CONTRAVENTIONS OF THE CONTINUOUS DISCLOSURE PROVISIONS: CIVIL OR ADMINISTRATIVE PENALTIES.

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1. INTRODUCTION

The administrative penalty regime contained in *Corporations Act 2001* (Cth), Part 9.4AA was introduced in 2004. Its purpose is to provide an alternative to the civil penalty regime for minor contraventions of the continuous disclosure provisions.[1] The administrative penalty regime allows ASIC to issue infringement notices specifying the payment of a penalty in situations where ASIC is satisfied that a minor contravention of the continuous disclosure regime has occurred.

Prior to the introduction of the administrative penalty regime a contravention of the continuous disclosure provisions could give rise to a criminal prosecution or a civil penalty application. Very few enforcement actions were issued prior to the introduction of the administrative penalty regime. Commentators have argued that the administrative penalty regime should assist ASIC in the enforcement of minor contraventions of the continuous disclosure provisions. Administrative penalty notices issued by ASIC should lead to the perception that ASIC is able to pursue contraventions of the continuous disclosure provisions. This is more likely to lead to voluntary compliance. This paper outlines the provisions of the administrative penalty regime and explores its advantages.

The administrative penalty regime has also been the subject of much criticism. One of the main criticisms levelled against the administrative penalty regime is that it allows ASIC to impose penalties without the involvement of the courts. When imposing penalties ASIC is acting as both the prosecutor and judge. The regime has been criticised as being either premature or not necessary in light of the other enforcement options available to ASIC.

Despite the fact that the administrative penalty regime is designed to provide an enforcement mechanism for minor contraventions of the continuous disclosure provisions[2] the use of the regime is not limited in any way. There is no provision in the Act stating that the regime is to be used to enforce minor contraventions exclusively, nor is there a definition of, or any guidance as to what a minor contravention actually is. As there is no provision in the Act limiting the use of the regime to non serious contraventions of the continuous disclosure provisions and no guidance as to what a non serious contravention actually is there is a risk that ASIC may in fact use these provisions to enforce serious contraventions of the continuous disclosure provisions. This could lead to inadequate enforcement of contraventions of the continuous disclosure provisions.

This paper examines ASIC's use of the administrative and civil penalty regimes as enforcement mechanisms for contraventions of the continuous disclosure provisions. This

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[1] The administrative penalty regime was introduced by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth).

[2] Explanatory Memorandum, CLERP 9 Bill 2003 (Cth) para 5.458.

examination is useful for three reasons. First the examination reveals that the administrative penalty regime has allowed ASIC to increase its enforcement activities in relation to contraventions of the continuous disclosure provisions. Secondly the examination reveals the factors that ASIC has used to determine whether a contravention is minor or serious. Thirdly the analysis examines whether or not ASIC's use of the administrative penalty regime has been restricted to non serious contraventions of the continuous disclosure provisions.

The analysis of ASIC's use of the civil and administrative penalty regimes suggests that ASIC is complying with the intention expressed by parliament in the Explanatory Memorandum to the CLERP 9 Bill 2003 (Cth)[3] and is utilizing the administrative penalty regime exclusively for non serious contraventions of the provisions. However, this enforcement regime has been available for a short time period. While the provisions governing the administrative penalty regime do not contain a provision limiting its use to minor contraventions and some guidance as to what a minor contravention actually is there is a risk that in the future ASIC may use this regime to enforce serious contraventions.

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II. CONTINUOUS DISCLOSURE

The ASX listing rules require listed disclosing entities to continuously disclosure price sensitive information to the ASX. Subject to certain exceptions ASX listing rule 3.1 states that '[o]nce an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.'[4]

Since 1994 the continuous disclosure requirements contained in the ASX listing rules have received statutory backing. *Corporations Act 2001* (Cth), s 674 requires listed disclosing entities to comply with the obligation to disclose contained in ASX listing rule 3.1. *Corporations Act 2001* (Cth), s 675 imposes similar obligations on other disclosing entities. These provisions were introduced following the 1991 recommendations made by the Companies and Securities Advisory Committee (CASAC). CASAC believed that '[a] statutory-based system of continuous disclosure [would] promote investor confidence in the integrity of Australian capital markets and provide benefits to market participants and management in various interrelated ways.'[5]

Commentators have argued that it is vital that companies comply with the continuous disclosure provisions in order to ensure that stakeholders in the capital market are fully informed of all information that is likely to have an impact on the value of securities. Dixon argued that

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3 Explanatory Memorandum, CLERP 9 Bill, n 2, para 5.465.

