# Whether to protect or punish: legal consequences of contravening the *Corporations Act*

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- ***The importance of understanding the three strands of corporate litigation in the context of a contravention of the Corporations Act***
- ***Contravention can carry civil liability provisions, civil penalty provisions and criminal liability provisions***
- ***Understanding the interrelationship between the various corporate civil actions, civil penalties and criminal offences provided under the Act***

Two major developments in corporate law have once again brought to light the impact of the legal consequences of a Company Secretary, governance professional, director or other company officer contravening the *Corporations Act 2001* (Cth) [CA]. These are the High Court of Australia decision in *Rich v ASIC* (2004)[1] on the meaning of civil penalties and the commencement of the *Corporate Law Economic Law Reform Program (Audit Reform and Continuous Disclosure) Act 2004* (Cth) [CLERP 9].[2]

Before delving into the complex issues that have arisen from these developments in Australian corporate law and their impact on the consequences of contraventions of the law, it is necessary to view corporate litigation as a process model. This means that, if there is an alleged contravention of the law, you can put three simple questions:

1 Who can bring the legal action? (who can sue)
2 What are the legal actions? (on what grounds) and
3 What are the remedies or sanctions being claimed? (the consequences).

The primary purpose of this article is to answer the third question, as this has recently gone through some important major changes. But to help put this into context, the James Hardie asbestos claims, as discussed in the Jackson QC Report[3], provide a perfect example of the process model.

Who can bring a case against the officers of James Hardie? The answer in a civil case was established as long ago as 1843 in *Foss v Harbottle* (1843)[4] and is also known as the 'proper plaintiff rule'. The company itself, as a separate legal entity (as established in *Salomon v Salomon & Co Ltd* (1897))[5] has the correct legal standing and capacity to bring a case against itself. If an officer[6] has contravened the law, then the company is likely to have suffered some harm (such as the share price declining or a loss of a commercial opportunity) and thus the company is the 'victim'. As the board of directors normally authorises litigation to be brought on behalf of the company, this can cause practical difficulties if the board wants the company to sue one of its own officers!

If the company, through the board, determines not to bring a civil action, there are some other potential plaintiffs. Under s 50 *Australian Securities and Investments Commission Act 2001* (Cth) [ASIC Act] ASIC may bring a civil case on behalf of the company if it is determined to be in the 'public interest'. Another possibility is a member/shareholder doing so on the grounds of oppression (under s 232) or as a class action, known as a statutory derivative action, under s 236. Both these procedures are complex and expensive for the member to bring, unless the court allows the company to pay or indemnify the legal costs of the plaintiff. Finally, there has been some limited use of litigation by creditors, such as

applying for an injunction under s 1324 CA and then the court awarding compensatory damages as an alternative to the injunction requested.[7] Thus, the victims of the asbestos used in the James Hardie products have no legal standing to sue the actual officers of the company.

If the officers of the corporation have acted criminally, that is, if their actions or omissions to act are deemed to be dishonest or reckless, causing the company detriment or gaining for them a personal advantage, then a prosecution may be launched. ASIC, with the aid of the Australian Federal Police, will conduct the criminal investigation, following strict procedures as to how evidence is collected and making determinations as to whether a prosecution should be completed. If it is a minor contravention of the law, ASIC will conduct the actual prosecution in the lower criminal courts. If the matter is more serious, with the potential for an officer being sent to gaol, then the case is usually passed to the Commonwealth Director of Public Prosecutions (DPP).[8] The criminal prosecution must be commenced within five years of the contravention of the CA, unless the Minister gives consent, under s 1316.

Once it has been determined who is bringing the case, the second question requires the plaintiff (in a civil case) or the prosecution (in a criminal case) to determine which specific laws have been broken. In the James Hardie example, it might be a civil action for breach of the officers' statutory duties contained in ss 180 to 183 CA and/or their common law duty of reasonable care or their equitable fiduciary duty not to make a secret profit or be in a conflict of interest. Section 185 CA enables these actions to be brought together, as they are not mutually exclusive.[9] Alternatively, as there was an announcement and media release made by James Hardie to the Australian Stock Exchange (ASX) in February 2001, which has been described by Jackson QC as 'seriously misleading'[10], relating to the provision of funds for asbestos victims, this may be argued to be a specific contravention of the CA under s 1041H or its predecessors at the time of the announcement (that is, s 995 *Corporations Law*).

