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# CIVIL OR CRIMINAL - WHAT IS THE DIFFERENCE?

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In most legal systems, the administration of justice is organized on the basis of a broad distinction between civil and criminal process. Criminal process, typically although not exclusively, is initiated by the government or an agency of government, and is directed towards the punishment of an individual who is alleged to have contravened a rule of conduct for which such punishment has been made the sanction. In Australia, punishment might take the form of imprisonment perhaps for life, or perhaps even for an indefinite term, but usually for a term of months or years, or it may take the form of a non-custodial sentence perhaps involving a fine or other penalty. The primary, although not the exclusive, concern of criminal justice is to keep the peace. That is why violent crime is treated with particular severity. The most elementary

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* Chief Justice of Australia. I am grateful to my former Associate Greg O'Mahoney for his assistance in the preparation of this paper.

duty of government is to protect the lives and personal security of citizens. An armed robbery involving a modest sum of money might attract a heavier sentence than a fraud involving a much greater sum. Yet not all crimes involve overt breaches of the peace. A major drug offence might attract a sentence in a range similar to sentences for homicide. And not all breaches of the peace, or even offences against life, warrant severe retribution. Manslaughter might range in culpability from an offence that is little less than murder to an offence that is little greater than negligence. Civil process, typically although not exclusively, is initiated privately, and is directed towards the vindication of personal rights, usually through an award of damages for the breach of contractual, tortious, or other private obligations.

This broad distinction between criminal and civil process is reflected in practical differences in the administration of criminal and civil justice. Criminal process is accusatorial. The prosecutor must make out a case, and the accused may remain silent. In serious matters, trial is ordinarily by jury. In most parts of Australia, juries have now largely disappeared in the administration of civil justice. In criminal cases the standard of proof is higher than in civil cases. Allegations of crime must be established beyond reasonable doubt, and citizens have the benefit of a presumption of innocence. There is no corresponding presumption that a person has not broken a contract, or has not acted negligently. Civil process is structured as a contest between parties neither of whom has any superior claim to the protection of the law. Because the potential outcome of the criminal process is punishment for an offence

against public order, whereas the typical aim of civil process is vindication of private rights, the one is more demanding of the initiating party than the other. If the police charge a surgeon with the offence of negligently driving a motor car, the surgeon may be facing only a moderate fine, but the police will have to prove the negligence beyond reasonable doubt. If a patient accuses the surgeon of negligently conducting an operation, the surgeon, or the surgeon's insurers, may be facing a claim for huge damages, and for the surgeon the possible outcome might be humiliation and professional disgrace. Yet in such a case the negligence need only be proved on the balance of probabilities. There are many cases where the outcome of civil proceedings may be more serious for a defendant than the outcome of some kinds of criminal process. But the nature of the process is different. In a civil case a plaintiff is seeking a vindication of legal rights. The procedure is designed to accommodate, so far as possible, the legitimate interests of both parties. In a criminal case a citizen is charged with an offence. The power of the state is brought to bear against the citizen, and the outcome faced is conviction and punishment. In such a case the law provides that the accuser must assume heavier burdens, and the accused must be given the benefit of procedural and substantive protections defensive of human rights and dignity. Most legal systems recognise a qualitative difference between the prosecution of a citizen by the government for a crime, and the resolution of a dispute between two citizens as to their respective civil rights and obligations.

Even so, the distinction between civil and criminal cases has never been rigid, and the dividing line between them is becoming increasingly blurred.

Although my present concern is with judicial process, and the justice system, it may be noted in passing that governments in Australia are increasing the use of what are sometimes called administrative penalties. The procedure is not novel. So-called "on-the-spot" fines for minor traffic infringements have been customary for many years, and in many respects the system is convenient and efficient. Even more serious offences, such as breaches of revenue laws, have commonly been dealt with administratively. What has been seen in recent years, however, is an expanding policy of imposing fines and other penalties for a wide range of regulatory offences as a means of avoiding (in the interests of both the government and the alleged offenders) the cost and delay involved in the legal process. Persons who are subject to such penalties are normally given the option of contesting the allegation in court; but often the amount of the penalty is modest, and would be far outweighed by the cost of going to court. The issues raised by administrative penalties are beyond the scope of this paper, but such penalties are part of the wider context, and should not be overlooked.

Within the civil justice process, there is a long history of remedies with a dual nature. An example is to be found in statutory provisions which proscribe conduct of a certain kind, give a person injured by contravention a right to claim compensation, and provide for an award of

damages with a punitive as well as a compensatory element. The *Statute of Monopolies* of 1623 provided for the recovery of treble damages and double costs. The *Australian Industries Preservation Act* 1906 (Cth), the local counterpart of the Sherman Act of the United States, was early Australian legislation providing for an award of treble damages to a plaintiff who was damaged by anti-competitive behaviour.

