did not consume any large amount of time, but in my view the proceedings could have been managed very much more efficiently if not subject to the penalty privilege and if, consequently, the defendants' evidence and ASIC's evidence in reply could have been served before the commencement of the hearing.

The penalty privilege also led to some substantial gaps in the hearing timetable. Relying on the privilege, the defendants did not indicate whether they would go into evidence until after ASIC closed its case in chief. They then sought, and were granted, a substantial adjournment for the purpose of preparing their evidence. ...

When the defendants' affidavits appeared they were, perhaps predictably, very large. Mr Rich's affidavit ran to 1956 paragraphs and Mr Silbermann's to 1061 paragraphs. They were supported by seven lever-arch folders of evidence referred to in the affidavits and another 17 volumes of the defendants' tender bundle. ASIC sought an adjournment to review the defendants' evidence, which was granted ...

In the result, ASIC closed its case on 9 February 2006 ..., and the oral hearing of the defendants' case began on 13 June 2006 ..., a gap of just over four months. The more usual practice in the Equity Division, in a case where there is no penalty privilege and affidavits are exchanged before the hearing, is for the defendants to go into evidence immediately after the plaintiff's case is closed, or perhaps after a short break, so it seems to me that this substantial gap was very much tied up with the penalty privilege.<sup>92</sup>

The law has since been amended to remove the penalty privilege in relation to proceedings involving disqualification.<sup>93</sup> This restores the law to the position that existed prior to the *Rich* case by abrogating both the penalty privilege and the resulting 'use' evidential immunity as far as disqualification proceedings are concerned.<sup>94</sup> The author believes, however, that amendment remains the proper

<sup>92</sup> *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, 26–8.

<sup>93</sup> See above n 43.

<sup>94</sup> As Middleton, 'The Privilege against Self-Incrimination', above n 17, 313–14, has observed:

Section 1349(1) and (3) [of the *Corporations Act*] provide that a person is not entitled to refuse to comply with a requirement to answer a question, or give information, or to produce a book or any other thing, or to do any act whatever, on the ground that those requirements might tend to make that person liable to a penalty by way of a disqualification order or a banning order or a specified range of other cancellation or suspension orders. Section 1349 applies to all requirements to provide information made in the context of civil or criminal proceedings and to administrative proceedings before a tribunal (including ASIC) that arise out of the *ASIC Act* or the *Corporations Act*. Section 1349 applies to all requirements to provide information in the context of ASIC's investigative powers ...

legal approach in relation to the penalty privilege in civil penalty proceedings:<sup>95</sup> the procedural problems resulting from the *Rich* case and the other case law since 2000 remain in such proceedings.<sup>96</sup> Spender sets out some of these difficulties, which she, like the author, believes are having a ‘profound effect on civil penalty proceedings’<sup>97</sup> and are ‘rapidly diminishing’ their ‘utility’ as a remedy.<sup>98</sup>

One such difficulty arises when defendants argue that, in conducting civil penalty proceedings, ASIC is adopting the role of prosecutor and that the rules in relation to prosecutorial fairness should therefore apply.<sup>99</sup> This has the potential to impose further obligations on ASIC ‘to call material witnesses’<sup>100</sup> or ‘to exclude unfairly prejudicial documentary evidence’.<sup>101</sup> In *Australian Securities and Investments Commission v Loiterton*, while ASIC accepted that the proceedings attracted an obligation of prosecutorial fairness, it submitted that ‘the content of that obligation in civil penalty proceedings is ... uncertain.’<sup>102</sup> The defendants in that case were unrepresented.<sup>103</sup> However, in two recent decisions, namely, *Visy Industries Holdings Pty Ltd v Australian Competition and Consumer Commission*<sup>104</sup> and *Standen v Feehan*,<sup>105</sup> the Federal Court has stated that prosecutorial fairness does not apply in civil penalty proceedings.

As Spender has observed, ‘[t]he issue of prosecutorial fairness also raises the question whether [ASIC] should be permitted ... to adduce fresh evidence [in civil penalty proceedings] after its case is closed’, that is, whether ‘it may ... “split its case”’.<sup>106</sup> A party is generally not permitted to split its case.<sup>107</sup> This principle applies to a plaintiff in civil proceedings, just as it does to the

Section 1349(4) of the *Corporations Act* makes it clear that the ‘use’ evidential immunity afforded by s 68(3)(b) of the *ASIC Act* does not apply where ASIC is seeking a disqualification order from the court or where ASIC is seeking to impose an administrative disqualification order or banning order. Accordingly, [even] where examinees claim the penalty privilege before they make self-incriminating statements at ASIC’s oral examination that may expose them to a penalty (by way of a judicial or administrative disqualification order or an administrative banning order), those statements are admissible against them in any subsequent proceedings for such orders.

<sup>95</sup> But for a different view, see Middleton, ‘The Privilege against Self-Incrimination’, above n 17, 296.

<sup>96</sup> See above nn 16–17 and accompanying text for discussion of this.

<sup>97</sup> Spender, above n 19, 253.

<sup>98</sup> *Ibid* 249. It should be noted that other scholars have made similar arguments: see, eg, Middleton, ‘The Difficulties of Applying Civil Evidence and Procedure’, above n 19, 508, 510.

<sup>99</sup> Spender, above n 19, 253.

<sup>100</sup> *Ibid*, citing *Adler (Appeal)* (2003) 179 FLR 1, 149 (Giles JA); *Australian Securities and Investments Commission v Plymin* (2003) 175 FLR 124.

<sup>101</sup> Spender, above n 19, 253, citing *Australian Securities and Investments Commission v Rich* (2005) 216 ALR 320.

