Reforming the Enforcement of Directors' Duties in Sri Lanka: Adopting Australia's Civil Penalty Regime

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ABSTRACT

This article evaluates the effectiveness of the criminal penalty regime governing directors' duties in Sri Lanka and considers whether the adoption of Australia's civil pecuniary penalty regime would provide a more effective and proportionate enforcement mechanism. The article examines the theoretical foundations of responsive regulation, analyzes the Australian experience with civil penalties over three decades and proposes a framework for implementing similar reforms in Sri Lanka.

Keywords: Directors' Duties Enforcement, Civil Penalty Regime, Responsive Regulation, Corporate Law Reform

INTRODUCTION

The enforcement of directors' duties represents a critical component of corporate governance frameworks worldwide. In Sri Lanka, the Companies Act No. 7 of 2007 introduced statutory codification of directors' duties for the first time, establishing both civil and criminal liabilities for breaches.[1] However, the predominantly criminal nature of the enforcement regime raises important questions about its effectiveness, proportionality and ability to secure meaningful compliance in practice.

Australia's experience with civil penalty regimes offers valuable insights for jurisdictions seeking to reform their approach to directors' duties enforcement. The civil penalty regime was introduced through the Corporate Law Reform Act 1992 (Cth), which came into effect on February 1, 1993,[2] and was subsequently refined by the Corporate Law Economic Reform Program Act 1999 (Cth), with the current Part 9.4B coming into force in March 2000.[3] Over three decades, Australia's civil penalty regime has evolved into a sophisticated enforcement mechanism occupying a middle ground between compensatory civil remedies and punitive criminal sanctions.

This article argues that Sri Lanka should consider adopting a civil penalty regime modeled on the Australian approach to address the inherent limitations of criminal enforcement, provide regulators with greater flexibility and ultimately enhance compliance with directors' duties.

Theoretical Foundations: Responsive Regulation and the Pyramid of Enforcement

The Genesis of Civil Penalties in Australia

The development of Australia's civil penalty regime is rooted in the work of the Senate Standing Committee on Legal and Constitutional Affairs, commonly known as the "Cooney Committee," which conducted a

[1] Harsha Cabral, Duties of Company Directors & Corporate Governance in Sri Lanka, 2011, p. 5
[2] *Corporate Law Reform Act 1992* (Cth) ss 2(3), 17; Commonwealth, *Gazette: Special*, No S 25, 27 January 1993.
[3] *Corporate Law Economic Reform Program Act 1999* (Cth).

comprehensive inquiry into the reform of directors' duties in 1989.[4] The Committee recognized that the existing criminal enforcement regime was fundamentally flawed. Courts were reluctant to impose imprisonment for breaches of directors' duties, viewing such sanctions as disproportionate for conduct that did not necessarily involve dishonesty or criminal intent. Consequently, courts frequently imposed lenient fines instead of custodial sentences, creating a perception that corporate law was weak.[5]

The Cooney Committee concluded that criminal penalties involving potential imprisonment appeared too draconian for many types of directorial misconduct, while firmly rejecting proposals for the wholesale removal of criminal sanctions. The solution was grounded in responsive regulation theory and embodied in two key recommendations: first, that criminal liability under company law should not apply in the absence of genuine criminality; and second, that civil penalties should be provided for breaches by directors where no criminality is involved.[6]

Strategic Regulation Theory and the Enforcement Pyramid

Strategic regulation theory, or responsive regulation theory, provided the intellectual foundation for the Cooney Committee's recommendations. This theory defines a regulator's goal as securing compliance with the law and offers guidelines for achieving that compliance.[7] A central tenet is that regulated individuals are motivated by various factors and successful regulatory agencies must be equipped with a range of enforcement options.

The enforcement pyramid model posits that regulators should employ a graduated approach, escalating the severity of sanctions in response to the seriousness of contraventions.[8] At the base are persuasive measures and voluntary compliance mechanisms. As one moves up the pyramid, sanctions become progressively more severe, encompassing administrative actions, civil penalties and ultimately criminal sanctions at the apex. The pyramid model suggests that regulators should start with less intrusive measures and escalate only when necessary, reserving criminal prosecution as a last resort.