So-called "customs prosecutions" in Australia have always been of a hybrid character. This subject was examined by the High Court in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*[1]. Proof has sometimes been facilitated by legislative provisions making an averment in a pleading or other initiating process prima facie evidence of the truth of its contents. The legislative device of claiming penalties by civil process, and in effect reversing the onus of proof, has been thought to be justified in exceptional cases where evidence of breach of the law is notoriously difficult to obtain. In brief, there is a long history of civil remedies being given a punitive content, and offences being established by predominantly civil procedure. As Hayne J observed in the case just mentioned[2], courts often identify a case as criminal or civil in essence, but announcements of a conclusion that a particular kind of case is essentially of one character or the other are usually unaccompanied by an account of the process by which the essence has been distilled.

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[1] (2003) 216 CLR 161.

[2] (2003) 216 CLR 161 at 205.206.

At the extremes, it may be easy to identify the difference. Criminal process aims to punish; civil process aims to compensate. But there is a large, and increasing, grey area in between. Statutes confer upon regulatory authorities, and upon courts, powers and discretions which result in a proliferation of apparently civil sanctions for offending conduct. Writing of the position in the United States in 1992, one author said[3]:

> "Punitive civil sanctions are rapidly expanding, affecting an increasingly large sector of society in cases brought by private parties as well as by the government. These sanctions are sometimes more severely punitive than the parallel criminal sanctions for the same conduct. Punitive civil sanctions are replacing a significant part of the criminal law in critical areas of law enforcement, particularly in white-collar ... prosecutions, because they carry tremendous punitive power. Furthermore, since they are not constrained by criminal procedure, imposing them is cheaper and more efficient than imposing criminal sanctions ... With more punishment meted out in civil proceedings, the features distinguishing civil from criminal law become less clear. As civil law becomes more punitive, serious doubt arises about whether conventional civil procedure is suited for an unconventional civil law."

Although the Supreme Court of the United States has stressed that, in deciding whether a particular civil sanction constitutes criminal punishment, it is the purpose of the sanction rather than the form of the proceedings that is determinative[4], it has been pointed out that "the line

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[3] K Mann "Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law" (1992) 101 (5) *Yale Law Journal* 1795, 1798.

[4] *United States v Halper* 49 US 435 (1989).

between punitive purpose and non-punitive purpose becomes faded when multiple objectives for enforcing the sanction exist."[5]

In Australia, competition regulation and environmental law have for many years provided examples of law enforcement through civil sanctions, sometimes invoked by agencies of government, and sometimes invoked by private citizens or corporations. The so-called consumer protection provisions of the Trade Practices Act, for example, are more commonly enforced at the suit of an alleged offender's competitors than at the suit of disgruntled consumers. Part 9 of the *Corporations Act* 2001 (Cth) is one of the best known examples of legislation providing for dual, or hybrid, procedures of enforcement. State criminal statutes have long included provisions governing various forms of misconduct by directors and other officers of corporations. Those provisions are not uncommonly enforced in ordinary criminal proceedings. The *Corporations Act* contains an elaborate set of provisions creating both criminal and civil sanctions for breaches of duties and other misconduct of officers of corporations. The aim was to provide regulators with more options and to facilitate oversight and regulation[6]. It seems unlikely, in practice, that civil sanctions are

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[5] L Kerrigan et al, "The Decriminalisation of Administrative Law Penalties: Civil Remedies, Alternatives, Policy and Constitutional Implications" (1993) 45 *Administrative Law Review* 367, 372.

[6] G Gilligan, H Bird and I Ramsay, "Civil Penalties and The Enforcement of Directors' Duties" (1999) 22 *UNSWLJ* 417; Australian Law Reform Commission Report 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, 2002, 77.

invoked only in cases where there is no allegation of conduct that could involve criminal culpability. On the contrary, many actions for civil penalties are based on allegations which, if true, and evidence which, if accepted, would sustain a criminal prosecution. Deciding which form of process to pursue is a matter of major public and private importance. Accepting that enforcement agencies are to be given a wider range of options, there are public policy issues involved in the selection of the desired option. One sanction provided by the legislation is disqualification from involvement in the management of a company. In *Rich v Australian Securities and Investments Commission*[7] the issue before the High Court was whether such a sanction involved a penalty or forfeiture for the purpose of the principles governing privilege in relation to discovery. That question was answered in the affirmative.

