Book Review

Editor: Angelina Gomez

THE LAW OF CIVIL PENALTIES

The Law of Civil Penalties, edited by Deniz Kayis, Eloise Gluer and Samuel Walpole, Federation Press, 2023, 352 pages: ISBN 9781760024611. Hardcover $180.00

I review this book not as a researcher with longstanding Australian corporate law expertise, nor as an Australian legal practitioner. Instead, for over 15 years before I returned to Australia in 2022, my career was spent in Hong Kong as a financial regulatory, white collar crime and commercial litigation lawyer. It is a jurisdiction where civil penalties as understood and litigated in Australia could run into legal difficulties. Unlike Australia, Hong Kong has specific human rights legislation which require "criminal" proceedings to be subject to certain fundamental rights.[1] On this basis, at least for natural person defendants, pecuniary penalties with a deterrent purpose have, save for in disciplinary contexts covering limited groups of persons such as professions, been held (by Sir Anthony Mason, sitting as a Hong Kong judge) as "criminal" in nature.[2] And where pecuniary penalties are imposed in a sector-based disciplinary setting, they are calculated on a disaggregated "per infraction" basis, with the totality principle applied in ways which do not appear significantly to reduce the overall penalty (if at all).[3]

Against this background, I am fascinated by how civil penalties are applied and litigated in Australia. My first essay for my Master of Laws studies in 2023 was for the subject "White Collar Crime", in which I suggested that Australia should either re-think its forms of civil penalties due to human rights concerns, or allow it to be deployed freely without being encumbered by human rights and criminal law-related niceties. For the purpose of that essay, *The Law of Civil Penalties* came too late: it would have been an extremely useful reference back then. Nonetheless, given the proliferation of civil penalties into multiple areas of Australian law, and in particular corporate and financial law in which my interests lie, reading the book for the purposes of reviewing it gave me an opportunity to learn more about civil penalties. Further, the book's importance is clear: its foreword was written by former High Court Chief Justice French, who in his time as a Federal Court judge devised criteria for the determination of civil penalties[4] that later became widely adopted as the "French factors".

Chapter 1 of the book opened with refreshing brevity: "[t]he purpose of civil penalties is deterrence. This is now so firmly established that a chapter on this topic could begin and end with that simple statement."[5] Adopting a similar though somewhat less brief approach to reviewing this book, one can say that the overarching theme of the book is how no matter how hard it tries to break free, civil penalties remains, to varying degrees depending on the aspect or field of regulation, entangled with criminal law. This was so apparent from most of the chapters that this review could begin and end with that simple statement.

But as was immediately acknowledged in Chapter 1 after its headline-grabbing opening, the "simple proposition" that civil penalties' purpose is deterrence still "bears a good deal of unpacking".[6] And so it is with any review of this book in unpacking civil penalties' various entanglements with criminal law and attempts to break free from it.

---

[1] *Hong Kong Bill of Rights Ordinance* (Hong Kong) cap 383, s 8, Arts 10–11.

[2] *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170.

[3] See, eg, *Moody's Investors Service Hong Kong Ltd v Securities and Futures Commission* (Hong Kong Securities and Futures Appeals Tribunal Application 4 of 2014, 31 March 2016) <https://www.sfat.gov.hk/files/AN-4-2014-Determination.pdf>; *HSBC Private Bank (Suisse) SA v Securities and Futures Commission* (Hong Kong Securities and Futures Appeals Tribunal Application 3 of 2015, 21 November 2017) <https://www.sfat.gov.hk/files/AN-3-2015-Determination.pdf>.

[4] *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076.

[5] T Begbie KC, "The Purpose of Civil Penalties (Or, 'The Road to Deterrence')" in D Kayis, E Gluer and S Walpole (eds), *The Law of Civil Penalties* (Federation Press, 2023) 2.

[6] Begbie, n 5, 2.

