Foreword

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This is a most timely and valuable publication. Civil penalties play an increasingly important role in securing regulatory compliance. They have been described as part of a framework of responsive regulation. Responsive regulation is that which is available to a regulatory agency which has a range of enforcement options subject to different motivational factors. On one model, civil penalties take their place in an "enforcement pyramid" with measures of increasing severity proportional to the nature of the contravention. They may range from persuasion, formal warning, civil monetary or other penalty, criminal fines and non-custodial orders for individuals and ultimately incarceration for individuals and permanent licence cancellation or deregistration for bodies corporate at the apex of the pyramid.[1]

The utility of non-criminal penalties as a tool for securing regulatory compliance is obvious enough. Civil penalties comprise pecuniary penalties, but may be connected with other statutory remedies including compensation orders, prohibitory injunctions, mandatory compliance training, corrective advertising and public acknowledgment of contraventions. The legal processes necessary to establish liability for a civil penalty require proof of contravention on the balance of probability albeit *Briginshaw v Briginshaw*[2] may have a part to play in determining the level of satisfaction required where contravening conduct could also be characterised as criminal. The proceedings do not require a judge and jury. Criminal contraventions of Commonwealth regulatory law triable on indictment require not only to be heard by a jury but require a unanimous verdict by the jury.[3]

Criminal penalties are informed by purposive elements of particular and general deterrence and by retribution. In *Australian Building and Construction Commissioner v Pattinson* (***Pattinson***)[4] the High Court was concerned with the imposition of pecuniary penalties under the *Fair Work Act 2009* (Cth) (***Fair Work Act***). The case involved alleged misrepresentations by a CFMEU officer made to employees at their place of work that in order to perform the work they were required to become a member of an industrial association. The contraventions were admitted and pecuniary penalties imposed on the officer and the Union. The Full Court of the Federal Court set aside the penalties imposed by the primary judge and substituted lesser penalties. The High Court allowed an appeal against the Full Federal Court's decision, which was said to be constrained by a "notion of proportionality" and by the proposition that the statutory maximum

1 I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) cited in M Welsh, "Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice" (2009) 33 *Melbourne University Law Review* 908, 910–11.

2 *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336.

3 *Alqudsi v The Queen* [2016] HCA 24; 258 CLR 203.

4 *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 96 ALJR 426.

civil penalty provided a yardstick according to which the maximum could be imposed only in a case involving the worst category of contravening conduct. Six of the Judges stated that under the civil penalty regime, the purpose of a civil penalty was primarily, if not solely, the promotion of the public interest in compliance with the provisions of the *Fair Work Act* by the deterrence of further contraventions of the *Fair Work Act*. The Full Court had erred in drawing from the criminal law the proposition that a penalty must be proportionate to the seriousness of the conduct that constituted the contravention. There was no known place for a "notion of proportionality" in the sense in which the Full Court had used that term in a civil penalty regime. Justice Edelman in dissent described the approach of the Full Court of the Federal Court as following the long-standing and basic principle of justice that focusses upon just desert – that penalty which, in justice, is no more than is deserved. The Full Court was correct to reduce the penalty imposed upon the officer, Mr Pattinson. Further, Edelman J held that civil penalties usually require an application of the same notions of proportionality as in the criminal law.

The joint judgment and the dissenting judgment threw up important questions of principle relating to the character and purpose of civil penalties. Those questions and much more are explored in this collection of high-quality essays by highly qualified writers.

In Chapter 1, "The Purpose of Civil Penalties" by Tim Begbie KC, the reader is taken down two historic roads – for which read lines of cases – enunciating divergent rationales for civil penalties which inform the approach to their quantification and content. The Chapter is introduced by a quotation from Robert Frost's 'The Road Not Taken'. A question about the purpose of a civil penalty attracted conflicting answers from the outset until, as the author observes, "[i]n due course a clear fork was reached, demanding a choice between two possible roads". The clear fork was the *Agreed Penalties Case*[5] which confirmed that deterrence is the purpose of civil penalties. The Chapter ends with the observation that the existential crisis for civil penalty travellers is over: "[t]hey can now turn from the long-trodden paths of criminal sentencing, and strike out with confidence on the new(ish) road to deterrence." Two enigmatic lines from Frost follow.

In Chapter 2, Justice Robert Bromwich and Anna Holtby wrestle with the application of the process of "instinctive synthesis" developed in the context of criminal law sentencing, to the determination of civil penalties. Instinctive synthesis was described by McHugh J in *Markarian v The Queen*:

> By instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.[6]

Bromwich and Holtby, with some justification, describe instinctive synthesis as a "black box". Their stated aim is to identify its nature and what it may be becoming. Some

5 *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 (***Agreed Penalties Case***).