Competition legislation and environmental law also provide familiar examples of the use of civil process and civil penalties, often accompanied by entitlements to compensation on the part of persons injured by contravening conduct, in aid of the enforcement of laws that in another context would bare a criminal aspect.

One of the reasons advanced in argument in *Rich* for the view that the sanction did not involve a penalty or forfeiture was that the purpose of a disqualification order was said to be purely protective, that is to say,

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[7] (2004) 220 CLR 129.

protective of the community and the investing public. The distinction between punishment and protection is familiar in the area of disciplinary proceedings against professional people such as lawyers and doctors; but it is not clear-cut. In dealing with that argument, McHugh J made a close examination of the reasons for decisions given by judges in cases in which disqualification orders had been made. He demonstrated[8] that the factors which, in practice, are taken into account by judges imposing disqualification orders, and fixing the terms of such orders, are substantially the same as those taken into account in the ordinary criminal sentencing process, including retribution and general and personal deterrence. In one respect most forms of punishment aim, directly or indirectly, to protect the community. Retribution and deterrence ultimately aim to protect the public. The incapacitating effect of imprisonment on a dangerous offender serves a legitimate purpose going beyond considerations of just deserts, although the overriding requirement of proportionality between punishment and crime must be observed. The contention that the sole, or defining, purpose of disqualification from office is protective and not punitive did not withstand critical examination.

There are others who know better than I know what factors go into a decision to deal with corporate misfeasance by way of an application for civil penalties rather than by the pursuit of criminal sanctions. Some

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[8] (2004) 220 CLR 129 at 152-156.

of them may be here today. They would certainly include the Director of Public Prosecutions. Regulatory authorities have to ration their resources. Presumably, in seeking to satisfy the public that it is getting value for the regulatory dollar, they take account of the comparative likelihood of success. Whether there is thought to be greater scope for an agreed outcome in civil rather than criminal proceedings may also be a factor. It may be that, where there is an accusation of corporate wrongdoing, resort to criminal procedure raises the stakes to a level that destroys the prospect of any co-operation. Ultimately, however, decisions to take one course rather than the other may have to be justified to a critical public. Because such decisions are for the executive branch of government and not the judiciary, issues of transparency and accountability are ultimately dealt with by the political process. At the same time, judicial decisions may be affected, and judicial discretions may be enlivened, by such choices. Exactly how, and by whom, the choices are made is an important question.

Courts have techniques to deal with the requirements of individual justice in cases where allegations of serious breaches of the law come before them in the form of civil proceedings. Civil courts, ultimately, are in charge of their own procedures, and those procedures may be modified in the interests of justice. Thus, for example, a court may require a two-stage hearing, dealing first with the issue of liability, and later with the question of penalty, in order to enable a defendant who does not wish to give evidence at the first stage to give evidence at the second. This may reflect the accusatorial nature of a certain

proceeding. An example can be seen in the recent decision of the Court of Appeal of New South Wales in *Forge v ASIC*[9]. In Australia, what is sometimes called the *Briginshaw v Briginshaw*[10] requirement introduces an element of flexibility into the standard of proof. This requirement was developed in a quite different context, and its theoretical basis may be open to question, but it reflects a commonsense notion that, even in civil proceedings, the seriousness of an allegation may affect the level of proof required to engender a comfortable satisfaction in a tribunal of fact.

The problem of fixing an appropriate level of the civil penalty in a case where, on the same facts, it appears that if an offender had been prosecuted criminally a sentence of imprisonment would have been an appropriate penalty, was considered by Finkelstein J in *ASIC v Petsas*[11]. The judge eschewed any attempt to contrive some sort of artificial equivalence. In working out the level of a fine he applied orthodox sentencing considerations. The recent case of *ASIC v Vizard*[12] confronted the same judge with the interesting question of the approach to be adopted where a particular penalty is jointly recommended by the parties.

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**9** (2004) 213 ALR 574 cf *Hall v NSW Trotting Club Ltd* [1977] 1 NSWLR 378; *Malone v Marr* [1981] 2 NSWLR 894.

**10** (1938) 60 CLR 336.

**11** (2005) 23 ACLC 269; [2005] FCA 88.

**12** (2005) 219 ALR 714.

What is sometimes called plea bargaining raises sensitive issues in the context of criminal justice, especially when there are victims of crime observing the procedure. Whether the same sensitivity exists, or ought to exist, in proceedings for civil penalties may be a matter for discussion.