Regulators face "system capacity overload"; they cannot detect and enforce every contravention of the laws they administer.[9] Resource constraints force many regulators to engage in "the pretence of consistent law enforcement," with enforcement spread thinly and weakly. The enforcement pyramid addresses this reality by enabling strategic resource allocation.

The Three-Tiered Framework

The Cooney Committee's proposals resulted in a three-tiered hierarchy of enforcement measures. At the base are civil remedies, including compensation orders that allow parties who have suffered loss to recover damages. In the middle tier are civil penalties, which serve to sanction misconduct falling short of criminal offences through both monetary and non-monetary sanctions such as pecuniary penalties and disqualification orders. At the apex are criminal sanctions, including fines and imprisonment, reserved for contraventions involving genuine criminality such as dishonesty or fraudulent intent.

This structure reflects a nuanced understanding of corporate misconduct. Not all breaches of directors' duties are equal in severity or culpability. Some breaches may result from inadvertence, negligence or poor judgment rather than dishonest intent. As the Australian Attorney-General stated when introducing the civil penalty provisions, directors who breach their duties without dishonest or fraudulent intent should not be exposed to

[4] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989) ('Cooney Report').
[5] Ibid 191.
[6] Ibid.
[7] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).
[8] Ibid 35-38.
[9] John Braithwaite, 'Responsive Business Regulatory Institutions' in C A J Coady and C J G Sampford (eds), *Business, Ethics and the Law* (Federation Press, 1993) 83, 89.

criminal sanctions and possible imprisonment, but shareholders should still be protected through appropriate civil penalties.[10]

Directors' Duties in Sri Lanka: The Current Statutory Framework

Codification of Directors' Duties

The Companies Act No. 7 of 2007 marked a watershed moment in Sri Lankan corporate law by codifying directors' duties in statutory form for the first time.[11] Prior to this enactment, directors' duties were derived primarily from common law principles developed through judicial decisions.[12] The Act's statutory codification provided much-needed clarity by expressly setting out directors' duties while establishing both civil and criminal liabilities for their breach. If directors are to be held accountable for their conduct, their responsibilities and duties must be clearly identified.[13]

The Fundamental Duties

The Companies Act No. 7 of 2007 establishes several fundamental duties. The primary duty, the "golden rule", is the duty of directors to act in good faith and in the interests of the company.[14] This duty is subject to further qualifications, including requirements relating to the standard of care and bona fides.[15] The duty to act in the company's interests applies even to nominee directors of subsidiary companies, who must act in the best interests of the subsidiary rather than the parent company that nominated them, unless the subsidiary's Articles of Association provide otherwise.[16]

Directors are also bound to comply with the provisions of the Companies Act No. 7 of 2007 and with the company's Articles of Association.[17] Additionally, the Act prohibits directors from acting in any manner that is reckless or grossly negligent, requiring them to exercise the degree of skill and care that may reasonably be expected of a person with their knowledge and experience.[18] A director must promptly disclose any personal interest in a transaction (or proposed transaction) involving the company.[19] A director has a duty not to improperly use company information. [20]

The Enforcement Challenge

While the Companies Act No. 7 of 2007 represents a significant advance in codifying directors' duties, persistent concerns remain regarding the effectiveness and proportionality of its enforcement framework. The primary reliance on criminal prosecution demands proof beyond reasonable doubt, affords extensive procedural safeguards to defendants, and carries the enduring stigma associated with criminal conviction. Such characteristics render criminal enforcement ill-suited to many forms of directorial misconduct, particularly breaches arising from negligence, regulatory non-compliance, or flawed commercial judgment rather than deliberate dishonesty.