Part I of the book covers what is described as "Purpose, Methodology and Principles". On questions of purpose (Chapter 1, by Tim Begbie KC), proportionality in imposition of penalties (Chapter 3, by Tim Game SC and Surya Palaniappan), and the scope agreed penalties as between a regulator and the parties it seeks to penalise (Chapter 4, by Justice Michael O'Bryan and Alice Lloyd), courts have at least rhetorically sought a break from criminal law, only to find that whether as matters of policy or principle, criminal law keeps lurking. By contrast, when it comes to approaches and precepts in attaching or calculating the extent of liability such as the use of an instinctive synthesis approach in determining penalties (Chapter 2, by Justice Robert Bromwich and Anna Holtby), the application of course of conduct and totality principles as liability limiting mechanisms (Chapter 5, by Justin Gleeson SC and Kunal Sharma) and accessory liability (Chapter 7, by Sarida Derrington), courts have been more willing to adopt and adapt them from criminal law for use in the civil penalties context, albeit with varying degrees of confusion and uncertainty. Separately, Chapter 6 (by Professor Pamela Hanrahan) considers how principles derived from responsive regulation theory in regulators' choices between seeking criminal or civil penalties operate alongside, but also in conflict with, pragmatic realities of how criminal and civil penalties cases are run, as well as the governance structures surrounding regulators' making of such choices.

Part II of the book moves on to the use of civil penalties in specific areas of the law. They include the spheres of corporate misconduct (Chapter 8, by Dr Vicky Comino), privacy law (Chapter 9, by Dr Katharine Kemp and Melissa Camp), competition law (Chapter 10, by Dr Ruth CA Higgins SC), consumer law (Chapter 11, by Deb Mayall), financial services regulation (Chapter 12, by Nicholas Simoes da Silva and Matt Corrigan), environmental regulation (Chapter 13, by Anna Reynolds, Tom Webb, Oscar Luke and Matt Floro) and industrial law (Chapter 14, by Philip Boncardo and Ben Bromberg). In highly simplified terms, what emerges from these chapters seem to be that while all major areas of law to which civil penalties apply have to grapple with the entanglements with criminal law, those (such as consumer law and privacy law) where the application of civil penalties are relatively new and where the option of criminal prosecutions is less of a factor (or not a factor at all) tend to concern itself less with such entanglements. My personal favourite among the Part II chapters is Chapter 8 on corporate misconduct, which proposes the abolition of notions of penalty privilege in litigating civil penalties, as well as the application of quasi-criminal standards of proof in scenarios such as civil penalties cases thanks to *Briginshaw v Briginshaw*.[7] While Dr Comino may have so proposed for mostly pragmatic reasons related to the conduct of civil penalty litigation, I believe such changes would also assist in crystallising the "civil" nature of civil penalties in circumstances where, unlike Hong Kong, Australia does not have to grapple with human rights laws when using civil penalties as a tool.

Meanwhile, the singular Chapter 15 (by Glenn Owbridge PSM and Nicholas Felstead) which constitutes Part III of the book points to the popularity of civil penalties as a regulatory tool. Far from being daunted by the legal morass that was presented in the preceding fourteen chapters, Chapter 15 proposes an extension of the use of civil penalties to deter acts undermining our political system, such as the spread of disinformation and inappropriate influencing of government decisions.

By the standards of a technical legal text, *The Law of Civil Penalties* is a riveting read. Although the chapters were written by different authors, they form a coherent tale. It is one where civil penalties are akin to a stereotypical second-generation organised crime scion who wants to escape from the family trade (being, in the case of civil penalties, the tentacles of criminal law itself), only to find that not only is it not so easy to disentangle from it all, but that some parts of the family trade end up being quite to the scion's liking.

And just like any good organised crime novel, it leaves plenty of unsolved mysteries which may in time be sequel material (though in the case of this book, it is due more to the state of the law than any intentional appetite whetting by the authors and editors). For example, an "unsolved mystery" may emanate from the 2022 High Court ruling in *Australian Building and Construction Commissioner v Pattinson*.[8] It confirmed that the purpose of civil penalties is deterrence, that the penalty must not just be

[7] *Briginshaw v Briginshaw* (1938) 60 CLR 336.

[8] *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450.

constitute an acceptable cost of doing business, and that notions of proportionality in penalty setting do not apply save that the penalty must not be oppressive. This immediately raises questions. If a penalty is not oppressive in some way, then how is it not a mere cost of doing business? How does a penalty deter if there is no oppression?

The answers to these and many more questions on civil penalties await if the editors are open to producing a sequel (or, in academic speak, volume 2). If there is such a sequel, let's hope there is more interest from academic lawyers, who authored or co-authored three out of fifteen chapters in this book, the rest being written by practitioners of various stripes. An issue like civil penalties which draws out a combination of technical black letter legal questions, commercial and policy considerations, and human rights/ procedural fairness conundrums cries out for more interest from the legal academic world.

Kevin Yam

PhD Candidate, Melbourne Law School

Non-resident Senior Fellow, Georgetown University Center for Asian Law