<sup>102</sup> [2004] NSWSC 172 (Unreported, Bergin J, 1 April 2004) [371]; see also at [370].

<sup>103</sup> *Ibid* [374].

<sup>104</sup> (2007) 161 FCR 122, 147–8 (Lander J); see also at 124 (Moore J), 129 (Weinberg J).

<sup>105</sup> [2007] FCA 1761 (Unreported, Lander J, 14 November 2007) [5].

<sup>106</sup> Spender, above n 19, 253. See also Middleton, ‘The Difficulties of Applying Civil Evidence and Procedure’, above n 19, 522–3.

<sup>107</sup> Middleton, ‘The Difficulties of Applying Civil Evidence and Procedure’, above n 19, 522, citing *Re HIH Insurance Ltd (in prov liq)*; *Australian Securities and Investments Commission v Adler* (2001) 40 ACSR 214, 215–17 (Santow J).

prosecution in a criminal case, although Austin J in *Australian Securities and Investments Commission v Rich* noted that the principle is likely to be applied less strictly in civil cases.<sup>108</sup> However, because of the serious consequences attaching to civil penalty proceedings, Austin J in *Australian Securities and Investments Commission v Rich* also thought that it is unlikely that the court's discretion to permit a plaintiff to split its case would be applied as liberally in such cases.<sup>109</sup> This view is consistent with the views expressed earlier by Santow J in *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler*, where his Honour held (as explained by Spender) 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'.<sup>110</sup>

Additionally, while the standard of proof for civil penalty proceedings is the civil standard (on the balance of probabilities) not the criminal standard (beyond reasonable doubt),<sup>111</sup> the *Briginshaw* test<sup>112</sup> has been cited consistently by the courts in determining the level of proof required by ASIC when making out its allegations in civil penalty proceedings.<sup>113</sup> That test requires a higher level of 'satisfaction' (one commensurate to the seriousness of the allegations) before finding that a contravention has occurred where the allegation and the consequences are serious.<sup>114</sup> This generally means that the courts 'must be reasonably satisfied that facts have occurred in determining whether the plaintiff has proved its case on the balance of probabilities',<sup>115</sup> although it should be noted that Austin J in *Australian Securities and Investments Commission v Vines* went as far as saying that an "exactness of proof" may be required for ASIC to

<sup>108</sup> (2006) 235 ALR 587, 592. Spender states that 'the court's discretion [to allow further evidence] is more likely to be liberally exercised' in 'civil cases' to enable 'a plaintiff ... to resolve "a deficiency" after its case is closed': Spender, above n 19, 254, citing JD Heydon, *Cross on Evidence* (10<sup>th</sup> Australian ed, 2010) 661–2, which itself cites *Wright v Willcox* (1850) 9 CB 650, 657; 137 ER 1047, 1050 (Wilde CJ), 657; 1050 (Maule J), 658; 1050 (Cresswell J), 658; 1050 (Talfourd J) in support of this proposition. Spender also states that a 'court is more likely to allow the evidence if the issue is unforeseeable, that is where the plaintiff has been surprised.'

<sup>109</sup> (2006) 235 ALR 587, 593.

<sup>110</sup> Spender, above n 19, 254, quoting *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2001) 40 ACSR 214, 216–17 (Santow J).

<sup>111</sup> *Corporations Act* ss 1317L, 1332.

<sup>112</sup> See *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361–3 (Dixon J).

<sup>113</sup> See, eg, *Australian Securities and Investments Commission v Doyle* (2001) 38 ACSR 606, 622 (Roberts-Smith J); *Australian Securities and Investments Commission v Vines* (2003) 21 ACLC 159, 160 (Austin J); *Adler (Appeal)* (2003) 179 FLR 1, 30 (Giles JA); *Australian Securities and Investments Commission v Loiterton* [2004] NSWSC 172 (Unreported, Bergin J, 1 April 2004) [11], [259], [454].

<sup>114</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362–3 (Dixon J).

<sup>115</sup> Spender, above n 19, 253 (emphasis in original), citing *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ); *Adler (First Instance)* (2002) 168 FLR 253, 343–4 (Santow J); *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451; *Re PFS Wholesale Mortgage Corporation Pty Ltd; Australian Securities and Investments Commission v PFS Business Development Group Pty Ltd* (2006) 57 ACSR 553.

make out its case.<sup>116</sup> On appeal, the Court of Appeal of New South Wales agreed that the *Briginshaw* test applied but said that it could be satisfied by circumstantial evidence.<sup>117</sup>

Spender discusses two other recent cases concerning civil penalty proceedings, *Macdonald v Australian Securities and Investments Commission* ('*Macdonald*')<sup>118</sup> and *Australian Securities and Investments Commission v Mining Projects Group Ltd* ('*Mining Projects*'),<sup>119</sup> which in her view 'demonstrate the tension between the disclosure policies underpinning civil and criminal procedure.'<sup>120</sup> Unfortunately, they also show 'the further embrace of the criminal model and the concomitant complication of [ASIC's] case.'<sup>121</sup> It should be noted that in *Re Water Wheel Mills Pty Ltd* Mandie J had previously ordered ASIC to lodge its case against the directors but subsequently refused to grant ASIC's application that the directors lodge a defence.<sup>122</sup> As Spender has observed: 'Arguably, this decision fully embraces the criminal procedure model of disclosure.'<sup>123</sup> In contrast to civil procedure, where the 'policy of the prevention of surprise has prevailed ... since the *Judicature Acts* and [where] new court rules require not only disclosure of case strategy through pleadings but also evidence', criminal procedure rests on 'the accused's right to silence' so that 'disclosure is either non-existent or minimal'.<sup>124</sup>