4 ASX Listing Rule 3.1.

5 Companies and Securities Advisory Committee, *Report on an Enhanced Statutory Disclosure Regime* (September 1991) (CASAC Report) p 6-7.

> [t]o maintain the credibility of the market, it is essential that all participants believe that the game is being played on a level playing field. If it's found that certain players are achieving an unfair advantage, then those disadvantaged are more inclined to pick up their bat and ball and play the game elsewhere. This loss of players in the market damages liquidity and impinges on optimal resource allocation decisions which in turn potentially affect the whole community's standard of living. [6]

However, the statutory-based system of continuous disclosure will promote investor confidence only if those statutory provisions are adequately enforced. Prior to 2004 the enforcement mechanisms available to ASIC were the criminal and civil penalty regimes. In 2004 the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) *(CLERP 9 Act)* introduced the new administrative penalty regime as an alternative to the civil penalty regime. The administrative penalty regime is designed to provide a non criminal enforcement mechanism for minor contraventions of the continuous disclosure provisions. Before considering the provisions of the continuous disclosure regime this paper will consider the enforcement mechanisms that were available to ASIC prior to 1 July 2004.

III. ENFORCING THE CONTINUOUS DISCLOSURE PROVISIONS PRIOR TO 1 JULY 2004

When the continuous disclosure provisions were enacted in 1994 they were criminal provisions. It has been argued that many breaches of the continuous disclosure provisions were not pursued because of the difficulty in proving the elements of the offence to the required criminal standard.[7] The requirement to pursue criminal proceedings meant that financial penalties would be imposed only in the most serious and blatant cases.[8] In 2002 The Department of Treasury noted that no prosecutions had been launched in relation to contraventions of the continuous disclosure provisions and that the lack of criminal prosecutions was due in part to the requirement to satisfy the criminal evidentiary burdens.[9]

The lack of criminal prosecutions for contraventions of the continuous disclosure provisions was recognised in 2002 when on 11 March the *Corporations Act 2001* (Cth) was amended by the enactment of the *Financial Services Reform Act 2001* (Cth) (*FSR Act)*. The *FSR Act* provided that in addition to criminal sanctions the continuous disclosure and other market misconduct provisions could be enforced by the civil penalty regime.[10]

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6 Jim Dixon, 'Can Australia's Continuous Disclosure Regime be Improved?' (2003) 6 Australian CPA 80, p 80.

7 Explanatory memoranda, Financial Services Reform Act 2001 para 2.78.

8 Department of Treasury, Commonwealth of Australia "Corporate Disclosure Strengthening the Financial Reporting Framework" (2002) p 147.

9 Department of Treasury, n 8, p 147.

10 The other market misconduct provisions enforced by the civil penalty regime are the market manipulation, false trading and market rigging, dissemination of information about an illegal transaction and insider trading provisions. As a result of the *FSR Act* civil penalty provisions are now categorised as either corporation/scheme civil penalty provisions or financial services civil

The civil penalty regime deems certain provisions of the *Corporations Act 2001*(Cth) to be civil penalty provisions. [11] If ASIC believes that a civil penalty provision had been contravened it can issue proceedings seeking a declaration of contravention and civil penalty orders.[12] Civil penalty proceedings differ to criminal prosecutions in that proceedings for a declaration of contravention and civil penalty orders are treated as civil proceedings for the purposes of the application of the rules of evidence and procedure.[13] The standard of proof is proof on the balance of probabilities.[14]

