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The Rise of Civil Penalty Regimes

Businesses should be aware of a recent trend among Federal and State authorities to increasingly impose civil penalties to enforce compliance with their statutory schemes. The number and type of legislation under which these regimes operate are expanding and the level of fines also dramatically increasing.

Types of regimes

In the Federal sphere alone there are in excess of 60 pieces of legislation which impose civil penalty provisions, and similarly substantial numbers of State Acts. The type of legislation which impose civil penalty provisions generally fall within the following groups:

- consumer protection, such as the Trade Practices Act, various credit and home building legislation. Some consumer protection legislation also impose criminal sanctions for breach of certain provisions, such as the Fair Trading Act and the Property Stock and Business Agents Act;
- industry regulation, with legislation such as the Therapeutic Goods Act, the Broadcast Services Act, the Telecommunications Act, the SPAM Act and various insurance Acts;
- employment regulation, such as workers compensation and occupational health and safety legislation;
- corporate governance, such as the Corporations Act 2001; and
- environmental protection, such as the Water Act 2007.

These areas are generally supervised by a government regulatory authority, the most significant being:

- the Australia Prudential Regulation Authority (APRA) in relation to insurance legislation;
- the Australian Securities and Investments Commission (ASIC) in relation to corporate legislation;
- the various state Fair Trading departments in relation to homebuilding and consumer protection; and
- the Australian Competition and Consumer Commission (ACCC) in relation to trade practices.

These agencies are increasingly utilising the civil, rather than criminal, penalty regimes available under the legislation they administer as it offers them an efficient and effective enforcement tool. This is because:

- litigation concerning civil penalty provisions generally are determined in civil courts subject to civil standards of proof, rather than the higher criminal onus of beyond reasonable doubt;
- litigation is based on civil procedure principles and accordingly the regulatory agency can seek payment of its costs if successful, unlike traditional criminal prosecutions; and
- the fines imposed are often substantial so as to justify not pursuing a separate criminal prosecution.

Expanding number of regimes - Privacy

The number of civil penalty regimes is steadily increasing and businesses need to be vigilant in ensuring they are informed of new areas which apply to their operations.

One recent example is in relation to privacy which will affect nearly all businesses. There are currently no civil penalties available for serious contraventions of the Privacy Act, and only limited (and rarely used) criminal penalties for credit reporting and tax file number offences. The recent Australian Law Reform Commission (ALRC) has recommended that the penalty regime be strengthened to allow the Privacy Commissioner to seek a civil penalty in the Federal Court for a serious or repeated interference with the privacy of an individual. The context of what constitutes "interference" is not clear and businesses will need to monitor this development carefully.

The ALRC has also recommended that the Privacy Act be amended to require an agency or organisation to notify the Privacy Commissioner and affected individuals when a data breach has occurred that may give rise to serious harm to an affected individual. It is possible that a civil penalty would be imposed on a business if there was a failure to notify an individual of certain data breaches. This regime already exists in some jurisdictions in North America and a similar scheme may soon be implemented in Australia.

Increase in size of penalties - Workplace Relations and OH&S

As well as an ever growing number of new civil penalty regimes, Courts are also markedly increasing the severity of penalties being imposed in existing regimes. The recent case of *Jordan v Mornington Inn Pty Limited* [2008] FCAFC 70, illustrates this point. In that case the Full Federal Court confirmed that a penalty of \$170,000 imposed on an employer was not manifestly excessive in relation to breaches of the Workplace Relations Act 1996 relating to coercion in relation to an AWA. This decision is a high watermark in civil penalties under the Workplace Relations Act 1996 and signals the clear intention by the Courts to endorse the use of civil penalties in the future.

Similarly, in the area of occupational health & safety the National Review Panel, which is considering a Model OH&S Act to be adopted nationally in 2011, has recommended a substantial increase in civil penalties. Currently, in New South Wales the maximum penalty that can be imposed on a company for breaching the general duty to ensure safety of its employees and others at its workplace is \$825,000. Under the Model Act this will increase to \$3,000,000. Whereas the current maximum fine for an individual in NSW is \$82,500, this is set to increase to \$600,000. The proposal to increase the level of OH&S fines is consistent with a sharp increase in penalties already being imposed in occupational health & safety prosecutions throughout the country.

Protection during investigation and prosecution

Businesses should be aware that the procedural protections relating generally to a criminal investigation and prosecution will not necessarily apply in civil penalty regimes.

During the investigation stage many civil penalty regimes will expressly exclude, limit or vary the right against self-incrimination, often couched as the right to silence. This will often extend to a requirement to provide documents under compulsion, despite this being against the interests of the business being investigated. While there are some limited protections available in certain cases, businesses need to pay close attention to the particular regulatory regime in question.

If a prosecution is commenced, other procedural protections may also be limited, for example, the right to hear the prosecution's case before presenting a defence or the obligation on the prosecutor to prove the offence beyond reasonable doubt, rather than on a balance of probabilities.

These issues have already been canvassed in many of ASIC's prosecutions, including high profile cases against Rodney Adler and Jodee Rich, following the collapses of HIH Insurance and One.Tel Limited. These cases demonstrate the difficulty in adequately protecting a person's rights where criminal or illegal conduct is alleged but civil rather than criminal sanctions are pursued.

Lessons for businesses

In summary, there are a number of important issues for businesses to consider now that there is a shift towards a greater number of civil penalty regimes including:

- the risk of inadvertent breach;
- steps needed to ensure awareness of and compliance with new civil penalty regimes;
- steps needed to protect the interests of the business and its officers during any investigation and prosecution by a regulator;
- directors and officers insurance in relation to any civil penalties; and
- the cost of defending any potential prosecution, including a potential order to pay the regulator's costs.

Authors

Michael Selinger

Senior Associate

T: +61 (0)2 8083 0405

E: michael.selinger@holdingredlich.com.au

Bede Haines, Lawyer

Frances Thomas, Lawyer

Key Contacts

If you would like any further information please contact:

Melbourne



Howard Rapke

Partner

T +61 (0)3 9321 9752

E howard.rapke@holdingredlich.com.au

Sydney



Harold Werksman

Partner

T +61 (0)2 8083 0405

E harold.werksman@holdingredlich.com.au

Brisbane



Paul Venus

Partner

T +61 (0)7 3135 0613

E paul.venus@holdingredlich.com.au

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Melbourne

350 William Street, Melbourne VIC 3000
T +61 (03) 9321 9999 F +61 (03) 9321 9900

Sydney

Level 65, MLC Centre, 19 Martin Place, Sydney NSW 2000
T +61 (02) 8083 0388 F +61 (02) 8083 0399

Brisbane

Level 1, 300 Queen Street, Brisbane QLD 4000
T +61 (0)7 3135 0500 F +61 (0)7 3135 0599