The absence of an intermediate enforcement mechanism between purely compensatory civil remedies and punitive criminal sanctions consequently creates a regulatory gap, increasing the risk of under-enforcement where violations escape sanction because criminal proceedings are disproportionate and civil compensation alone is insufficient to deter future misconduct. A comparable enforcement challenge has been addressed in other regulatory contexts in Sri Lanka, most notably under the Personal Data Protection Act No. 9 of 2022, which,

[10] Commonwealth, *Parliamentary Debates*, Senate, 28 November 1991, 3616 (Graham Richardson, Attorney-General).
[11] Harsha Cabral, above n 1
[12] Ibid 5
[13] Senate Standing Committee on Legal and Constitutional Affairs, above n 3, 7.
[14] *Companies Act No 7 of 2007* (Sri Lanka) s 187.
[15] Cassidy, "Has the "sleeping" director finally been laid to rest?", (1997) 25 ABLR 102.
[16] *Companies Act No. 07 of 2007* (Sri Lanka) s 187(2)
[17] *Companies Act No. 07 of 2007* (Sri Lanka) s 188
[18] *Companies Act No. 07 of 2007* (Sri Lanka) s 189
[19] *Companies Act No. 07 of 2007* (Sri Lanka) s 192
[20] *Companies Act No. 07 of 2007* (Sri Lanka) s 197

while creating punishable offences under section 38, also adopts a compliance-oriented, regulatory enforcement model that mitigates over-criminalisation while strengthening accountability.[21]

Australia's Civil Penalty Regime: Structure and Operation

Legislative Framework

Australia's civil penalty regime for directors' duties is contained in Part 9.4B of the Corporations Act 2001 (Cth). The regime applies to designated "civil penalty provisions," which are listed in section 1317E.[22] These provisions include the core directors' duties: the duty of care and diligence (section 180(1)), the duty to act in good faith in the best interests of the corporation and for a proper purpose (sections 181(1) and (2)), the duty not to improperly use position (sections 182(1) and (2)), the duty not to improperly use information (sections 183(1) and (2)) and the duty to prevent insolvent trading. Notably, sections 181, 182 and 183 are "dual-track" provisions that permit both civil penalty proceedings and criminal prosecutions, depending on the nature and circumstances of the breach.

Two-Step Procedure and Available Sanctions

Part 9.4B establishes a two-step procedure for civil penalty proceedings.[23] First, the court must be satisfied that a person has contravened a civil penalty provision and makes a "declaration of contravention" in accordance with section 1317E. The declaration may relate not only to direct contraventions but also to attempts to contravene or involvement in contraventions of civil penalty provisions.

Only after a declaration of contravention can the court impose sanctions, including: pecuniary penalty orders, requiring payment of a monetary penalty; disqualification orders, prohibiting the person from managing corporations for a specified period; compensation orders, requiring payment of compensation to affected parties; and various other orders such as relinquishment orders and refund orders.

For individuals, section 1314G provides that the pecuniary penalty is the greater of: (a) 5,000 penalty units; or (b) if the court can determine the benefit derived and detriment avoided because of the contravention, that amount multiplied by three.[24] For corporate contraveners, the maximum penalty is significantly higher: the greatest of (a) 50,000 penalty units; (b) three times the benefit derived and detriment avoided; or (c) either 10% of annual turnover for the relevant 12-month period, or 2.5 million penalty units if 10% of turnover would exceed that amount.

In determining the appropriate pecuniary penalty, courts must consider all relevant matters, including: the nature and extent of the contravention; the nature and extent of any loss or damage suffered; the circumstances in which the contravention took place; and whether the person has previously been found to have engaged in similar conduct.

Procedural Aspects

The Australian Securities and Investments Commission (ASIC) has standing to apply for declarations of contravention, pecuniary penalty orders, disqualification orders, compensation orders and other available orders. Proceedings must be commenced within six years of the contravention. Importantly, courts must apply the rules of evidence and procedure for civil matters when hearing civil penalty proceedings.

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[21] T B Abeysekara and A E. Ranasinghe, 'Holistic Approach in Introducing Proper Legal Framework to Regulate Data Protection and Privacy in Sri Lanka' (2022) 8(1) *Vidyodaya Journal of Management* 169–200; T B Abeysekara and SI Dabarera, 'Legal Challenges in Achieving a Business-Oriented Data Protection Ecosystem in Sri Lanka' (2025) *Journal of Business Research and Insights* 11(1) 1–9.