If ASIC, which has commenced its investigation[11], comes to a conclusion that the announcement was actually false and misleading, then a criminal offence under s 1041E may be brought. This in turn could lead to criminal offences contained within s 184 CA for the officers' duties that are committed dishonestly or recklessly.

So the importance of both a plaintiff or prosecutor carefully selecting the grounds for suing or prosecuting the company and its officers cannot be underestimated. However, it is the third question that is often the most misunderstood. If one wins the case (in other words, the assertions are proved on a balance of probabilities in a civil matter or beyond reasonable doubt in a criminal case), what are the consequences to the defendant? It is interesting to note that the language of consequences changes depending upon whether it is a civil or criminal case. A civil case will talk about the remedies that are available to the plaintiff if the action is successful, whereas in a criminal case the outcomes are known as sanctions.

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Before explaining in more detail the choice of remedies and sanctions for contraventions of the CA and associated case law actions, the impact of the *Financial Services Reform Act 2001* (Cth) [FSRA], the *Federal Criminal Code Act 1995* (Cth) and CLERP 9 need to be considered. In the financial services industry, the introduction of the Australian financial services licence (AFSL) in March 2002[12] imposed a duty of 'breach reporting'. Section 912D requires AFSL holders to notify ASIC within five business days of any significant breach of the AFSL or financial services laws. Failing to do so can result in a criminal conviction for the licence holder and those involved in its contravention! In a broader context, any ASX-listed entity will have to consider its disclosure of such litigation under Chapter 6D, being the continuous disclosure regime.[13]

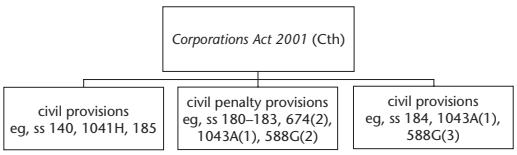
Finally, the Commonwealth Criminal Code was introduced to standardise the criminal offences and available defences in all Commonwealth statutes. After 1995, all new crimes created in a Commonwealth statute were required to be explicitly drafted to notify the reader of the type of crime noted and the elements of the crime that had to be proved under the statute. This has resulted in a number of new subsections being added to the

existing CA (and all the other Commonwealth statutes) to comply with this law.[14] The advent of the FSRA 2001 amendments and the Criminal Code amendments caused Chapter 7 of the CA to increase its number of criminal offences by an amazing 289 per cent.[15]

In many ways, the third question is probably the most important to understand. It is that a contravention of the CA may carry liability that will fall within one of three different forms of consequences:

1 civil liability provisions
2 civil penalty provisions, and
3 criminal liability provisions.

To add to the complexity, the civil penalty provisions are further divided between the 'corporations' scheme civil penalties' and the 'financial services civil penalties'. This results in very similar breaches of the law actually having slightly different outcomes for those found to be in breach of the law. After the commencement of CLERP 9 on 1 July 2004, the maximum penalty for a contravention of the financial services civil penalty was increased by five times, compared to the maximum corporations' scheme civil penalty.[16]




The diagram above illustrates these three areas of contravention and also provides some common examples of each type of statutory provision found in the CA.

Equally as important to note is that the CA provides that the same (or similar) conduct may give rise to more than one of the above named types of liability. So it is potentially possible that a failure to comply with a provision of the CA could expose the miscreant to, for example, liability under both civil penalty provisions and criminal provisions. There are a number of examples of such dual liability provisions in the CA. Some examples include:

- insolvent trading provisions: a person who fails to prevent an insolvent company from incurring a debt may be in breach of a civil penalty provision and a criminal offence — subss 588G(2) and (3)
- continuous disclosure provisions: an entity that fails to disclose information to the ASX may be in breach of a civil penalty provision and a criminal offence — s 674(2); post-CLERP 9 introduction, any person who is involved in the contravention, as well as the company, may commit an offence under s 674(2A). ASIC has the power to impose an infringement notice on the company by s 1317DAC
- insider trading provisions: a person who trades upon and/or communicates to others inside information may be in breach of a civil penalty provision and a criminal offence — subss 1043A(1) and (2).