If the court is satisfied that a civil penalty provision has been contravened the court is required to issue a declaration to that effect.[15] Once a declaration of a contravention of the continuous disclosure provisions has been made the court can impose a pecuniary penalty if it is satisfied that;

> the contravention:
>
> (i) materially prejudices the interests of acquirers or disposers of the relevant financial products; or
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> (ii) materially prejudices the issuer of the relevant financial products or, if the issuer is a corporation or scheme, the members of that corporation or scheme; or
>
> (iii) is serious.[16]

In addition to the imposition of a pecuniary penalty the court has the power to order the person who has contravened the civil penalty provision to pay compensation to another person or corporation if the other person or corporation has suffered loss or damage as a result of the contravention.[17] *Corporations Act 2001* (Cth), s 920A(1) gives ASIC the power to ban a person from providing any financial service if that person has not complied with a financial services law or ASIC has reason to believe that that person will not comply with a financial services law. The definition of financial services law in *Corporations Act 2001* (Cth), s 761A includes the continuous disclosure provisions.

The Explanatory Memorandum to the Financial Services Reform Bill 2001 referred to the extension of the civil penalty regime to the continuous disclosure and other market misconduct provisions and stated that

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penalty provisions. The provisions that were civil penalty provisions prior to the enactment of the *FSR Act* are categorised as the corporations/scheme civil penalty provisions. The continuous disclosure provisions and the other market misconduct provisions are categorised as the financial services civil penalty provisions.

[11] *Corporations Act 2001* (Cth), s 1317E

[12] *Corporations Act 2001* (Cth), s 1317J.

[13] *Corporations Act 2001* (Cth), s 1317L.

[14] *Corporations Act 2001* (Cth), s 1332.

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

[16] *Corporations Act 2001* (Cth), s 1317G(1A)(c). In 2002 the maximum pecuniary penalty available for a contravention of the continuous disclosure provisions was $200,000. In 2004 this maximum was increased to $1 million for corporations by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth).*

[17] *Corporations Act 2001* (Cth), s 1317HA.

> [t]he application of the civil burden of proof (balance of probabilities) will facilitate the bringing of actions for breaches of the provisions. The application of civil penalties is likely to act as a deterrent to market misconduct. [18]
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> …
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> ASIC is very keen to have the market misconduct and insider trading provisions become civil penalty provisions, on the grounds that this will enhance its ability to safeguard the integrity of Australian financial markets. [19]

The Department of Treasury welcomed the extension of the civil penalty regime to cover the continuous disclosure and other market misconduct provisions. The Department noted that the deterrent effect of the financial penalties would be enhanced by ASIC's capacity to commence civil proceedings as well as criminal prosecutions.[20]

Commentators have argued that the extension of the civil penalty regime to the market misconduct provisions was an important development.[21] In 2001 Joe Longo noted that this expansion represented one of the most significant additions to ASIC's powers for many years.[22] Joe Longo stated that

> [u]ltimately, civil penalties expand ASIC's potential armoury of responses to alleged market misconduct, making it more likely that company directors and officers will face court action in the future. This will be particularly the case, for example, in the area of continuous disclosure, where ASIC has not brought any criminal actions but has often expressed its concerns about the adequacy of disclosure.[23]

ASIC has issued two civil penalty applications in relation to alleged contraventions of the continuous disclosure provisions occurring between 11 March 2002 and 1 July 2004.[24] The 1 July 2004 is significant because that it the date that the administrative penalty regime was introduced by the *CLERP 9 Act*.