[22] *Corporations Act 2001* (Cth) s 1317E.

[23] George Gilligan, Helen Bird and Ian Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties' (1999) 22 *University of New South Wales Law Journal* 417, 427-428.

[24] *Corporations Act 2001* (Cth) s 1314G (as amended by *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth)).

The civil standard of proof, proof on the balance of probabilities, applies to civil penalty proceedings, rather than the criminal standard of proof beyond reasonable doubt.[25] However, courts typically apply the modified Briginshaw standard of "reasonable satisfaction," which requires stronger evidence where serious allegations have been made, where the facts alleged are inherently improbable, or where findings are likely to produce grave consequences.[26]

The Hybrid Nature of Civil Penalties

Civil penalties occupy an unusual position in legal taxonomy. They have been described as "a hybrid between the civil and the criminal law" and as "punitive civil sanctions."[27] Like criminal proceedings, civil penalty proceedings have a punitive purpose, involve a contest between the state and the individual and concern public wrongs and moral culpability. However, unlike criminal proceedings, civil penalty proceedings employ civil rules of evidence and procedure and result in civil rather than criminal liability, without the stigma of criminal conviction.

The concept of a "penalty" has long been recognized as describing a sanction for wrongdoing against the public interest that is neither entirely criminal nor entirely civil. Parliament deliberately chose not to label certain types of regulatory misconduct as criminal, recognizing that the stigma of criminal conviction was inappropriate, while still needing something beyond mere liability to pay compensation to encourage compliance. The civil penalty represents the "halfway house" solution adopted to address this policy challenge.[28]

Advantages of the Civil Penalty Regime: Three Decades of Experience

Enhanced Enforcement Capabilities

One of the primary anticipated benefits of Australia's civil penalty regime was that it would enable ASIC to deal more effectively with corporate misconduct.[29] The regime was expected to form a major element of ASIC's overall enforcement structure by providing greater flexibility and reducing reliance on criminal prosecution. Experience over three decades suggests that these expectations have been substantially realized.

The civil penalty regime offers ASIC significant practical advantages over criminal prosecution. Civil proceedings benefit from the lower standard of proof, balance of probabilities rather than beyond reasonable doubt, making it easier to establish contraventions. The more relaxed civil evidentiary threshold, introduced by section 1332 of the Corporations Act, removes many of the technical barriers that can frustrate criminal prosecutions. Additionally, civil penalty proceedings are generally cheaper, quicker and easier to conduct than criminal prosecutions, enabling more efficient deployment of limited regulatory resources.

These procedural advantages translate into greater sanction certainty. It is easier to obtain a declaration of contravention under the civil penalty regime than to secure a criminal conviction, leading to a higher success rate for enforcement actions.[30] Greater sanction certainty enhances the deterrent effect of the law, as potential wrongdoers face a higher likelihood of being held accountable. Paradoxically, the increased deterrent effect may be achieved even though the sanctions imposed under the civil penalty regime are less severe than criminal penalties, because certainty of sanction matters more to potential offenders than severity of sanction.

[25] *Corporations Act 2001* (Cth) s 1317L.
[26] *Briginshaw v Briginshaw* (1938) 60 CLR 336.
[27] Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) 77.
[28] Explanatory Memorandum, *Corporate Law Reform Bill 1992* (Cth) [61], [66].
[29] George Gilligan, Helen Bird and Ian Ramsay, *How Effective Are the Civil Penalty Sanctions in Deterring Contraventions of Directors' Duties?* (Centre for Corporate Law and Securities Regulation, University of Melbourne, 1999).
[30] Ian Ramsay and Miranda Webster, 'An Analysis of the Use of Civil Penalties by the Australian Securities and Investments Commission' (2025) 53 *Federal Law Review* (forthcoming). Between 2013 and 2022, ASIC achieved an 86% success rate in civil penalty proceedings.