It is worth noting that, as a principle of law, a person should not be tried twice for the same set of events, which is generally known as a 'double jeopardy'. This is particularly important where a person has a civil case brought against them and then there is an attempt to follow it with a criminal case based on the same facts. It is possible for a civil claim to made once a criminal conviction has been reached. In *Adler v ASIC* (2003)[17], Mr Adler[18] had been held to have contravened 176 provisions of the CA by his behaviour and was ordered to pay a civil pecuniary penalty of $900 000 to the Federal Government, plus contribute to nearly $8 million in damages (with the HIH chairman, Mr Williams) and have a 20–year disqualification from taking part in the management of companies. A separate criminal case has been brought against Mr Adler for market manipulation of the HIH share price, based on the same $10 million transaction as the civil penalty case. Mr Adler applied for the double jeopardy principle to be applied to stay the criminal proceedings. The court has ruled that it is not a double jeopardy because the civil action was based on his personal directors' duties, whereas the criminal case is about protecting the stock market integrity and reputation from illegal practices. The criminal case has not yet been tried and thus an outcome is still unknown at the time of writing.

## Civil liability under the *Corporations Act 2001*

Civil liability under the CA is relatively straightforward. Civil actions, depending upon the circumstances, may be brought by parties including (but not limited to) the company, shareholders (members), creditors, ASIC, or investors, as discussed above.

A good example of this principle is found in s 140, which creates a statutory contract between the corporation, its officers and its members by virtue of the corporation's constitution. This is purely a civil action of enforcement of members' rights and does not contain any form of penalties.

Alternatively, ss 1041H and 1041I combine to permit a person to bring a civil action against a corporation for loss arising from misleading or deceptive conduct in relation to financial products or financial services.[19] The CLERP 9 amendments

place a limit on the amount of damages that can be awarded by a concept called 'proportionate liability' in Part 7.10 Division 2A of the CA. Finally, and importantly, an individual's civil rights at common law and equity are often preserved by specific provisions of the CA such as s 185, which allows a civil action to be brought at common law or equity for breach of duty owed to the corporation.

In many cases, it is not just the ability to bring a case: the court (and the defendant) will want to know the exact remedy that is being sort by the plaintiff. The common civil remedies that are available under the legislation include:

- compensation or damages: the court may award statutory damages or compensation in a variety of circumstances under s 1325 where there has been a contravention of the law
- injunctions: the court may grant an injunction in a variety of circumstances, which may be as an interim measure or permanently under s 1324. The court also has the discretion to substitute damages instead of an injunction if it is felt that it is more appropriate.

Irregular procedures can often arise and it is the Company Secretary that is left with the job of sorting out the problem. A classic example might be where the incorrect notice of a general meeting has been sent out, but the majority of members still turn up at the correct time and venue for the meeting. This mere procedural irregularity will not normally invalidate an otherwise valid proceeding, such as a meeting, unless the court finds that the irregularity has caused irremediable substantial injustice. The test laid down in s 1322 for determining whether the irregularity would have caused a substantial injustice will depend on the specific facts of the circumstances. The court retains a wide discretion to grant the protection under s 1322, as stated in *Re: National Roads and Motorists' Association Ltd*.[20] An interesting application of s 1322 application for a procedural irregularity arose in *Re Wave Capital Ltd*[21] [2003] FCA 969.

Court relief is a power granted to the court under s 1318. The court may excuse a person from civil liability where, in the circumstances, they ought fairly to be excused. This is an additional protection for honest officers who are involved in business decisions that go wrong and can be contrasted with the business judgment rule defence contained in s 180(2). Once again the court has a wide discretion whether to grant relief, as stated in *Daniels v Anderson*[22], and the court should be slow to exercise its discretion where it is an independent expert.[23]

Remedial orders are an important tool for the court if the plaintiff makes such a request. The court may grant a variety of remedial orders that it considers appropriate in a variety of circumstances under their powers in s 1325A.