Administrative issues, familiar in both corporate and competition regulation, relating to leniency or amnesty policies designed to encourage what is sometimes called self-reporting also raise interesting questions. They are unlikely to be of direct relevance to the judicial function, but presumably they are of major importance to legal practitioners advising their clients. The Federal Treasurer recently reminded business people involved in anti-competitive arrangements of the importance of being the first to visit the regulator, and the danger of being the second.

In the case of most crimes, and in the case of some forms of conduct that attract civil penalties, it is possible to identify a victim. Unlike some civil law systems, common law criminal procedure does not make an injured victim claiming compensation a party to the proceedings. One of the most notable changes in the administration of criminal justice in recent years has been a growing awareness of a need to take account of the impact of offences on victims; in some jurisdictions provision is made for evidence of victim impact to play a formal role in sentencing proceedings. Some jurisdictions have legislated to provide for state-funded compensation of victims of crime,

usually in fairly modest amounts. Most perpetrators of offences that come before the criminal courts are unlikely to be in a financial position to meet a claim for damages, especially if they are facing a prison sentence. The emphasis on punishment, rather than compensation, which distinguishes criminal justice has a practical aspect. On the other hand, conduct which contravenes corporate, or competition, or environmental regulation, which may sometimes cause identifiable and readily provable harm to victims, is often engaged in by individuals or corporations of substantial means. Compensation of victims may be a realistic possibility. A question of public policy may then arise. Should the law, either in its substance or its practical administration, emphasise the objective of compensation or punishment? There may be conflicting interests in play.

The imposition of civil penalties and the making of orders disqualifying people from holding offices or participating in corporate management may have a retributive and deterrent purpose, of a kind familiar in ordinary criminal punishment. In some cases, a regulatory regime providing for such remedies might exist alongside a statute providing for frankly criminal sanctions and alongside common law or statutory rights for victims to claim damages. It is not unusual for different government agencies to be involved in making decisions about what kind of process to invoke, and, of course, claims for damages will often be brought by private litigants, or by persons with group responsibilities, such as a liquidator of an insolvent corporation. Class actions are an alternative possibility in some cases. An officer of a failed

corporation might find that he or she is facing civil or criminal litigation brought by a number of different adversaries acting in a number of different interests; victims of the corporate failure may or may not find themselves represented in such litigation. Whether there is need for greater co-ordination in the pursuit of the law's various objectives may be a question for consideration.

It is beyond the scope of this paper, with its emphasis on penalties, to consider in detail the related and important issue of standing to commence proceedings seeking remedies for breach of regulatory provisions. Environmental legislation sometimes provides for interested or concerned citizens to sue. In the United States, such proceedings are sometimes called "citizen suits". Regulatory authorities, with limited resources, must be selective in the litigation they commence. Individuals or groups may be given standing to initiate proceedings in the public interest[13]. Sometimes the failure of a regulatory authority to act against what is claimed to be a breach of the law might itself be a source of grievance. What might be described as the private, or at least the non-governmental, enforcement of regulatory regimes is part of the context in which the interplay of criminal and civil penalties takes place.

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[13] See, for example, *Oshlack v Richmond River Council* (1998) 193 CLR 72; *South-West Forest Defence Foundation Inc v Executive Director, Department of Conservation and Land Management (No 2)* (1998) 154 ALR 411.

Multiplying the avenues and forms of redress for offences against laws regulating corporate governance, or anti-competitive behaviour, or environmental matters, often in circumstances where the criminal law also plays an important role, raises issues of double, or even multiple, jeopardy. Sometimes those issues are addressed directly by statute. Section 1317P of the *Corporations Act* provides that criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether a declaration of contravention, or a civil penalty order, or a compensation order, or a disqualification order has been made. The statute imposes certain restrictions on the use in criminal proceedings of evidence previously given in civil proceedings. This, again, raises an issue of public policy. Even in respect of cases falling squarely within the area of criminal process, such as homicide, there is current debate about the principle of double jeopardy. The bounds of such debate are extended by a provision such as s 1317P.

Proliferation of rules and regulations is a common and understandable response to the complexities of modern business, and to the demand for accountability in all forms of behaviour which affects the public. Yet it is worth remembering that, no matter how furiously a game is played, it is not necessarily made fairer by constantly increasing the number of rules. Regulatory complexity can be oppressive. Citizens have a basic right to know, or to be advised about, their legal obligations, and the possible risks they face. Reasonable certainty and

clarity of the law is an aspect of justice, and it promotes legitimate and beneficial risk-taking. Our capitalist society professes to encourage and reward risk-taking, but that assumes the risks are reasonably identifiable. There may be a question whether multiplication of options for regulatory enforcement is always consistent with this purpose.