Proportionality and Graduated Sanctions

The civil penalty regime implements the enforcement pyramid model by providing regulators with graduated sanctions that can be matched to the severity of misconduct. Prior to the introduction of civil penalties, ASIC faced a stark choice: either pursue criminal prosecution with all its difficulties and resource requirements, or take no enforcement action at all. This binary choice frequently resulted in under-enforcement.

Civil penalties fill the critical gap in the middle range of sanctions, enabling ASIC to take enforcement action in relation to non-criminal contraventions of directors' duties. This gap had been undermining ASIC's ability to enforce these provisions effectively. The availability of civil penalties means that regulators can now pursue enforcement action for conduct that is wrongful and harmful but not severe enough to justify criminal prosecution. Without civil penalties, such conduct would likely go unsanctioned, leading to under-enforcement and erosion of compliance.

Conversely, civil penalties also protect against over-enforcement by providing a non-criminal punitive sanction for conduct that might otherwise be pushed into the criminal paradigm because its severity makes purely remedial sanctions inadequate. Imposing criminal sanctions on conduct that is not truly criminal risks undermining respect for the criminal law and may discourage competent individuals from accepting directorships due to perceived harshness of the regulatory regime.

Flexibility and Strategic Enforcement

The dual-track provisions that permit both civil penalty proceedings and criminal prosecutions for certain contraventions provide ASIC with valuable flexibility. ASIC can assess each case on its merits and select the most appropriate enforcement response based on factors such as the severity of misconduct, the presence or absence of dishonesty, the harm caused and the regulatory message that needs to be sent. This flexibility enables regulators to display a graduated approach to corporate misconduct, pursuing criminal sanctions for the most serious offences while employing civil penalties for less serious contraventions.

Strategic regulation theory emphasizes that successful regulatory agencies must be armed with a range of enforcement options because regulated individuals are motivated by various factors. The availability of civil penalties has allowed criminal prosecutions to be reserved for genuinely criminal conduct. In many cases where civil penalty proceedings have been brought, it appears that criminal prosecution could not have been sustained or was deemed unnecessary by regulators. This suggests that the civil penalty regime has achieved its aim of limiting the reach of criminal sanctions to appropriate cases while still enabling enforcement action in situations where criminal conviction could not be obtained.

Deterrence Without Stigma

A key advantage of civil penalties is that they can provide substantial deterrence without imposing the stigma of criminal conviction or the possibility of imprisonment. While criminal sanctions carry significant moral opprobrium, civil penalties do not suggest the same level of moral culpability. This distinction is important because it enables the law to differentiate between conduct that is improper and worthy of sanction and conduct that is genuinely criminal and deserving of society's strongest condemnation.

The deterrent effect of civil penalties operates through multiple mechanisms. Pecuniary penalties can be substantial, particularly following increases to maximum penalty amounts in recent years. Disqualification orders prevent wrongdoers from managing corporations, protecting the marketplace from future misconduct. Compensation orders require wrongdoers to make victims whole, removing any financial benefit from misconduct while providing remediation to those harmed.

As illustrated by the *Vizard* case, where civil penalty proceedings resulted in a 10-year ban from managing corporations and pecuniary penalties of $390,000, the damage to a director's reputation can be "public and complete" even without criminal conviction.[31]

Practical Impact and Resource Efficiency

The practical impact of civil penalty proceedings on corporate governance is well illustrated by the *Centro* case, which has been described as "a wake-up call" to directors who fail to examine financial papers sufficiently.[32] The case demonstrates that public civil enforcement of the statutory duty of care has become an important influence on Australian corporate governance, particularly for large listed companies. Public enforcement through civil penalty proceedings complements private enforcement mechanisms, with the two forms working together effectively in Australia.

The resource efficiency of civil penalty proceedings compared to criminal prosecutions represents a significant practical advantage. Public regulators invariably face resource constraints and must make difficult choices about how to allocate limited investigative and enforcement capabilities. Many regulatory agencies are forced to engage in "the pretence of consistent law enforcement" because resource constraints prevent them from pursuing all meritorious cases.