#### 1 Mining Projects

In *Mining Projects*, two procedural disputes arose in the interlocutory stages of the civil penalty proceedings commenced by ASIC against Mining Projects Group ('MPG'), a minerals exploration company, and two of its directors, Messrs Frost and Revelins. 'ASIC contend[ed] that in breach of [*Corporations Act*] s 1041H MPG made misleading public announcements about the ... potential for uranium mining at Niue Island in the South Pacific.'<sup>125</sup> 'The directors [were] alleged to have knowingly procured the breach and thereby contravened ss 180 and 181' in relation to their duty as directors, to have 'engaged in insider trading' in contravention of s 1043A 'and [to have] improperly used company information' in contravention of s 183 of the *Corporations Act*.<sup>126</sup> The relief sought against MPG was a declaration of contravention pursuant to *Corporations Act* s 1041H,<sup>127</sup> while ASIC sought 'the

<sup>116</sup> (2003) 21 ACLC 159, 163.

<sup>117</sup> *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451, 554 (Santow JA), 603 (Ipp JA); see also at 546 (Spigelman CJ).

<sup>118</sup> (2007) 73 NSWLR 612.

<sup>119</sup> (2007) 164 FCR 32.

<sup>120</sup> Spender, above n 19, 250.

<sup>121</sup> *Ibid* 258.

<sup>122</sup> (Unreported, Supreme Court of Victoria, Mandie J, 22 June 2001) 13, 15–16.

<sup>123</sup> Spender, above n 19, 254.

<sup>124</sup> *Ibid* 250, citing Middleton, 'The Difficulties of Applying Civil Evidence and Procedure', above n 19, 511.

<sup>125</sup> *Mining Projects* (2007) 164 FCR 32, 34 (Finkelstein J).

<sup>126</sup> *Ibid*.

<sup>127</sup> *Ibid*.

imposition of pecuniary penalties against the directors [under *Corporations Act* s 1317G] and an order that they be disqualified from managing a corporation [under *Corporations Act* s 206C].<sup>128</sup>

The first procedural dispute, initiated by ASIC, concerned the pleadings. After ASIC ‘delivered a detailed statement of claim’ and ‘[e]ach defendant ... filed a defence’, ASIC ‘contend[ed] that the defences [were] deficient and ... [sought] orders for the provision of further and better particulars.’<sup>129</sup> The directors, however, argued that ‘they [could not] be compelled to provide any further information because of [the operation of] penalty privilege or the privilege against self-incrimination.’<sup>130</sup>

After canvassing the law on both privileges, which Finkelstein J correctly categorised as ‘quite distinct’,<sup>131</sup> his Honour found that both applied. The privilege against self-incrimination applied because ‘ASIC’s allegations of insider trading and breach of directors’ duties suggest[ed] that the directors [were] exposed to criminal charges being laid’, while the orders sought for pecuniary and non-pecuniary penalties attracted the penalty privilege.<sup>132</sup>

Concerning the penalty privilege, which ‘serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it’,<sup>133</sup> Finkelstein J also noted the requirement that a defendant deliver a defence in a civil action.<sup>134</sup> However, his Honour went on to state that

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>135</sup>

Finkelstein J further stated that potential difficulties arise where a defendant wishes to run a positive case, since ordinarily this must be raised in the defence.<sup>136</sup> While acknowledging that whether it must be raised in a defence in a civil action to recover a penalty is not clear, his Honour favoured the approach that the defendant should be able to amend their defence after the plaintiff’s case is concluded and that in ‘an exceptional case the judge may grant a short adjournment to allow the plaintiff time to prepare, if he is otherwise taken by surprise.’<sup>137</sup> His Honour added:

<sup>128</sup> Ibid 34–5.

<sup>129</sup> Ibid 35.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid 36. See also above n 72 and accompanying text.

<sup>132</sup> *Mining Projects* (2007) 164 FCR 32, 36 (Finkelstein J).

<sup>133</sup> Ibid 37, quoting *Daniels* (2002) 213 CLR 543, 559 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also above n 79 and accompanying text.

<sup>134</sup> *Mining Projects* (2007) 164 FCR 32, 37.

<sup>135</sup> Ibid 37, citing *Hadgkiss v Construction, Forestry, Mining and Energy Union* (2005) 146 IR 106, 111–12 (Graham J); *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* (2005) 226 ALR 247, 251 (Gyles J).

<sup>136</sup> *Mining Projects* (2007) 164 FCR 32, 37.

<sup>137</sup> Ibid.

In most cases that will not be necessary. 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. The advocate who runs a civil penalty proceeding should be equally adept at dealing with the defendant and his witnesses without knowing in advance every word they are about to say.<sup>138</sup>

The author does not share Finkelstein J's confidence that this will mostly be the case, that is, that ASIC will not require an adjournment, given the difficulties encountered by ASIC in its civil penalty proceedings in the *One.Tel* case against Rich and Silbermann.<sup>139</sup>

The second procedural dispute concerned a complaint about discovery made by the defendants. Even though Finkelstein J held that the witness statements and affidavits that ASIC had procured from third parties were covered by legal professional privilege and could not be inspected by the directors, his Honour also commented, by way of obiter, that 'a regulatory body that brings a civil proceeding to recover a penalty is under an obligation similar to that owed by a prosecutor to an accused',<sup>140</sup> referring to a prosecutor's duty of disclosure. To discharge that duty, 'the prosecutor is required to deliver to the accused, among other things, all witness statements, notes of interviews with witnesses, [and] evidence from experts'.<sup>141</sup> Finkelstein J acknowledged, however, that the matter was 'not at large',<sup>142</sup> citing the judgment of Giles JA (who delivered the judgment of the New South Wales Court of Appeal) in *Adler v Australian Securities and Investments Commission*.<sup>143</sup> Giles JA had there rejected a submission that ASIC was required to act with the same degree of fairness and detachment as a prosecutor,<sup>144</sup> stating that the duties of prosecutors 'have [been] developed in the particular circumstances of criminal proceedings. By declaring that these proceedings are to be conducted as civil proceedings, the legislature has plainly declined to pick up the concepts'.<sup>145</sup> Finkelstein J also referred to Heerey J's comments in *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd [No 2]*.<sup>146</sup> Heerey J had 'dealt with the same point in short order'.<sup>147</sup>

<sup>138</sup> *Ibid* 37–8.

