Civil pecuniary penalties – fair or unfair?

Civil pecuniary penalties can be hefty and are being used increasingly in the major commercial statutes to drive compliance.

This trend has raised hard questions about the State pursuing criminal law goals without affording those involved the protections which are usual in the criminal context.

So a review by the Law Commission is timely.

Submissions on the Commission’s Issues Paper¹ are due by 15 February 2013.

Most civil pecuniary penalties are imposed in the securities market and competition spheres, and the sums at issue can be significant.

The highest maximum penalty for an individual is $1 million and for a body corporate, the greater of either $10 million, an amount based on the commercial gain resulting from the contravention, or 10% of turnover.

Inconsistency in application

One of the main issues identified by the Law Commission, echoing concerns expressed by the Legislation Advisory Committee, is that civil pecuniary penalty provisions are being included in legislation without any authoritative, principled guidance from ‘above’.

This has resulted in inconsistency both within and between statutes as to:

• whether civil pecuniary penalties are provided for and, if so

• the penalty levels and surrounding procedural rules and protections.
Crossing the ‘civil-criminal’ divide

The Law Commission describes civil pecuniary penalties as a ‘hybrid’ action in that they cross the traditional ‘civil-criminal’ divide – which sees the purpose of the criminal law as being to punish individuals for public wrongs, and the purpose of the civil law as being to compensate individuals for private wrongs.

The penalties cross this divide because they bring the State into civil proceedings with the aim of punishing the offender (rather than compensating the victim). The primary rationale for such punishment is to set an example and to discourage further breaches.

But, although they resemble criminal sanctions in notable respects (i.e. by being public and punitive in nature), civil pecuniary penalties do not afford defendants the same procedural protections enjoyed by the accused in a criminal trial.

This is despite the fact that:

- the sums involved can be significant, and in many cases much greater than the maximum financial penalties under the criminal law, and
- the reputational harm can be as great or almost as great as that caused by criminal sanction.

Differences in procedural protections

The criminal law has comprehensive procedural protections to safeguard an accused from abuses of State power. These include:

- proof ‘beyond reasonable doubt’
- strict rules of evidence
- the accused’s right to silence, and
- the presumption of innocence.

Criminal offences also generally require evidence that the accused was morally culpable, by having a certain ‘mental element’ in relation to the prohibited act or omission – such as knowledge or intent.

The civil law has far fewer protections. This is largely because civil disputes occur between relatively evenly-matched, private individuals, protecting their private interests. It follows that civil litigants only have to prove matters to the standard of ‘balance of probabilities’, they do not generally have to be morally culpable, and do not have the comprehensive procedural protections necessary to protect against abuses of State power.

Overview of the Issues Paper

The Issues Paper seeks feedback on:

- procedural and evidential rules
- standard and burden of proof
- privilege against self-exposure to a non-criminal penalty
- double-jeopardy
- intention and defences
- terminology and classification of civil pecuniary penalties
- imposition of civil pecuniary penalties by non-judicial bodies
- instigation of proceedings
- maximum penalties
- when to impose a civil pecuniary penalty and the level of that penalty
- appeals
- limitation periods for commencing proceedings
- whether the Law Commission should recommend guidance to policy makers, and
- whether a specific legislative framework for civil pecuniary penalties should be introduced.
Footnotes

If you would prefer to receive this newsletter by email, or if you would like to be removed from the mailing list, please send us an email at subscriptions@chapmantripp.com.

Every effort has been made to ensure accuracy in this newsletter. However, the items are necessarily generalised and readers are urged to seek specific advice on particular matters and not rely solely on this text.

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