The ordinary limitations on the commencement of the civil actions are applied, which are normally six years for such a case. Section 1041I(2) actually states the six-year time period for commencing litigation under s 1041H for misleading conduct circumstances. The court has the power to amend these time limitations under some circumstances to prevent a substantial injustice.

## Criminal liability under the *Corporations Act 2001*

All the provisions of the CA are in fact criminal, unless the specific provision in question states otherwise (s 1311). Although the corporate entity itself can commit a crime, it usually operates through humans and they can be caught as well. A person 'involved'[24] in a corporation's criminal behaviour may also be liable under s 79. This is particularly important where the company is a licence holder (such as an AFSL) and it, the legal entity, has the primary legal responsibility. However, all the directors and officers involved in the transaction or contravention may also be caught.

It is quite common for directors to believe that, theoretically, they could be sent to gaol but, in reality, no one is actually convicted or sentenced to a term of imprisonment. The reality is actually quite different. Since the Commonwealth took over the jurisdiction of corporate law under the federal regulator, ASIC, there have been over 200 officers sent to gaol for a period of more than six months' imprisonment.

There are some overriding criminal principles that should be noted in understanding the operation of the criminal provisions of the CA.

Subject to Schedule 3 of the CA, the standard criminal penalty for a contravention of the CA is five penalty units (which is $550: ss 1311(5)). A penalty unit is defined as $110 in s 4AA *Crimes Act 1914* (Cth). The maximum criminal penalties for individual offenders, found in Schedule 3 of the CA, are specified at 2000 penalty units (the equivalent of $220 000) and/or five years' imprisonment. In between the five penalty units and the 2000 penalty units, there are lots of variations depending upon the severity of the crime as determined by parliament.

Corporate offenders face a financial penalty or

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fine of up to a maximum of five times the amount specified for an individual. This larger fine is a *quid pro quo* in lieu of a term of imprisonment, as stated in s 1312. Thus, currently the maximum penalty faced by corporate criminal offenders is $1.1 million per contravention of the CA. For example, if there were five breaches of the law, it is possible that the court could impose a maximum of $5.5 million.

Penalty notices, which cover the smaller summary offences contained within the CA, may be issued by ASIC under s 1313. These are normally set at a quarter of the standard offence (thus $137.50). Infringement notices for continuous disclosure will have a much greater impact, as to defend the actions in court could result in a $1 million corporate penalty or $200 000 personal liability for contravening s 674(2). This special type of infringement notice through CLERP 9 has been given its own Part 9.4AA of the CA.

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## Civil penalty provisions under the *Corporations Act 2001*

In 1993, the Federal Government was aware of some of the complex issues in pursuing white-collar criminal offences under the corporations legislation. One concept, borrowed from the *Trade Practices Act*, was to develop a civil penalty regime. The idea behind a civil penalty is that it is a hybrid between the civil and criminal law system. However, it has the major benefit of following the civil court procedures, rather than the criminal procedures and their attendant difficulties associated with gaining a conviction with a judge and jury.

The High Court of Australia in April 2004 ruled that in *Rich v ASIC*[25] a civil penalty is akin to a criminal matter and that evidence is weighed up under stricter parameters than a civil case. This will probably result in a change of attitude by the regulator in the enforcement of civil penalties over criminal actions. Certainly, since the judgment was delivered, ASIC would have reviewed both its investigative procedures and processes to take this new interpretation into account.

It is also worth noting that CLERP 9 has amended the split in Part 9.4B of the CA of the civil penalty regime. The regime divides civil penalty provisions (CPPs) into corporation/scheme CPPs (for example, officers' duties in ss 180–183) and financial services CPPs (for example, continuous disclosure in s 674; market manipulation in s 1041A; insider trading in s 1043A). A breach can result in a pecuniary penalty of up to $200 000, compensation orders and disqualification orders under s 206C.