<sup>139</sup> See above nn 85–92 and accompanying text. For a discussion in the author's previous work of the difficulties ASIC has faced in dealing with these defendants, see Comino, 'The Enforcement Record of ASIC', above n 14, 207.

<sup>140</sup> *Mining Projects* (2007) 164 FCR 32, 43.

<sup>141</sup> *Ibid*.

<sup>142</sup> *Ibid*.

<sup>143</sup> (2003) 179 FLR 1.

<sup>144</sup> *Ibid* 150–1.

<sup>145</sup> *Ibid* 151.

<sup>146</sup> (2007) 239 ALR 762.

<sup>147</sup> *Mining Projects* (2007) 164 FCR 32, 43 (Finkelstein J).

This is a civil proceeding. These documents are either discoverable or not in accordance with the law relating to discovery and legal professional privilege. That law confers rights on all litigants, whether they are model ones or not.<sup>148</sup>

This reasoning was affirmed on appeal.<sup>149</sup>

Accordingly, as Spender puts it, *Mining Projects* decided ‘that the obligation of defendants to particularise their defences in civil penalty proceedings is limited’, while also suggesting, in obiter, that ‘the prosecutorial duty of disclosure’ should apply in these proceedings.<sup>150</sup>

## 2 Macdonald

*Macdonald* concerns a procedural dispute raised by one of the defendants in ASIC’s civil penalty proceedings in the James Hardie matter.<sup>151</sup> While ASIC has been successful in these high profile proceedings,<sup>152</sup> this procedural decision of the New South Wales Court of Appeal does not appear to bode well for ASIC’s future use of civil penalties, providing further evidence of the courts’ reliance on criminal rather than civil procedural frameworks in civil penalty proceedings.

Against Peter Macdonald, former director and Chief Executive Officer of James Hardie Industries Ltd (‘JHIL’) and James Hardie Industries NV (‘JHINV’), ASIC sought declarations that various contraventions of the

<sup>148</sup> *Australian Competition and Consumer Commission v Visy Industries Holdings Pty Ltd [No 2]* (2007) 239 ALR 762, 784 (Heerey J), quoted in *ibid* 43–4 (Finkelstein J).

<sup>149</sup> *Visy Industries Holdings Pty Ltd v Australian Competition and Consumer Commission* (2007) 161 FCR 122, 147–8 (Lander J); see also at 124 (Moore J).

<sup>150</sup> Spender, above n 19, 255. See generally Bonnie-Louise Lussier and Ashley Tsascalos, ‘Two Kinds of Privilege: Self-Incrimination Privilege and Legal Professional Privilege’ (2008) 5(6) *Civil Procedure News New South Wales* 64.

<sup>151</sup> See Comino, ‘The Enforcement Record of ASIC’, above n 14, 184 fn 5:

On 15 February 2007, ASIC filed civil penalty proceedings in the NSW Supreme Court relating to disclosure by James Hardie Industries Limited (JHIL [now called ‘ABN 60 Pty Ltd’]) in respect of the adequacy of the funding of the Medical Research and Compensation Foundation ... for asbestos victims.

ASIC sought declarations that JHIL and James Hardie Industries NV (‘JHINV’) ‘made misleading statements and contravened continuous disclosure requirements’: ASIC, ‘ASIC Commences Proceedings Relating to James Hardie’ (Media Release No 07-35, 15 February 2007). In addition, ASIC alleged ‘that JHINV failed to act with requisite care and diligence in relation to its then-subsiary JHIL’. ASIC also commenced civil penalty proceedings against a number of former directors and former officers of these companies, seeking pecuniary penalties and orders banning them from acting as company directors.

<sup>152</sup> On 23 April 2009, the New South Wales Supreme Court found that the entire board of JHIL — seven non-executive directors and the executive director — as well as two company officers had breached their duties of care in *Corporations Act* s 180(1): *Australian Securities and Investments Commission v Macdonald [No 11]* (2009) 256 ALR 199, 386–7 (Gzell J) (‘*Macdonald [No 11]*’); ASIC, ‘James Hardie Proceedings’ (Media Release No 09-69, 23 April 2009). On 20 August 2009, rejecting the defendants’ pleas for exoneration, the Court also imposed penalties and banning orders: *Australian Securities and Investments Commission v Macdonald [No 12]* (2009) 259 ALR 116, 202 (Gzell J) (‘*Macdonald [No 12]*’). Former non-executive directors, including high profile professional directors Meredith Hellicar and Peter Wilcox, for example, were banned from managing a company for five years and fined \$30 000 each: *Macdonald [No 12]* (2009) 259 ALR 116, 202 (Gzell J); ASIC, ‘James Hardie Civil Penalty Proceedings’ (Media Release No 09-152, 20 August 2009). However, all of the defendants, except Peter Macdonald, have lodged appeals: ‘James Hardie Appeals Court Rulings’, *ABC News* (online), 23 September 2009 <<http://www.abc.net.au/news/stories/2009/09/23/2694744.htm>>.