6 [2005] HCA 25; 228 CLR 357 at 377–8 [51].

observations in the Full Court of the Federal Court and in the High Court's *Agreed Penalties Case* could mean that instinctive synthesis is not necessarily indispensable to the determination of civil penalties. The identification, in *Pattinson*, of deterrence as the overarching purpose of civil penalties is said to inform how instinctive synthesis should be exercised in the civil penalty context. Most of the inputs to the assessment process would be confined to those relevant directly or indirectly to deterrence. Retribution would not have any part to play. However, the relevant penalty regime required the Court in that case to impose a penalty proportionate in the sense of being deterrent without oppressive severity. The authors also discuss regulator submissions regarding available penalties and the appropriateness of agreed penalties. While concluding that the role for instinctive synthesis is not obligatory in the civil penalty context, the reasons for it being mandatory in criminal sentencing identify its value in civil penalty imposition. The authors conclude that "the black box of instinctive synthesis continues to have relevance as a tool which assists courts to manage many competing considerations in making civil penalty quantum determinations".

Tim Game SC and Surya Palaniappan in Chapter 3 discuss "Proportionality by Another Name in the Imposition of Civil Penalties". They pointed to the role of proportionality as a limiting principle, derived from *Veen (No 2)*.[7] They refer to the High Court's holding in *Pattinson* that proportionality as the Full Federal Court had described it, had no role to play in the imposition of civil penalties. They accept, however, that the High Court did not altogether eschew proportionality.

They seek to identify what they call "significant, potentially unattractive implications which may flow, if divergent fundamental principles are to be applied as between criminal law and civil penalty sanctions for the same or similar conduct".

There follows a discussion of proportionality in criminal cases and in civil penalty and white-collar criminal cases. Observations are made about the attractions of civil penalty over criminal prosecution. From a regulator's point of view the former involves application of a lower standard of proof, the absence of fault elements, a requirement to penalise without regard to proportionality where general deterrence is the sole object and a regime in which regulators are not inhibited from urging a specific penalty on the court.

Justice Michael O'Bryan and Alice Lloyd in Chapter 4 write about "Agreed Penalties and the Court's Discretion". They point to the significant public policy benefits involved in promoting predictability of outcomes in civil penalty proceedings and incentivising the settlement of future proceedings. The Chapter describes "the halting path to judicial acceptance of the agreed penalty principle", the content and character of that principle, and its implications for the discretion afforded to the courts to award an appropriate penalty responding to the circumstances of a particular case. The authors rightly say that the principle does not embody a legal rule that must rigidly be followed. It constitutes judicial guidance with respect to the exercise of the court's discretion to impose a civil penalty appropriate in the circumstances of the case. It establishes public policy considerations discussed in the *Agreed Penalties Case* as relevant matters to be taken into account in determining the appropriate penalty. The authors contend that the receipt and (if appropriate) acceptance of an agreed penalty is "consistent with principle"

7 *Veen v The Queen (No 2)* [1988] HCA 14; 164 CLR 465.

and "highly desirable in practice".[8] Decisions in the Federal Court applying the principle are discussed, including the recent decision in *Australian Competition and Consumer Commission v Uber BV*.[9] There the Court determined that the parties had provided an insufficient foundation for the imposition of the penalties which they jointly sought.

In Chapter 5, Justin Gleeson SC and Kunal Sharma write about "Course of Conduct and Totality in Civil Penalties". Although the law of civil penalties forms part of civil law, it entails the imposition of punishment for contraventions of legal norms. It therefore attracts parallels with the criminal law. It tends to appropriate some criminal law solutions to particular problems. They discuss "course of conduct" and "totality considerations" which are deployed in the criminal law to ensure that the overall sentence does not exceed what is just and appropriate. The case law reveals scope for differential approaches and are yet to be settled taxonomy of, and principled underpinning for, such approaches. The case law has disclosed different approaches in which these considerations have been applied. The authors express the view, following *Pattinson*, that they would regard it as still open to a judge to adopt a process adapted to the circumstances of the case, including reference to a course or courses of conduct as needed and resort to totality as a check on the aggregate penalty. Alternatively, the court might start with an aggregate maximum penalty and move to fix a single penalty having regard to course of conduct and totality in the process of instinctive synthesis. The authors caution that the court must keep a firm eye on the objective of imposing civil penalties – that an appropriate penalty is fixed with a view to achieving deterrence, specific and general, but avoiding oppressive severity. Course of conduct and totality remain available as analytical tools.

