

Enforcement Mechanisms (including Alternatives to Criminal Penalties)

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Introduction

Self-evidently, the role of an enforcement mechanism is to ensure compliance with an enacted behavioural rule by those to whom the rule is directed. The legislature has a choice as to whether to use criminal procedures or civil procedures for this purpose or to provide an administrative method of dealing with the breach.

Criminal law covers a vast array of behaviour, from killing your neighbour to parking too close to a letter box. There may be no social shame attached to the offence. Hart noted that “a crime is anything which is *called* a crime”². Criminal law is enforced by the State on behalf of the whole community with the aim of deterrence and punishment. A wide range of penalties are provided, from imprisonment to a community service order or licence cancellation. A high standard of proof is required and a person charged with an offence has access to many procedural protections (such as the right to remain silent and a privilege against self-incrimination). Perhaps because of this legislatures are increasingly seeking other means of enforcing compliance. The purpose of this paper is to focus primarily on two of those means—the use of civil penalties and infringement notice regimes—and refer briefly to certain other enforcement mechanisms. Necessarily the focus that I bring is very much from a Victorian viewpoint but, I suspect, the enforcement mechanisms and the considerations relating to their use are of general application.

Civil Penalties³

Civil penalty provisions are statutory provisions that prohibit or require certain conduct and set out a penalty for contravention of the prohibition or requirement. However, contravention is not an offence and a person contravening is not subject to criminal prosecution, conviction and sentence. Instead, a court or tribunal is given power to impose the specified penalty (or a penalty up to the maximum specified penalty) on the contravener, on the application of a person specified in the civil penalty provision. This is usually a government body but may be a private party, for example, a union or employer association or a private individual.

The specified penalty may be a monetary amount including an order for the payment of compensation, a community service order (such as cleaning up an oil spill or publishing a notice regarding the contravention) or another sanction (such as licence cancellation or disqualification from being a company director). A monetary penalty may be payable to the Crown, a government agency or a private party. Injunctive relief may also be available. It is, however, regarded as inappropriate for imprisonment to be available as a civil penalty.

The same conduct may also constitute a criminal offence. There can thus be a choice available

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² H. Hart “The Aims of the Criminal Law” (1958) 23 *Law & Contemporary Problems* 404.

³ See generally ALRC Report 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, December 2002.

to enforcement bodies. A regulatory body may choose to pursue a civil penalty if it is not confident of being able to prove all the necessary elements (including any mental elements) of the offence to the required standard. It may choose to do this even if an absolute liability criminal offence is available. You may even find civil penalty proceedings being launched following unsuccessful criminal proceedings.

The penalty is imposed through the application of civil procedural processes. The standard of proof required is the civil standard (the balance of probabilities) but with a gloss that the court or tribunal must be satisfied to a reasonable level, having regard to the nature and consequences of the facts to be proved. The more severe the conduct and penalty, the higher the level of satisfaction required⁴. It would, of course, be possible for the civil provision to stipulate the applicable standard of proof but, to date, this has not been done in Victoria. Indeed generally legislation providing for civil penalties makes little, if any, provision as to the procedure to be followed.

Various defences may be available to a person charged with a criminal offence. These include defences relying on mental impairment, duress, claim of right, external intervention and, in the case of strict liability offences, a defence of reasonable mistake of fact. There is currently in Victoria no statement of general defences available in civil penalty provisions.

The Attorney-General's Department of the Commonwealth of Australia has issued guidelines on the use of civil penalty provisions in Commonwealth legislation. They include the following—

The use of a civil penalty provision is most likely to be appropriate when—

- criminal punishment is not merited, or
- the size of the maximum penalty justifies the proceeding, or
- the proceeding is directed against white collar wrongdoing where imprisonment is either not available or inappropriate.

A civil penalty provision should be structured in the same way as an offence setting out all necessary elements. Mental elements should either be expressly applied or excluded (the latter is more readily justifiable because a conviction does not result). The penalty should be adequate for deterrence and will often be higher than a corresponding criminal penalty when the non-presence of a conviction is considered. A higher maximum penalty for a body corporate will often be appropriate. However, imprisonment must not be available as a penalty. The provision should clearly specify who may apply for a penalty and the time within which an application may be made. It should also specify the applicable rules of evidence and procedure. A person convicted of a criminal offence in respect of conduct should not be subject to a civil penalty proceeding in respect of the same conduct and civil penalty provisions should be stayed if criminal proceedings are commenced.

Evidence given in a civil penalty proceeding should be inadmissible in a criminal proceeding and a defence of acting honestly should be provided. The provision should specify a range of considerations that a court or tribunal should take into account in determining the amount of a civil penalty. Provision should be made for a global penalty to cover two or more breaches. A person should be protected from being penalised under two or more civil penalty provisions for the same or substantially the same conduct.

⁴ See *Briginshaw v Briginshaw* (1938) 60 CLR 336. See also *Evidence Act 1995* (Cth.) s. 140.

Civil penalty provisions have been creeping into Victorian legislation in recent years⁵. They have been a frequent feature of Commonwealth of Australia legislation for many years. Clearly they are here to stay.

Infringement notices

An infringement notice regime offers an offender the chance to avoid being subject to a criminal proceeding or a civil penalty proceeding by paying an administrative penalty. They are generally used for low-level common criminal offences, such as parking offences.

Under an infringement notice regime a person is served with a notice setting out particulars of an alleged offence and giving the person the option to either pay the penalty specified in the notice or elect to have the matter dealt with by a court. The penalty is usually significantly less than the maximum penalty that might be imposed in open court, generally no more than 20-25 per cent.