IV. THE CORPORATE LAW ECONOMIC REFORM PROGRAM (AUDIT REFORM AND CORPORATE DISCLOSURE) ACT 2004 (CTH).

The reforms to the civil penalty regime introduced by the *CLERP 9 Act* on 1 July 2004 impacted on ASIC's ability to enforce the continuous disclosure provisions. The

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18 Explanatory memoranda, Financial Services Reform Act, n 7, para 2.79.
19 Explanatory memoranda, Financial Services Reform Act, n 7, para 284.
20 Department of Treasury, n 8, p 133 and 147.
21 Moodie G and Ramsay I, 'The Expansion of Civil Penalties Under the Corporations Act' (2002) 30(1) ABLR 64 and Mc Convill, J, 'Australian Securities and Investment Commission's Proposed Power to Issue Infringement Notices: Another Slap in the Face to S1324 of the Corporations Act or an Undermining of Corporate Civil Liberties?' (2003) 31 ABLR 36 at 39.
22 Longo J, 'Civil Penalty Regime to Extend to Market Misconduct' (2001) Keeping Good Companies 635 at 635.
23 Longo, n 22, at 635.
24 These civil penalty applications were issued against Southcorp Ltd and Chemeq Ltd. See ASIC Media Releases 03/070 and 04/426.

amendments included an increase in the maximum penalty payable by a corporation for a contravention of the continuous disclosure provisions from $200,000 to $1 million.[25] The *CLERP Act* gave ASIC the power to seek civil penalties against individuals who are knowingly involved in a corporation's contravention of the continuous disclosure provisions[26] and clarified the law to make it clear that an application for compensation for loss arising as a result of a contravention of the continuous disclosure provisions could be made regardless of whether or not a declaration of a contravention had been made.

The most controversial change enacted by the *CLERP 9 Act* was the introduction of the administrative penalty regime as an alternative to the civil penalty regime for contraventions of the continuous disclosure provisions. Prior to considering the new administrative penalty regime in detail, the next section of this paper will consider the other changes introduced by the *CLERP 9 Act.*

A *Increase in maximum penalty*

The *CLERP 9 Act* was preceded by a discussion paper entitled "Corporate Disclosure Strengthening the Financial Reporting Framework" which was released by the Department of Treasury in 2002 (The Department of Treasury Discussion Paper).[27] The Department of Treasury Discussion Paper argues that the continuous disclosure regime contained in the *Corporations Act 2001* (Cth) should be supported by effective enforcement provisions and remedies.

The Department of Treasury Discussion Paper argues that the penalty to be applied should be able to be tailored to suit the circumstances of the particular contravention.[28] The paper contrasts an intentional contravention committed by a major corporate entity with a minor or inadvertent contravention committed by a much smaller entity and argues that a wide range of penalties need to be available to cater for these different types of contraventions.[29]

The Department of Treasury Discussion Paper argues that the then maximum penalty of $200,000 may be sufficient for an inadvertent contravention committed by a small corporate entity. However this maximum penalty would not operate as an effective deterrent in relation to more serious contraventions of the continuous disclosure regime committed by large bodies corporate.[30]

To deal with this problem the *CLERP 9 Act* increased the maximum pecuniary penalty available for a contravention of the continuous disclosure provisions by corporate entities

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25 The increase in the penalty payable by corporations applied to all the financial services civil penalty provisions.

26 *Corporations Act 2001* (Cth), s 675(2A) and 1317G(1A).

27 Department of Treasury, n 8.

28 Department of Treasury, n 8, at para 8.3.7.

29 Department of Treasury, n 8, at 143.

30 Department of Treasury, n 8, at 144.

from $200,000 to $1 million. The Department of Treasury Discussion Paper argues that the increase in the maximum penalty 'would reflect [the] fundamental importance of these provisions to market integrity and investor protection.'[31] No minimum penalty has been set. The Department of Treasury Discussion Paper notes that the amendments would allow penalties that were substantially smaller than the maximum available penalty to be imposed where this was appropriate.[32]

The Explanatory Memorandum to the CLERP 9 Bill 2003 claims that there was broad support for the increase in the maximum pecuniary penalty.[33] ASIC supported the increase.[34] However, it has been argued that an increase in the maximum penalty of itself will not ensure that corporations comply with the continuous disclosure provisions. Golding and Kalfus claim that

> [f]or a major Australian corporate entity a fivefold increase in the maximum civil penalty to $1million is unlikely to have any practical impact upon its attention to the Continuous Disclosure Requirements. Instead, it is the rigour of enforcement, rather than the absolute amount of the penalty that is likely to impact on the effectiveness of the regulatory provisions. [35]

Cassidy and Chapple note that

> [w]hile raising penalties for disclosure breaches may marginally increase the pressure on Australian firms to provide timely and accurate disclosures, these reforms do not directly address enforcement risk. Whether increasing penalties provides a greater incentive to comply is difficult to measure in an environment where the regulator has no record of enforcement.[36]

It appears that parliament was also of the view that an increase in the maximum penalty for corporations would not by itself be sufficient to secure compliance with the continuous disclosure provisions. Other changes introduced by the *CLERP 9 Act* were also designed to address the lack of enforcement.