*Corporations Act* (which attracted the operation of s 1317E) had occurred,<sup>153</sup> orders that he pay a pecuniary penalty under s 1317G,<sup>154</sup> and orders that he be prohibited from managing a corporation under ss 206C and 206E.<sup>155</sup>

Notwithstanding that Macdonald had foreshadowed his intention to plead various statutory defences under the *Corporations Act*, including the business judgement rule (in s 180(2)) and good faith reliance upon information or advice supplied by others (in s 189), and to claim relief based on honesty (under ss 1317S(2) and 1318(1)), he asserted initially ‘that he should be excused *in limine* from filing any kind of defence at all’ because of the operation of the penalty privilege.<sup>156</sup> That argument, however, was abandoned after Young CJ in Eq at first instance rejected the proposition that the penalty privilege had such a wide operation.<sup>157</sup> In consequence, the relief ultimately sought by the defendant was ‘significantly narrower’.<sup>158</sup> Directions were sought that certain requirements of the *Uniform Civil Procedure Rules 2005* (NSW) (*UCPR*) be dispensed with so that his defence would be limited to a bare pleading — that is, one that admitted, did not admit or denied allegations in ASIC’s amended statement of claim — and that liberty be reserved to allow him to file an amended defence after ASIC closed its case.<sup>159</sup>

The relevant *UCPR* rules were rr 14.14(2) and 15.1(1). Rule 14.14(2) provides:

- In a defence or subsequent pleading, a party must plead specifically any matter:
- (a) that, if not pleaded specifically, may take the opposite party by surprise, or
  - (b) that the party alleges makes any claim, defence or other case of the other party not maintainable, or
  - (c) that raises matters of fact not arising out of the preceding pleading.

Rule 15.1(1) provides:

Subject to this Part, a pleading must give such particulars of any claim, defence or other matter pleaded by the party as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet.

Young CJ in Eq did not make the directions sought. Instead, his Honour ordered Macdonald to file and serve a defence but dispensed with the requirement for verification by affidavit (under *UCPR* r 14.23) pursuant to s 14 of the

<sup>153</sup> *Macdonald [No 11]* (2009) 256 ALR 199, 206–10, 212–13 (Gzell J).

<sup>154</sup> *Macdonald [No 12]* (2009) 259 ALR 116, 176–8 (Gzell J).

<sup>155</sup> *Ibid* 165.

<sup>156</sup> *Macdonald* (2007) 73 NSWLR 612, 614–16 (Spigelman CJ).

<sup>157</sup> *Ibid* 614 (Spigelman CJ), 619 (Mason P).

<sup>158</sup> *Ibid* 614 (Spigelman CJ).

<sup>159</sup> *Ibid*.



*Civil Procedure Act 2005* (NSW).<sup>160</sup> That direction was appealed to the New South Wales Court of Appeal.

As Spender has observed, '[a]ll judges in the New South Wales Court of Appeal agreed that the penalty privilege operate[d]', although (the author again agrees with Spender) 'there was some conflation of the operation of the privilege against self-incrimination per se and the penalty privilege'.<sup>161</sup> For instance:

Mason P stated ... that 'the law of privilege confers substantive rights to which procedural rules must yield unless there is clear statutory authority to the contrary'. ... [T]his contradicts the High Court's reasoning in *Daniels* which found that the penalty privilege does not confer substantive rights [whereas the privilege against self-incrimination does].<sup>162</sup>

Further, it should be noted that, even though 'ASIC submitted that there should be no relaxation of the pleading rules' (because the requirement for full pleading did not require Macdonald 'to assist ASIC in its claim for penalties'),<sup>163</sup> the Court was concerned that, if the defendant complied with the matters specified in the *UCPR*, there would be 'a likelihood or, indeed, a non-fanciful risk that, either directly or derivatively, compliance may assist [ASIC] to establish any part of its case which could result in the imposition of a penalty'.<sup>164</sup>

However, Mason P (with whom Giles JA agreed)<sup>165</sup> also thought that:

To draw the line conceptually at this point will not relieve [Mr Macdonald] from compliance with *Uniform Civil Procedure Rules*, r 14.14 and r 15.1, so far as disclosing in his pleading his intention to invoke the statutory defences or any other 'positive' defence ...<sup>166</sup>

His Honour then went on to provide an appropriate form of pleading, which formed the basis of the Court's orders, saying:

I see nothing wrong with a pleading in the following form:

If, which is denied, the matters alleged in para X [of the Statement of Claim] 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

<sup>160</sup> Ibid 619 (Mason P). See also Ashley Tsacalos and Ramena Kako, 'Privilege against Self-Incrimination and Limited Defences under the *Uniform Civil Procedure Rules*' (2008) 5(5) *Civil Procedure News New South Wales* 50, 51.

<sup>161</sup> Spender, above n 19, 255. See also above nn 66–71 and accompanying text.

<sup>162</sup> Spender, above n 19, 255 fn 54, quoting *Macdonald* (2007) 73 NSWLR 612, 619. See above n 77 and accompanying text.

<sup>163</sup> *Macdonald* (2007) 73 NSWLR 612, 622 (Mason P). See also Tsacalos and Kako, above n 160, 51. Rather, ASIC submitted that the requirement to file a full pleading merely 'ensure[d] that the defendant [gave] timely notice of any positive case he proposes to advance whether by reliance upon evidence tendered by [ASIC], cross-examination of [ASIC's] witnesses, or (in due course) tendering evidence of his own': *Macdonald* (2007) 73 NSWLR 612, 622 (Mason P).

<sup>164</sup> *Macdonald* (2007) 73 NSWLR 612, 615 (Spigelman CJ).

<sup>165</sup> Ibid 626 (Giles JA).