Civil penalties offer a more resource-efficient alternative that enables regulators to pursue enforcement action in a greater number of cases. This efficiency is particularly valuable for cases involving relatively small amounts or cases involving mismanagement or ignorance rather than specific criminal intent, situations where launching a major criminal investigation would not be warranted but where enforcement action is nonetheless desirable. The civil penalty regime has proven especially useful for addressing misconduct in small proprietary companies, where the fact of criminality is often difficult to establish.[33]

Multiple Functions

Civil penalty provisions serve multiple functions simultaneously: penal, protective and remedial. The penal function is evident in the punitive nature of pecuniary penalties and disqualification orders. The protective function operates through disqualification orders that remove unsuitable persons from corporate management. The remedial function is fulfilled through compensation orders that enable victims of misconduct to recover losses.

The ability to obtain compensation orders for insolvent companies through civil penalty proceedings provides particular relief to "long-suffering creditors" who might otherwise have no recourse. When directors breach their duties and the company subsequently becomes insolvent, creditors often bear the financial consequences of directorial misconduct. Compensation orders enable these victims to recover some or all of their losses, providing a measure of justice that purely criminal proceedings could not achieve.

Lessons for Sri Lanka: Implementing Civil Penalty Reform

Addressing Enforcement Gaps

The Australian experience demonstrates that civil penalties can effectively address critical gaps in enforcement capabilities that arise under purely criminal regimes. Sri Lanka's current enforcement framework, which relies heavily on criminal sanctions for breaches of directors' duties, likely suffers from similar deficiencies to those identified in Australia before the introduction of civil penalties. Courts may be reluctant to impose imprisonment for conduct that, while improper, does not involve dishonesty or fraud. The result may be lenient fines that fail

[31] *Australian Securities and Investments Commission v Vizard* [2005] FCA 1037; Ian Ramsay, 'Steve Vizard, Insider Trading and Directors' Duties' (2005) *Melbourne Law School Legal Studies Research Paper* No 145.
[32] *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291 ('*Centro* case'); see also Alex Katz and Duncan McIntosh, 'ASIC v Healey: Raising the Bar for Directors' (2011) 29 *Company and Securities Law Journal* 325.
[33] Helen Bird, 'The Problematic Nature of Civil Penalties in the Corporations Law' (1996) 14 *Company and Securities Law Journal* 405, 411.

to deter misconduct, or under-enforcement where regulators decline to pursue criminal prosecution because it seems disproportionate.

Adoption of a civil penalty regime would provide Sri Lankan regulators and courts with a middle-ground enforcement option that is more proportionate to many types of directorial misconduct. The regime would enable enforcement action in situations where criminal prosecution is impractical or inappropriate, while still imposing meaningful sanctions that deter future contraventions and promote compliance with directors' duties.

Implementing the Enforcement Pyramid

The enforcement pyramid model offers a theoretically sound and practically effective framework for regulatory enforcement. Sri Lanka should consider implementing this model in its corporate law framework by establishing a clear hierarchy of sanctions: civil remedies at the base, civil penalties in the middle tier and criminal sanctions at the apex. This graduated approach would enable regulators to match sanctions to the severity and culpability of misconduct, reserving the most severe sanctions for the most serious cases.

Implementation of the enforcement pyramid would require careful consideration of which directors' duties should be subject to civil penalties. The Australian model designates specific provisions as civil penalty provisions, including the core duties of care, good faith and proper use of position and information. Sri Lanka could adopt a similar approach, identifying key provisions where civil penalties would enhance enforcement effectiveness while maintaining criminal sanctions for contraventions involving dishonesty or fraud.

Procedural and Institutional Considerations

Any adoption of a civil penalty regime in Sri Lanka would need to address several procedural matters. The legislation should clearly specify: which provisions are subject to civil penalties; the maximum penalties that may be imposed on individuals and corporations; the factors courts must consider when determining appropriate penalties; the procedures for bringing civil penalty proceedings; the standard of proof applicable to such proceedings; and the relationship between civil penalty proceedings and criminal prosecutions.