There are a number of important points to note.

- Only ASIC may apply for a declaration of contravention of a CPP or a pecuniary penalty order: s 1317J(1).
- Only ASIC or the corporation may apply for a compensation order: subss 1317J(1) and (2).
- Any other person may apply for a compensation order in relation to a contravention of a financial services CPP: s 1317J(3A).
- The court may excuse a person from liability for a breach of a contravention of a CPP if the person acted honestly and the court thinks it is fair in the circumstances to excuse the person: s 1317S.
- No CPP proceedings may follow a successful criminal conviction for the same or similar conduct: s 1317M.
- CPP proceedings must be stayed if criminal proceedings are commenced against the same person for the same or similar conduct: s 1317N.
- Criminal proceedings may be commenced following CPP proceedings regardless of the outcome of the CPP proceedings: 1317P.
- CPP proceedings must be brought within six years of the contravention.

In December 2002, the Australian Law Reform Commission provided a detailed report titled *Federal Civil and Administrative Penalties in Australia* (ALRC Report 95). This report covered many different types of enforcement across all Commonwealth legislation and regulatory agencies. It noted at para 2.26 that:

> ...case law also suggests the term 'penalty' may be used to denote a civil debt or imposition owed to the Crown or the state, as opposed to a 'fine', which denotes a criminal monetary penalty. In *Gapes v Commercial Bank of Australia Ltd* (1979) 38 FLR 431, 445 Sweeney J cited the English Court of Appeal in *Brown v Allweather Mechanical Grouting Co Ltd* [1954] 2 QBD 443, 446, where it held that: 'It is true that there is a general rule that if the word "penalty" is used in a section as distinct from the word "fine", the penalty must be sought and recovered as a debt in a civil court, whereas a fine is a penalty imposed by a criminal court.

The Report went on at para 2.107 to state that:

> Civil pecuniary penalties are more closely aligned with criminal fines than with private law civil damages. Civil damages aim to compensate individuals for harm caused. Civil pecuniary penalties, on the other hand, are punitive — even if their chief aim is said to be deterrence — and are payable whether or not any harm was actually caused by the unlawful action. Whilst civil pecuniary penalties are thought not to entail the moral sanction of a criminal conviction, they do not serve as merely the tax or price of an illegal act.

From a practical aspect, the further confusion added by the imposition of both corporate law CPP and financial services CPP does not help the situation. As discussed above, the High Court, in *Rich v ASIC* has interpreted the concept of civil penalties not as a protective measure, but as a more punitive measure. This means, in practice, that civil penalties, both corporate and financial services, will be treated closer to a criminal prosecution procedure than to a civil litigation. This could be costly for the regulator, as well as more complex and time-consuming for all involved. In the long term, it may have an even greater impact on the type of coverage provided by directors' and officers' insurance policies.

## Alternatives

Some consideration must be also given to the consequences that fall outside the normal list of civil, criminal and civil penalty matters. Many disputes are resolved by a mixture of dispute resolution, negotiation, arbitration and clarification between corporations, their officers and the various regulators that are involved from the Australian Prudential Regulatory Authority, Australian Taxation Office, Australian Competition and Consumer Commission to ASIC. There is a broader influence of the regulatory policies of enforcement by ASIC that are known as the pyramid of enforcement, which range from education practices to gaol sentences. For example, the pragmatic use of enforceable undertakings that are contained in s 93AA ASIC Act may change the way a regulator wishes to proceed with either a criminal or civil penalty action.

Enforceable undertakings are legally binding agreements between the parties (a company and its officers with the regulators) which are published on the ASIC website[26]. The undertakings do not admit any liability, but the parties voluntary enter into an agreement to either refrain from being an officer for a period of time or to appoint an independent expert to review the corporate compliance program or to achieve other such practical outcomes to provide a commercial solution to a potential breach of the law. If the company and its officers ignore the enforceable undertaking, ASIC may take the agreement to court and it can be enforced or contempt-type actions can be brought. Since their introduction in 1998, there have been over 200 enforceable undertakings agreed to by ASIC[27].