<sup>166</sup> Ibid 625 (Mason P).

of his defence, the details whereof will be disclosed by amending this paragraph after the close of ASIC's case.<sup>167</sup>

Spigelman CJ, however, disagreed. His Honour considered that Mason P's suggested form of pleading did not satisfy the requirements of the *UCPR* and declared:

These rules require [Mr Macdonald] to make positive assertions of fact, and to provide particulars thereof, going well beyond simply an acceptance that: if, which is denied or not admitted, the facts and matters in the Statement of Claim should be accepted, etc. Indeed this is the very purpose of [rr 14.14(2)(a), (c)].

Mason P is of the view that a pleading and particulars should be ordered which identifies allegations in the Statement of Claim which, if established, would be relied upon by [Mr Macdonald] in its case under one of the exculpatory provisions. ...

On this basis r 14.14(2)(c) referring to facts *not* alleged in the pleading has no application. Similarly, I do not see how the obligation to give particulars 'necessary to enable (ASIC) to identify the [appellant's] case' within [r 15.1(1)] would apply. The scope of the pleading envisaged by Mason P appears to me to be confined to the 'surprise' factor in r 14.14(2)(a).<sup>168</sup>

Spigelman CJ concluded:

As presently advised, I do not see that there would be any practical significance to such a pleading. Notwithstanding the fact that the Court has, unusually, made orders with respect to case management of a trial, they remain interlocutory directions and can be amended by the judge managing the case or conducting the trial. If a matter of practical significance emerges this issue can be re-agitated.<sup>169</sup>

His Honour therefore dispensed with the requirements of *UCPR* rr 14.14 and 15.1(1) in relation to any matters that arise pursuant to the exculpatory provisions of the *Corporations Act*.<sup>170</sup>

All of the judges reserved the right of the defendant to file a further amended defence after ASIC had closed its case, although Mason P also recognised the possibility of ASIC having to split its case.<sup>171</sup>

### *C Consequences for ASIC in an Application for a Civil Penalty*

As a result of these case law developments, where diminished disclosure by the defendant means that ASIC in an application for a civil penalty may not know what matters will be raised in defence of the allegations but has to prepare its case to meet a high standard of proof (as was highlighted by Austin J in

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid* 618 (emphasis in original).

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.* The proposed order (at 618–19) was in these terms: 'With respect to the first defendant, the requirements of r 14.14 and r 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>171</sup> *Macdonald* (2007) 73 NSWLR 612, 619 (Spigelman CJ), 625 (Mason P), 626 (Giles JA).

*Australian Securities and Investments Commission v Rich*),<sup>172</sup> ASIC may be only marginally better off than it would be if it had to prove a criminal offence. Indeed, there are a number of cases besides the One.Tel case against Rich and Silbermann that illustrate that civil penalty actions that ASIC has chosen to commence have not turned out to be the swift and inexpensive enforcement option initially envisaged. One such case is that against the Australian Wheat Board ('AWB'),<sup>173</sup> where ASIC's primary case against Andrew Lindberg could be delayed until 2011, eight years after the fall of the Iraqi government.<sup>174</sup> Another is the unsuccessful civil penalty proceedings ASIC brought in March 2006 against investment banking giant Citigroup Global Markets Australia ('Citigroup').<sup>175</sup> According to an ASIC media release, ASIC's costs in the litigation against Citigroup amounted to close to \$1.5 million.<sup>176</sup>

<sup>172</sup> (2009) 236 FLR 1, 26–8. See above n 92 and accompanying text.

<sup>173</sup> As the author has previously observed:

In December 2007, ASIC commenced civil penalty proceedings against six former AWB employees, including former Managing Director, Andrew Lindberg, and former Chairman, Trevor Flugge, [alleging breaches of their duties] pertaining to the \$290 million rorting of the United Nations oil-for-food program by the wheat exporter. Those proceedings (with the exception of the civil penalty proceedings against Lindberg) have since been stayed until and unless ASIC, the Oil-for-Food Task Force or the [Commonwealth Director of Public Prosecutions] advise the defendants that no criminal proceedings will be instituted against them ...

Comino, 'The Challenge of Corporate Law Enforcement in Australia', above n 8, 248 fn 90, citing *Re AWB Ltd; Australian Securities and Investments Commission v Flugge [No 1]* (2008) 21 VR 252. See also ASIC, 'ASIC Launches Civil Penalty Action against Former Officers of AWB' (Media Release No 07-332, 19 December 2007); Commonwealth, Royal Commission into Certain Australian Companies in Relation to the UN Oil-for-Food Programme, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006) vol 1, lxiii (commonly known as the 'Cole Inquiry'). Civil penalty proceedings are not 'on the cards' for Lindberg: *Re AWB Ltd; Australian Securities and Investments Commission v Flugge [No 1]* (2008) 21 VR 252, 286 (Robson J).