B *Liability of individuals*

In addition to increasing the maximum penalty the *CLERP 9 Act* amended *Corporations Act 2001* (Cth), Part 9.4B to allow ASIC to seek civil penalties against individuals who are knowingly involved in a corporation's contravention of the continuous disclosure provisions. Civil liability arising as a result of a contravention of the continuous disclosure provisions was extended from disclosing entities to any other person involved in the contravention. The Explanatory Memorandum to the CLERP 9 Bill 2003 (Cth)

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31 Department of Treasury, n 8, at 144.

32 Department of Treasury, n 8, at 144.

33 Explanatory Memorandum, CLERP 9 Bill, 2, para 4.262.

34 Australian Securities and Investments Commission, Submission on CLERP 9 Corporate Disclosure: Strengthening the Financial Reporting Network (2002) p 34.

35 Golding G and Kalfus N, 'The Continuous Evolution so Australia's Continuous Disclosure Laws' (2004) 22 C&SLJ 385, at 403-4.

36 Cassidy A and Chapple L, **'**Australia's Corporate Disclosure Regime: Lessons from the Us Model' (2003) 15 Australian Journal of Corporate Law 81, at 88.

notes that '[t]he prospect of financial penalties being imposed on individuals is expected to operate as a more credible and effective deterrent than the prospect of financial penalties being imposed on a body corporate alone.'[37]

In addition to providing a credible and effective deterrent imposing liability on individuals can provide benefits to shareholders. Liability placed on the corporation effects adversely the corporation and its shareholders. Arguably, it is those shareholders who will be the victims of many contraventions of the continuous disclosure provisions. The increase in the maximum penalty that can be imposed on corporations will have additional adverse implications for the corporation's shareholders. Imposing liability on the individuals involved in the corporation's breach, rather than on the corporation itself will limit the harm caused to the shareholders.

Raykovski supports the extension of liability to persons involved in the contravention. He states that this

> is a welcome change and is likely to reduce the burden on listed entities and shift it onto those responsible for the breaches. Whilst it can be argued that managers may become over-cautious because of these additional obligations, this is a small price to pay for the provision of a powerful deterrent which goes to the source of the breach.[38]

While ASIC supported this amendment[39] the Explanatory Memorandum to the CLERP 9 Bill 2003 (Cth) notes that stakeholders generally were not in support.[40]

> A number of stakeholders considered that the extension of civil liability to persons involved in a contravention should be accompanied by a due diligence/business judgment defence and confined to officers or senior managers (and not those involved in the decision-making process but who cannot effect disclosure). [41]

The Explanatory Memorandum to the CLERP 9 Bill 2003 (Cth) states that the intention of the amendment was that liability would apply to individuals who have a real involvement with the disclosing entities contravention of the continuous disclosure provisions. Individuals would be liable only if they intentionally participated in and had actual knowledge of the essential elements of the disclosing entities contravention.[42] Liability would extend to individuals who 'aided, abetted, counselled or procured the contravention, were knowingly concerned in, or party to, the contravention; and conspired to effect the contravention.'[43]

The *CLERP 9 Act* introduced a due diligence defence for individuals. *Corporations Act 2001* (Cth), s 674(2B)[a] states that individuals will not be liable if they prove that they

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[37] Explanatory Memorandum, CLERP 9 Bill, n 2, para 5.450.

[38] Raykovski E, 'Continuous Disclosure: has Regulation Enhanced the Australian Securities Market? (2004) 30 (2) Monash University Law Review 269, at 297.