Chapter 6, written by Professor Pamela Hanrahan, deals with "Regulators' Enforcement Discretions and Civil Penalties". The Chapter is concerned with why and how regulators select civil penalty proceedings over other possible actions from their regulatory toolkit. The decision to commence civil penalty proceedings is very significant for the individual regulator and for the defendant. The civil penalties regime is not a simpler lower stakes enforcement pathway. Potential maximum civil pecuniary penalties can exceed $50 million for corporate defendants and even if pecuniary penalties sought are low, the cost and duration of proceedings and uninsurable financial risks can be "immense".

Professor Hanrahan points out that the regulator travels a narrow path between flanking sensitivities in choosing civil penalty proceedings over possible responses to contravention. On one flank, it may be criticised for sanctioning people and firms who are "really criminals" in a non-punitive way. On the other flank where the contravention is less culpable, people and firms might be seen as dragged into enforcement proceedings instigated by the state and exposing them to significant penalties that do not afford all the rights and privileges enshrined in the criminal law. As she observes:

> While the choice to instigate and maintain civil penalty proceedings remains in the hands of individual regulators rather than an independent prosecution authority, it is important that they make the choice carefully and responsibly, and that the way they make it is meaningfully scrutinised.

8 Citing the *Agreed Penalties Case* [2015] HCA 46; 248 CLR 484 at [58].

9 [2022] FCA 1466.

Sarida Derrington plunges into the challenging area of accessorial liability and its limits under civil penalty regimes. She begins with the proposition that to be held responsible for a primary wrong committed by another, an alleged accessory must have engaged in some conduct and had requisite knowledge sufficient for legal liability for the primary wrong. She discusses principles evolved over recent years about the knowledge requirement which has raised many of the most difficult questions in this area – including a test based on knowledge of "essential matters" constituting a contravention. The actual knowledge requirement for accessorial liability is discussed in the context of award provisions under the *Fair Work Act*, financial product disclosure requirements under the *Corporations Act 2001* (Cth) (***Corporations Act***) and the prohibition against misleading or deceptive conduct under the *Australian Consumer Law* and the *Australian Securities and Investments Commission Act 2001* (Cth). The authorities in all three contexts demonstrate what the author calls an ongoing push and pull between wider and narrower approaches to the "essential matters" test. The author argues for a more unified coherent approach than presently exists. She encourages engagement with the values, assumptions and policy belief underlying the case law concerning accessorial liability. Absent that engagement, those values, assumptions and policy beliefs will remain influential but undiscussed and untested.

Dr Vicky Comino in Chapter 8 discusses "Civil Penalties, Company Directors and Penalty Privilege". She contends that ideally parliament should introduce a "new procedural roadmap" to resolve evidential and procedural impediments facing the use of civil penalties. At the very least she calls for abrogation of the penalty privilege in cases where ASIC is seeking pecuniary penalties. She contends that serious consideration should be given to clarification of the burden of proof in civil penalty cases, including abolishing the application of the *Briginshaw* principle. Absent legislative reform there is a risk of continued uncertainty or default to criminal process values. There is discussion of the purpose of civil penalties in the light of the *Agreed Penalties Case* and *Pattinson*. The imposition of penalties on a defendant may have serious consequences enhanced by the increases in penalties available under the *Corporations Act* since 2019. These may have the practical effect of being punitive. Penalty privilege is characterised as a procedural rule contrasted with the privilege against self-incrimination, which is a "substantive common law right". The two privileges are often conflated. The case law is discussed and the conclusion reached that legislative intervention to remove the penalty privilege is needed.

In Chapter 9, Dr Katharine Kemp and Melissa Camp discuss "Pecuniary Penalties under the Privacy Act: Damage and Deterrence". In that Chapter they describe the introduction of civil penalties under the *Privacy Act 2012* (Cth) (***Privacy Act***), statutory requirements for an "appropriate penalty" and recent developments leading to reforms in 2022 greatly increasing maximum penalties for privacy contraventions. They analyse the requirement that the court can take into account "loss or damage suffered" as the result of a contravention when calculated for penalties. They explore "course of conduct" and the totality principle in this context. The nature of privacy harms, including physical harm, economic loss and wasted resources, injury to feelings and humiliation, autonomy harms, increased susceptibility to damage and consequences for innocent third parties are discussed. The role of the maximum pecuniary penalty

is also discussed – for corporate entities, an amount not exceeding the greater of $50 million, three times the value of the benefit obtained by the body corporate from the contravening conduct, or if that cannot be determined, 30% of the adjusted turnover of the body corporate during the breach turnover period.