The attraction of the regime lies in avoiding the need for prosecuting agencies to prove the offence and their prevalence takes pressure off the criminal courts.

In Victoria the *Infringements Act 2006* provides a framework for the issuing and serving of infringement notices and provides for their enforcement. Available enforcement mechanisms include warrants to seize property, the detention, immobilisation and sale of vehicles, driver licence suspension, vehicle registration suspension or non-renewal, attachment of earnings or debts orders and the placing of a charge over an interest in land. Offenders may work off outstanding fines under a community work permit scheme. Imprisonment is also an option for non-payment in certain circumstances. Operational guidelines on the use of sanctions have been developed. The use of the more serious sanctions requires court authorisation.

At the initial stages agencies may offer payment plans to people who meet specified criteria. Certain disadvantaged categories of person are automatically entitled to be offered a payment plan. Agencies are required to develop procedures for the internal review of infringement notices. Reviews are generally to be conducted within 90 days.

Particular provision is made to divert out of the infringements system people with “special circumstances” such as mental disability, drug or alcohol addiction or homelessness.

The Attorney General has issued guidelines under the Act to which there is annexed a policy document on infringement offences. The guidelines state that the four main principles used in assessing the suitability of an infringement offence are gravity, clarity, penalty and consequence.

Gravity

The policy states that it is generally inappropriate for more serious or complex offences to be dealt with under the infringement regime. This includes offences with fault elements (subject to a proposed limited trial) and offences that include an exception, proviso, excuse or qualification. Indictable offences, offences where imprisonment is a mandatory sentencing option and offences where there is a victim of violence are also regarded as generally inappropriate.

5 *Outworkers (Improved Protection) Act 2003*, ss. 47-8; *Long Service Leave Act 1992*, ss. 88, 92; *Gas Industry Act 2001*, ss. 54-6; *Rail Corporations Act 1996*, s. 38ZZZC-F; *Victorian Renewable Energy Act 2006*, ss. 62, 63, 70-1; *Owners Corporation Act 2006*, s. 166; *National Electricity Law (Victoria)*, ss. 58-69; *Consumer Credit (Victoria) Code*, ss. 100-112.

Clarity

There needs to be clarity about what constitutes the offending behaviour so that it can be adequately described on the infringement notice.

Penalty

As a general rule, the infringement penalty should be no more than approximately 25% of the maximum penalty for the offence and should generally not exceed 12 penalty units (approximately \$1,400) for an individual and 60 penalty units (approximately

\$7,000) for a corporation.⁶ Infringements should not generally apply graduated penalties.

Consequence

A conviction should not be recorded as a result of the payment of an infringement penalty⁷. However, the fact of an offence having occurred can be recorded for certain purposes, for example, the issuing of demerit points.

In Victoria today many hundreds of offences may be disposed of under the infringements regime. Departments wishing to propose new offences to be dealt with in this way must consult the Infringement System Oversight Unit in the Department of Justice and comply with the Attorney-General's guidelines and the policy annexed to it. If the proposed infringement offence is to be made by means of a regulation made by the Governor in Council, the responsible Minister is required to obtain a consultation certificate.

Other enforcement mechanisms

In Victoria Division 2 of Part 11 of the *Fair Trading Act 1999* makes provision for other enforcement mechanisms to deal with contraventions of consumer legislation including—

- written undertakings with respect to contraventions of consumer legislation with which a court may direct compliance
- injunctions to restrain certain conduct
- injunctions requiring the taking of positive action including the institution of training programs, the refund of money, the disclosure of information about business activities or associates or the disposal of goods

⁶ Penalty units are provided for by s. 110 of the *Sentencing Act 1991*:

“110 Meaning of penalty units

- (1) If in an Act or subordinate instrument (except a local law made under Part 5 of the **Local Government Act 1989**) there is a statement of a number (whether whole, decimal or fractional) of what are called *penalty units*, that statement must, unless the context otherwise requires, be construed as stating a number of dollars equal to the product obtained by multiplying the number of penalty units by the amount fixed from time to time by the Treasurer under section 5(3) of the **Monetary Units Act 2004**.
- (2) If in a local law made under Part 5 of the **Local Government Act 1989** there is a statement of a number (whether whole, decimal or fractional) of what are called *penalty units*, that statement must, unless the context otherwise requires, be construed as stating a number of dollars equal to the product obtained by multiplying \$100 by that number of penalty units.”.

⁷ The policy preserves the current Victorian “deemed conviction” for certain drink driving/excessive speed offences dealt with by way of infringement notice but declares that no new infringement offences which record a “conviction” will be allowed.

- injunctions restraining a person from carrying on business
- the making of an adverse publicity order requiring the disclosure of information or the publication of an advertisement
- orders prohibiting the payment of money or the transfer of other property
- orders appointing a receiver or trustee of property.

The availability of such mechanisms vastly increases the armoury at the disposal of regulators to attack non-compliant conduct without resorting to criminal prosecution or civil penalty action.

Conclusion

A modern complex society with limited judicial resources and an economic need for efficiency must necessarily seek mechanisms for the enforcement of its rules additional to traditional criminal processes. This is acceptable so long as procedures are in place to ensure fairness and that enforcement is carried out in a principled non-arbitrary way. Civil penalties and infringement notice regimes are regarded by regulators as satisfying that acceptability test. However, more needs to be done by way of providing procedural protection and certainty to parties to civil penalty proceedings and continuing vigilance is required to ensure that the infringement regime continues to comply with currently accepted policy guidelines. Close attention also needs to be paid to the development of other enforcement mechanisms to ensure accountability and the equitable application of the law.