[39] Australian Securities and Investments Commission, n 34, at 36.

[40] Explanatory Memorandum, CLERP 9 Bill, n 2,at para 4.262.

[41] Explanatory Memorandum, CLERP 9 Bill, n 2, at para 4.263.

[42] Explanatory Memorandum, CLERP 9 Bill, n 2, at para 5.447.

[43] Explanatory Memorandum, CLERP 9 Bill, n 2, at para 5.447.

(a) took all steps (if any) that were reasonable in the circumstances to ensure that the listed disclosing entity complied with its obligations under subsection(2); and

(b) after doing so, believed on reasonable grounds that the listed disclosing entity was complying with its obligations under that subsection.

In addition *Corporations Act 2001* (Cth), s 1317S provides relief for individuals who have contravened the continuous disclosure provisions but have acted honestly and in the circumstances ought fairly be excused.[44]

C *Applications for compensation and declarations of contravention*

A further amendment made by the *CLERP 9 Act* clarified the law so that it is clear that applications for compensation can be made regardless of whether or not a declaration of a contravention has been made.[45] This applies to all civil penalty provisions including the continuous disclosure provisions.[46] The Department of Treasury Discussion Paper notes that the purpose of the compensation provisions is to ensure that persons are compensated adequately when they suffer loss or damage as a result of a contravention of the civil penalty provisions.[47] The Department of Treasury Discussion Paper notes that there was some uncertainty as to whether or not compensation could be awarded in situations where there had been no declaration of a contravention.[48] The amendment resolved this confusion. In addition the amendment allowed compensation to be claimed from either or both the disclosing entity and any person involved in the contravention.[49]

This amendment will be particularly important in situations where ASIC does not issue a civil penalty application. Only ASIC may apply for a declaration that a contravention of a civil penalty provision has occurred.[50] Where ASIC does not seek a declaration of contravention other parties will be able to seek compensation.

V. THE ADMINISTRATIVE PENALTY REGIME

The most controversial amendment introduced by the *CLERP 9 Act* was the introduction of the administrative penalty regime. The administrative penalty regime contained in *Corporations Act 2001* (Cth), Part 9.4AA is intended to allow ASIC to issue an infringement notice in relation to a relatively minor contravention of the continuous disclosure provisions. If ASIC has reasonable grounds for believing that a disclosing entity has committed a minor contravention it can issue an infringement notice specifying

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[44] *Corporations Act 2001* (Cth), s 1317S.
[45] *Corporations Act 2001* (Cth), s 1317HA(1).
[46] *Corporations Act 2001* (Cth), s 1317H(1) and 1317HA(1).
[47] Department of Treasury, n 8, at 154.
[48] Department of Treasury, n 8, at 154.
[49] Department of Treasury, n 8, at 154.
[50] Corporations Act 2001 (Cth), s 1317J(1).

the payment of a fixed penalty. Prior to issuing the infringement notice ASIC must give the disclosing entity a statement of ASIC's reasons for believing that the contravention has occurred and must hold a hearing at which the disclosing entity is given the opportunity to respond.[51] If at the conclusion of the hearing ASIC has formed the view that a contravention has occurred ASIC can issue the infringement notice specifying that a set penalty must be paid.[52] The entity can choose to pay the penalty within 28 days and no further action is taken.[53] If the penalty is not paid within 28 days ASIC can commence court proceedings.[54]

The new administrative penalty regime was introduced for the purpose of increasing compliance with the continuous disclosure provisions by supplementing the existing civil and criminal court procedures. [55] The Department of Treasury discussion paper argues that the new administrative penalty

> would remedy a significant gap in the current enforcement framework by facilitating the imposition of a financial penalty in relation to relatively minor contraventions of the regime that would not otherwise be pursued through the courts and in relation to which ASIC considers a relatively small financial penalty would be justified.[56]

ASIC supported the proposal for the introduction of the new administrative penalty regime. In its submission in response to the Department of Treasury discussion paper ASIC notes that