<sup>174</sup> This has occurred because of the problems ASIC has experienced in one of two civil penalty cases against Lindberg. While ASIC launched its first case against Lindberg in December 2007 (see above n 173), it tried unsuccessfully early in 2009 to amend the case by adding new allegations relating to an AWB internal investigation called Project Rose, the so-called 'Tigris transaction' and AWB's responses to the United Nations' Volcker inquiry: *Re AWB Ltd; Australian Securities and Investments Commission v Lindberg [No 3]* [2009] VSC 209 (Unreported, Robson J, 28 May 2009) [42]. When ASIC subsequently lost its appeal to include the amendments (*Australian Securities and Investments Commission v Lindberg* [2009] VSCA 235 (Unreported, Maxwell P, Dodds-Streton and Mandie JJA, 9 October 2009) [10]–[11] (Maxwell P, Dodds-Streton and Mandie JJA)), it filed a second civil penalty case concentrating on the new allegations. However, ASIC suffered a major defeat on 9 December 2009 when Robson J of the Supreme Court of Victoria threw the second case out of court as an abuse of process: *Re AWB Ltd; Australian Securities and Investments Commission v Lindberg [No 10]* (2009) 76 ACSR 181, 185, 235. Robson J permanently stayed this second case, stating (at 184): 'If the second proceeding is not stayed, ASIC will have achieved by the second proceeding that which they could not achieve by amendment.' See also Patrick Durkin, 'ASIC Humiliated Again', *The Australian Financial Review* (Sydney), 10 December 2009, 5. It should be noted that the Victorian Court of Appeal has since allowed the appeal by ASIC against this decision: *Australian Securities and Investments Commission v Lindberg [No 2]* (2010) 265 ALR 517, 534–5 (Maxwell P, Buchanan and Weinberg JJA). See also ASIC, 'ASIC Successfully Appeals Permanent Stay on Second AWB Case' (Advisory No 10-29AD, 19 February 2010).

<sup>175</sup> *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd [No 4]* (2007) 160 FCR 35.

<sup>176</sup> ASIC, 'ASIC v Citigroup' (Media Release No 07-193, 17 July 2007).

While all of these defendants may not have contravened the *Corporations Act*, there is no doubt that ASIC's ability to prove a contravention has been significantly reduced by the onerous procedural standards imposed upon it. Moreover, it is clear that the courts, by treating civil penalty proceedings like criminal proceedings, are undermining Parliament's aim in introducing the civil penalty regime. In particular, they are weakening ASIC's ability to use civil penalties as an effective enforcement mechanism to deal with non-criminal contraventions of the corporations legislation.

#### D The Solution

If Parliament's objective in introducing the civil penalty regime is to be achieved, law reform is needed.<sup>177</sup> The author agrees with Spender that negotiating an effective civil penalty procedure on a case-by-case basis is problematic and carries the danger of 'lead[ing] to indeterminacy or default to criminal procedure',<sup>178</sup> as has been the experience to date. This occurs to some extent because 'it is endemic to the judicial power and function to be zealous about fair procedure', and '[z]ealousness about fair procedure has led to the development of a gold standard which belongs to the criminal law rather than the negotiated standard' which characterises civil proceedings.<sup>179</sup> Significantly, the Australian Law Reform Commission made a similar point: 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>180</sup>

Roman Tomasic, after quoting the author's views about the High Court's approach in the *Rich* case,<sup>181</sup> supported the view expressed by John Farrar 'that

<sup>177</sup> See also Spender, above n 19, 256. Other academics have also made calls for reform to develop a special procedure for civil penalties: see, eg, Rees, above n 61, 155 (who has called for either court rules or legislative intervention); Middleton, 'The Difficulties of Applying Civil Evidence and Procedure', above n 19, 509 (who has called for a uniform civil code for civil penalty proceedings under the *Corporations Act* and the *ASIC Act*, as discussed above in n 19). Calls for reform have not been confined to the academy. The Australian Law Reform Commission, which conducted an inquiry into civil and administrative penalties in the federal sphere, recommended that a regulatory contraventions statute should be passed to govern the law and procedure of non-criminal contraventions of federal law: Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) 24.

<sup>178</sup> Spender, above n 19, 257.

<sup>179</sup> *Ibid* 249.

<sup>180</sup> Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No 65 (2002) 556, quoted in *ibid* 257.

<sup>181</sup> Roman Tomasic, 'The Challenge of Corporate Law Enforcement: Future Directions for Corporations Law in Australia' (2006) 10 *University of Western Sydney Law Review* 1, 9, quoting Comino, 'High Court Relegates Strategic Regulation and Pyramidal Enforcement to Insignificance', above n 39, 67 ('by imposing heightened procedural protections in relation to civil penalties and treating civil penalty proceedings more like criminal proceedings, the case really undermines the ability of the civil penalty regime in Pt 9.4B to provide an effective method of corporate regulation').

the effect of these corporate law reforms [in part 9.4B] aimed at making corporate law less penal in nature<sup>182</sup> has been ‘more cosmetic and rhetorical than real’.<sup>183</sup> Tomasic further stated that:

This outcome is hardly surprising given the difficulties that appeal courts have had in grafting socio-legal theory [strategic regulation theory] onto traditional evidentiary rules that seek to protect the interests of litigants.<sup>184</sup>

The best solution thus seems to be for Parliament to enact a ‘new procedural road-map’<sup>185</sup> by way of a statute, code or court rules to govern the law and procedure of civil penalty proceedings. This map should apply not only to ASIC’s civil penalty proceedings but to those of all Australian regulatory agencies that have power to bring such proceedings.<sup>186</sup>

Importantly, this approach also recognises that our current map of the law, ‘a map as the law was perhaps 100 years ago, after the *Judicature Acts*, but before ... the explosion of legislation’,<sup>187</sup> which has created a whole range of statutory remedies, is limited.<sup>188</sup> Civil penalties are an example of the new statutory remedies developed by regulatory law that fit uneasily within the traditional civil–criminal procedural divide.<sup>189</sup>

It is not surprising, then, that Spender, in also calling for law reform in this area, states that ‘a paradigm shift is required which reconsiders the bifurcation of civil and criminal procedure to effectively accommodate regulatory law and statutory remedies.’<sup>190</sup> In support of this statement she relies on the work of academics who in recent times have challenged the rationale of the civil–criminal procedural divide.<sup>191</sup>

Perhaps the most interesting contribution to the scholarship in this field is made by Issachar Rozen-Zvi and Talia Fisher, who propose that the present procedural division along civil–criminal lines should be replaced ‘with a model that runs along two axes that are more compatible with the actual goals of our justice system’: the severity of the sanction or remedy and (the more controver-

<sup>182</sup> Tomasic, above n 181, 9.