## Conclusion

In my opinion, all Company Secretaries, governance professionals, directors, officers and senior managers should clearly understand the interrelationship between the various corporate civil actions, civil penalties and criminal offences provided under the CA. In my experience this is not actually the case, and corporate officers' education and training is an important step in developing good corporate governance fundamentals in Australia, as advocated by Justice Owen in the 2003 HIH Royal Commission Report.

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## Notes

1 [2004] HCA 42

2 The *Corporate Law Economic Law Reform Program (Audit Reform and Continuous Disclosure) Act* 2004 (Cth) is normally referred to as 'CLERP 9' and most of the provisions commenced on 1 July 2004. See Standen, M, 'CLERP 9: practical effects for Company Secretaries' (2004) vol 56 (8) September *Keeping good companies* p 460

3 <www.cabinet.nsw.gov.au/publications.html>

4 (1843) 2 Hare 461

5 [1897] AC 22

6 Officer is defined in s 9 CA to include the directors, the company secretary, or a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or a person who has the capacity to affect significantly the corporation's financial standing. These last two functional descriptions after CLERP 9 are the definition of a 'senior manager' in the CA

7 *Allen v Atalay* (1993) 11 ACSR 753

8 Section 1315

9 *State of South Australia v Marcus Clark* (1996) 66 SASR 199

10 Jackson, D, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (September 2004)

11 ASIC Media Release 04–305 'ASIC investigates James Hardie over asbestos fund' 24 September 2004

12 With full compliance and implementation of the legislation by March 2004

13 Note CLERP 9 amendments to continuous disclosure regime now impose personal liability on officers involved

and corporate liability for civil penalties, as well as the ASIC power to issue infringement notices

14 All Commonwealth statutes had to comply with the *Criminal Code* by December 2001

15 See Adams, M, 'Does increasing criminality make for better reform of the financial services industry?' (2003) 14 *Australian Journal of Corporate Law* p 202

16 Section 1317G

17 Special leave to the High Court of Australia was refused on 28 May 2004 (S444 of 2003)

18 *ASIC & HIH v Adler, Williams & Fodera* [2002] NSWSC 483; [2003] NSWCA 131

19 Prior to July 1998, the civil misleading and deceptive conduct was also found in s 52 *Trade Practices Act 1974* (Cth) [TPA] and the various state/territory *Fair Trading Acts*. However, the TPA was amended to produce a 'carve-out' in s 51AF which prevents the TPA being used if the conduct relates to a financial service or a financial product, as defined in the CA. This change came about after the famous NRMA 'prospectus' which was held to be misleading under s 52 TPA in *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452. In the NRMA case, the judge gave the injunction to stop the float for a contravention of s 52 TPA, but noted that it would have also been successful under s 995 of the *Corporations Law* (predecessor to s 1041H of the CA). It is worth noting that even within s 1041H of the CA there are further exclusions relating to takeovers (see s 670A); fundraising documents, like prospectuses (see s 728); and product disclosure statements under ss 953A, 1022A. It is an objective standard applied to the meaning of 'misleading conduct', as stated in *National Exchange Pty Ltd v ASIC* [2004] FCAFC 90. Some limits have been imposed on the damages that can be awarded under s 1041I for a contravention of s 1041H by the concept of proportionate liability under s 1041L and s 1044B, post 26 July 2004

20 [2003] FCAFC 2006

21 For more discussion of this case see Adams, M and Hargovan, A, 'Cost orders: a new wave of liability for the company secretary?' (2003) vol 55 (11) December *Keeping good companies* p 644

22 (1995) 37 NSWLR 438

23 Such as an expert in a prospectus case, for example, *Reiffel v ACN 075 839 226 Ltd* [2003] FCA 194

24 This is an important criminal concept which has traditionally been called aiding and abetting, and enables individuals to be caught as well as the key perpetrators of the crime

25 [2004] HCA 42

26 <www.asic.gov.au>

27 The data is available from the ASIC website (www.asic.gov.au) and has been analysed by Ms Marina Nehme, a LLM student at UTS, being supervised by the author in 2004.