The Australian two-step procedure, requiring first a declaration of contravention, then consideration of appropriate sanctions, offers a sound model that ensures procedural fairness while maintaining efficiency. The application of civil rules of evidence and procedure, with the balance of probabilities standard of proof, provides accessibility while the modified Briginshaw standard ensures that courts give appropriate weight to the seriousness of allegations and their consequences.

Successful implementation of a civil penalty regime requires an adequately resourced and capable regulatory institution. Sri Lanka would need to ensure that its corporate regulatory authorities possess the necessary resources, skills and legal powers to investigate potential contraventions and bring civil penalty proceedings effectively. The working relationship between regulators and prosecutorial authorities is also important, as demonstrated by the coordination between ASIC and the Commonwealth Director of Public Prosecutions in Australia.

Balancing Public and Private Enforcement

The civil penalty regime should complement, not replace, private enforcement mechanisms. Shareholders and creditors who suffer loss due to breaches of directors' duties should retain the ability to seek compensation through civil proceedings. The Australian experience suggests that public enforcement through regulatory civil penalty proceedings and private enforcement through derivative actions and personal claims can work together effectively, with each form of enforcement addressing different aspects of accountability and remediation.

Sri Lankan reform should ensure that compensation orders in civil penalty proceedings are accessible to victims of directorial misconduct while preserving private rights of action. The legislation might provide for regulators to bring compensation proceedings on behalf of affected persons, or enable affected persons to intervene in civil penalty proceedings to seek compensation orders.

Cultural and Contextual Adaptation

While the Australian civil penalty regime offers a valuable model, Sri Lanka should not simply transplant Australian provisions without considering local context and conditions. The quantum of penalties would need to be calibrated to the Sri Lankan economic context to ensure that penalties are meaningful deterrents without being unduly harsh. The specific directors' duties designated as civil penalty provisions should reflect Sri Lankan priorities and the most pressing corporate governance challenges in the local context.

Cultural factors may also influence the effectiveness of different enforcement approaches. If criminal sanctions carry particularly strong stigma in Sri Lankan society, or if certain types of regulatory misconduct are viewed with particular seriousness, these factors should inform the design of the civil penalty regime. The goal is not to replicate the Australian system exactly but to adapt its core principles and mechanisms to Sri Lankan circumstances in ways that enhance enforcement effectiveness and promote compliance with directors' duties.

CONCLUSION

Three decades of Australian experience with civil penalties for breaches of directors' duties demonstrates that this enforcement mechanism offers significant advantages over purely criminal approaches. Civil penalties provide a proportionate middle ground between compensatory civil remedies and criminal sanctions, enabling regulators to pursue enforcement action in situations where criminal prosecution would be disproportionate or impractical. The regime implements the enforcement pyramid model of responsive regulation, providing graduated sanctions that can be matched to the severity and culpability of misconduct.

The practical benefits of civil penalties include: enhanced enforcement capabilities through lower evidentiary burdens and civil procedural rules; greater sanction certainty leading to increased deterrence; flexibility to pursue strategic enforcement approaches; meaningful deterrence without the stigma of criminal conviction; resource efficiency enabling broader enforcement reach; and simultaneous achievement of penal, protective and remedial objectives. These benefits have contributed to making public civil enforcement of directors' duties an important influence on Australian corporate governance.

Sri Lanka should seriously consider adopting a civil penalty regime modeled on the Australian approach. Such reform would address the inherent limitations of criminal enforcement of directors' duties, provide regulators with greater flexibility and effectiveness and ultimately enhance compliance with corporate governance standards. Implementation would require careful attention to procedural details, institutional capabilities and contextual adaptation, but the potential benefits for Sri Lankan corporate governance are substantial.

The enforcement of directors' duties is too important to be left to an overly rigid binary choice between criminal prosecution and civil compensation. A sophisticated enforcement regime requires graduated sanctions that can respond proportionately to different types and severities of misconduct. Civil penalties have proven their worth in Australia over three decades. It is time for Sri Lanka to learn from this experience and modernize its approach to enforcing directors' duties through adoption of a carefully designed civil penalty regime that serves the interests of shareholders, creditors, employees and the wider Sri Lankan economy.

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