<sup>183</sup> John Farrar, *Corporate Governance: Theories, Principles, and Practice* (2<sup>nd</sup> ed, 2005) 234, quoted in *ibid*.

<sup>184</sup> Tomasic, above n 181, 9.

<sup>185</sup> Spender, above n 19, 257.

<sup>186</sup> See *ibid*.

<sup>187</sup> Joachim Dietrich and Thomas Middleton, ‘Statutory Remedies and Equitable Remedies’ (2006) 28 *Australian Bar Review* 136, 169.

<sup>188</sup> See also Spender, above n 19, 257, where Spender discusses the rise of statutory remedies that has created what she describes as ‘a plethora of remedial choices, some of which may be accommodated into the traditional criminal–civil spectrum but others [of which] elude the categorisation.’

<sup>189</sup> See *ibid*.

<sup>190</sup> *Ibid* 258.

<sup>191</sup> *Ibid* 257, quoting Judith Resnik, ‘The Domain of Courts’ (1989) 137 *University of Pennsylvania Law Review* 2219, 2222; Issachar Rosen-Zvi and Talia Fisher, ‘Overcoming Procedural Boundaries’ (2008) 94 *Virginia Law Review* 79; Dietrich and Middleton, above n 187, 169. Other prominent scholars, including Bob Cover and Owen Fiss, have also questioned the distinction between ‘civil’ and ‘criminal’ procedure: see, eg, Robert M Cover and Owen M Fiss, *The Structure of Procedure* (1979) iii–iv.

sial axis) the balance of power between the parties.<sup>192</sup> They point out that the existing regime is said to respond to the reality of unequal adversaries, where the civil–criminal dichotomy is a proxy for the balance of power between the parties:

The pro-defendant bias inherent in the rules of criminal procedure is intended to remedy the system’s built-in imbalance of power in favor of the prosecution, which stems from the government’s greater access to resources, its ability to gather evidence even before the suspect knows that an investigation is under way, and its sophisticated investigative and prosecutorial apparatuses. The enhanced criminal procedural safeguards, including the beyond a reasonable doubt standard of proof, are designed to restore the balance of power between the parties and to place them on equal footing. In the civil sphere, on the other hand, there is an assumption of structural equality in power and resources between the parties. This is reflected in the supposed neutrality of civil procedure, including its preponderance of the evidence standard of proof, which favors neither defendant nor plaintiff.<sup>193</sup>

Rosen-Zvi and Fisher, however, believe that the existing ‘civil–criminal divide is a poor and inadequate proxy for this balance of power’,<sup>194</sup> since it ignores many situations where structural imbalances exist in the civil sphere as well as many instances of power symmetry between the prosecution and defence in the criminal arena:

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 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, incapacitation, and retribution.<sup>195</sup>

Certainly, in Australia, well-resourced defendants have made it difficult for ASIC and its predecessor, the NCSC, to successfully bring criminal cases against them.<sup>196</sup> Assisted by the courts imposing criminal procedural protections in civil penalty litigation, well-resourced defendants have also made ASIC’s task in these proceedings much harder, as demonstrated by the delays and challenges that characterised its civil penalty proceedings against Rich and Silberman in the One.Tel case.

<sup>192</sup> Rosen-Zvi and Fisher, above n 191, 84; see generally at 133–55.

<sup>193</sup> *Ibid* 135.

<sup>194</sup> *Ibid*.

<sup>195</sup> *Ibid* 136 (citations omitted).

<sup>196</sup> Even in the HIH case, where ASIC has enjoyed the most success. It successfully prosecuted 10 former senior executives and directors of HIH Insurance and associated entities, with 6 of them serving time in jail: Alex Boxsell, ‘Closure on HIH Chase’, *The Weekend Australian Financial Review* (Sydney), 22–23 November 2008, 10. Moreover, ASIC’s HIH taskforce received \$30 million in funding and, at its peak, numbered 50 people, which shows how expensive and resource-intensive prosecutions can be.

The model put forward by Rozen-Zvi and Fisher proposes that the power of the party presently enjoying a built-in advantage in litigation, whether that be in criminal or civil proceedings, would be reduced.<sup>197</sup> Even though this model might be hard to operationalise, with a number of practical difficulties confronting Parliament if it were to adopt this approach, the author agrees that it is a useful starting point for the paradigm shift proposed by Spender, which may be a necessary prerequisite to achieving law reform in this area.<sup>198</sup> Those difficulties include how the relative power of each party is to be measured, with the author arguing for a scale of procedural protections being adopted according to the power of defendants so that those directors who can afford a stronger legal team would have fewer protections available to them.

#### IV CONCLUSION

Law reform is crucial if ASIC is to be an effective regulator, because, as this article has demonstrated, despite Parliament arming ASIC with the civil penalty structure since 1993, ASIC has been hampered in its regulatory efforts by the failure of that structure to provide it with a solid foundation for its work. The solution suggested by the author is for Parliament to introduce some sort of 'new procedural road-map'<sup>199</sup> to apply to all civil penalty proceedings. In that way, ASIC should be able to be a more effective regulator of the corporations legislation by being given the opportunity to properly implement Parliament's aim and use civil penalties to deal with corporate misconduct in most cases.

<sup>197</sup> Rosen-Zvi and Fisher, above n 191, 136.

<sup>198</sup> See Spender, above n 19, 258.

<sup>199</sup> *Ibid* 257.