They predict that the imposition of pecuniary penalties under the *Privacy Act* is likely to be a rarity for the near future given the Commissioner's limited history of enforcement and limited resources.

Dr Ruth Higgins SC writes under the Chapter entitled "Deterring *Homo Economicus:* Civil Penalties in Competition Law". The deterrence principle informing the imposition of civil penalties needs a laboratory in which to test its efficacy. Competition law is said to supply an apt laboratory. Dr Higgins considers what it means to say that deterrence is the sole object of civil penalties under the *Competition and Consumer Act 2010* (Cth) (***CCA***) and how effectively the structure and enforcement of the statutory regime serves that object.

She refers to a residual disquiet about the deterrence jurisprudence reflected in Edelman J's judgment in *Pattinson* and also in some comments of the plurality acknowledging what she calls "an etiolated role for retributivist notions". Not everybody is a rational agent seeking to optimise welfare through the maximisation of profit. Other incentives for conduct may include reputational enhancement and the push for power within a field of rivalry. The regulatory scheme of the *CCA* is outlined, including the penalty structure, which aligns with that in the *Privacy Act* discussed in an earlier chapter. Deterrence and retributivist theories are discussed, along with the *Agreed Penalties Case* and the *Pattinson* decision. "Instinctive synthesis" in a modified form is said to have been applied consistently in determining civil penalties. Residual disquiet about deterrence may be reflected in the use of the term "principal object" in the *Agreed Penalties Case*. A principal object implies the possibility of a secondary object. The judgment of Edelman J in *Pattinson* is analysed and the multifaceted task of deterring homo economicus. In the last sentence Dr Higgins describes "deterrence" as a continuing conversation between the state and aspirant-rational actors about ends, means, incentives and decisions.

In Chapter 11, Deb Mayall discusses "Civil Penalties and Other Civil Remedies in the Consumer Law Context". The author focusses upon the *Australian Consumer Law* and the evolution of civil penalties since its commencement on 1 January 2011. At that time, the maximum civil penalty for breaches of most of the provisions to which the penalty provision, s 224, applied was $1.1 million for bodies corporate and $220,000 for individuals. Now the maximum penalty for individuals is $2.5 million and, as noted before, for bodies corporate the maximum is at least $50 million. The maximum penalties for breaches of the *Australian Consumer Law* are aligned with those for contravention of the competition provisions of the *CCA*.

There is a discussion of remedies other than pecuniary penalties that may be applied by the court for contraventions of the *Australian Consumer Law*. This is an important point. Available orders include declarations, injunctions, adverse publicity orders, non-punitive community service orders, damages, compensatory orders, consumer redress orders and disqualification orders. These orders may be relevant to deterrence to the extent that they promote compliance with the law, but they also

serve a range of other purposes. These purposes are said to vary across denunciation, prevention and compensation.

There is a discussion of s 227 of the *Australian Consumer Law* which requires the court to give preference to an order for compensation where, although it would be appropriate that the defendant pay both a civil penalty and compensation, the defendant does not have sufficient financial resources to pay both. Discussion of that provision in Federal Court decisions is canvassed.

By way of final observation, the author observes that the ACCC will need to be cognisant of the potential effect that orders other than non-pecuniary penalty orders may have on the amount of penalty actually imposed. It is an interesting interaction.

In Chapter 12, Nicholas Simoes da Silva and Matt Corrigan discuss "Civil Penalties in the Financial Services Sector". The Chapter reflects upon the distinction between criminal law and civil regulation. It draws on the first complete historical database of civil penalties in Australian financial services legislation to chart their changed role in financial services laws. The ad hoc manner in which the law has developed has meant that it has evolved without a thorough and nuanced consideration of the principled use of civil penalties in financial services regulation. Trends are identified which undermine a principled use of civil penalties – over-reliance on deterrence, over-criminalisation, the emergence of dual- and triple-track regulation and the failure to differentiate the different penalties within and across financial services laws. The authors argue for changed regulatory approaches and reforms to the penalty architecture to ensure more principled and effective use of civil penalties. There is an interesting historical account of the emergence of financial services over several decades. Hoped for outcomes of civil penalties by way of more flexible penalty architecture, and quicker and easier enforcement outcomes have been called into question by research and reality over the past 20 years. The criminal law remains dominant on the books and in practice. The Chapter argues for a more thoughtful approach to civil penalties, engaging with their potential role in effective responsive regulation.

In Chapter 13, Anna Reynolds, Tom Webb, Oscar Luke and Matt Floro discuss "Civil Penalties in Federal Environmental Regulation". Their Chapter examines the civil penalty regime under the *Environment, Protection and Biodiversity Conservation Act 1999* (Cth) (***EPBC Act***) and how jurisdictions across Australia give effect (or otherwise) to civil penalties to adequately deter contravention of relevant laws. The relevant Commonwealth *EPBC Act* is discussed and the civil penalty regime under that Act laid out. There are particular difficulties and costs associated with the detection, surveillance and investigation of environmental contraventions. A major factor is the size of the Australian land mass and seas with dispersed populations and developments. That substantial hurdle has supported the proposition that specific and general deterrence is of particular importance when deciding of the quantum of penalty.[10]

The civil penalty regime is said to be under-utilised, reducing its capacity to credibly deter would-be wrongdoers. That under-utilisation is demonstrated and discussed. Reviews of the legislation by Dr Alan Hawke and by Professor Graeme Samuel AC are cited. The value of independence in environmental regulation is emphasised. Civil penalty provisions are said to provide a key benefit in diminishing

10 Citing *Minister for the Environment v Hansen* [2016] FCA 1146 at [57] (Bromwich J).

the burden of evidence collection in a field fraught with enforcement difficulties. The authors recommend that the Commonwealth Parliament consider strengthening the severity of the penalties under the *EPBC Act* and ensure that the Commonwealth EPA is sufficiently independent, well-resourced and institutionally robust to enforce civil penalties without fear or favour.

Philip Boncardo and Ben Bromberg in Chapter 14 discuss "Civil Penalties in Industrial Law". They describe *Pattinson* as heralding a new era for civil penalty regulation in industrial law. Real questions are said to linger on whether the sole purpose of civil penalties is deterrence or whether other objects or purposes may have operation. There is an overview of industrial regulation and an overview of civil penalty provisions in current industrial laws. The authors discuss the implications of *Pattinson* for the imposition of civil penalties in industrial law and the emphasis of that decision on deterrence. Its practical consequences are said to have been illuminated by recent decisions in which penalties imposed on a contravenor have been significantly increased on appeal or remittal.

In conclusion the authors observe that the analysis of the reasons for deterrence being the principal or sole purpose in imposing a civil penalty did not extend beyond the proposition advanced by the plurality in *Pattinson*. Whether *Pattinson* will spur legislative reform instilling a principle of proportionality remains to be seen. The present understanding and application of principle in civil penalty litigation is said to owe a great deal to industrial law which will continue to be at the cutting edge of development in this area.

The last Chapter, Chapter 15 by Glenn Owbridge PSM and Nicholas Felstead, is entitled "The Next Chapter: Civil Penalties as a Tool to Improve Political Conduct in Australia". The authors make the observation that civil penalty provisions are designed to set normative standards and alter behaviours. They do not require moral wrongdoing and may be contravened even when the conduct in question is altruistic in intent. In this Chapter the authors look to the future and how civil penalties might and ought to be used to address new or emerging issues in the Australian community – in particular, truth in political communication and issues relating to inappropriate influence on the political process.

The authors propose consideration of a civil penalties regime that would reach beyond "corrupt conduct" as defined in s 8 of the *National Anti-Corruption Act 2022* (Cth). Their Chapter is intended to spark debate as they discuss the need to better govern those who would govern us. They consider constitutional and other constraints demarcating available regulatory options. There is a discussion of truth in political communication and existing models for regulating disinformation. They raise questions about identification of the content, subject to prohibition, targeted propagators, temporal scope and who is to enforce the law. Then there is the question what is the penalty? The authors accept that a civil penalty must act as a deterrent. They examine whether such laws would impermissibly burden the implied freedom of political communication. This is described as the elephant in the room. Criteria for the application of that implied freedom are set out. Inappropriate influence on government and political parties is discussed in the context of donations and the offer of benefits, anonymous donations and the role of lobbyists. In conclusion the authors make a case for statutory proposals

which they consider would strengthen Australian democracy. They submit that a civil penalty regime is the best way to establish and preserve the important norms and indices of political conduct.

As appears from the above review, this book offers a very rich multifaceted account of the place of civil penalty regimes in our democracy, the definition of their proper purpose, the advantages and disadvantages of their application, their interaction with other non-criminal sanctions or remedies and the potential for their future use to strengthen democratic processes. The editors and their contributors are to be congratulated on a publication which rewards reading by law-makers, policy-makers, regulators, judges and legal practitioners alike.