> a power to impose administrative fines for contraventions of the continuous disclosure regime will improve the flexibility, cost effectiveness and timeliness of remedies, and underpin the integrity of the law by providing a proportionate remedy for conduct that may not otherwise be addressed. A power to fine is an important tool particularly for late or inadequate disclosure, where existing remedies are ineffective or overly complex.[57]

ASIC submitted that the use of existing criminal or civil proceedings was not always the most effective way of ensuring that the continuous disclosure requirements were complied with. Contraventions of the continuous disclosure provisions have an immediate impact on the market and so ASIC required a remedy that would allow them to respond quickly. The next section of this paper will consider the provisions of Part 9.4AA in detail. This paper will discuss the advantages of and some criticisms that have been leveled against the administrative penalty regime. Finally this paper will review ASIC's use of the civil and administrative penalty regimes.

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[51] *Corporations Act 2001* (Cth), s 1317DAD.
[52] *Corporations Act 2001* (Cth), s 1317DAC.
[53] *Corporations Act 2001* (Cth), s 1317DAF.
[54] *Corporations Act 2001* (Cth), s 1317DAG.
[55] Explanatory Memorandum, CLERP 9 Bill, n 2, at para 4.220.
[56] Department of Treasury, n 8, at 149.
[57] Australian Securities and Investments Commission, n 34, at para 3.10.

A. *The provisions of Part 9.4AA*

1 *Issuing the Penalty Notice*

The administrative penalty regime allows ASIC to issue an infringement notice to a disclosing entity if ASIC has reasonable grounds to believe that a disclosing entity has contravened the continuous disclosure provisions.[58] ASIC is not required to seek court approval prior to issuing the infringement notice.

The penalty notice can stipulate that a penalty be paid, information be disclosed to the market and/or documents be lodged.[59] There is no ability to impose a requirement to compensate persons who have suffered as a result of the contravention of the continuous disclosure requirements.

The procedural requirements are contained in the Act. In 2004 ASIC issued a guide entitled '*Continuous Disclosure Obligations: Infringement Notices, An ASIC Guide*' ('the ASIC Guide').[60] The ASIC guide aims to provide entities which may be subject to continuous disclosure obligations with information about ASIC's general approach to the infringement notice regime and to the stages in the infringement notice process. The Act and the ASIC Guide provide information as to how the administrative penalty regime will be utilised.

The *Corporations Act 2001* (Cth) requires ASIC to have regard to certain matters before a notice is issued. *Corporations Act 2001* (Cth), s 1317DAC(4) states that

> [i]In determining whether to issue an infringement notice to a listed disclosing entity for an alleged contravention of subsection 674(2), ASIC must have regard to:
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> > (a) any guidelines issued by the relevant market operator for the listed disclosing entity that relate to the provisions of the listing rules referred to in subsection 674(1); and
> >
> > (b) any other relevant matter. [61]

In addition to having regard to the above matters ASIC must provide the disclosing entity with a written statement that sets out ASIC's reasons for believing that the disclosing entity has contravened the continuous disclosure provisions.[62] Prior to issuing the statement of reasons ASIC must consult with the relevant market operator if the disclosing entity is a listed disclosing entity.[63] ASIC is not required to consult with the relevant market operator if the listed disclosing entity is the market operator or the disclosing entity conducts a business in competition with the market operator.[64]

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58 *Corporations Act 2001* (Cth), s1317DAC(1).

59 *Corporations Act 2001* (Cth), s1317DAE(1).

60 Australian Securities and Investments Commission '*Continuous Disclosure Obligations: Infringement Notices, An ASIC Guide*' May 2004.

61 *Corporations Act 2001* (Cth), s 1317DAC(4)

62 *Corporations Act 2001* (Cth), s 1317DAD(1)(a).

63 *Corporations Act 2001* (Cth), s 1317DAD(2).

64 *Corporations Act 2001* (Cth), s 1317DAD(3).

In addition to providing the written statement of reasons Part 9.4AA states that prior to issuing the infringement notice ASIC must

> give a representative of the disclosing entity an opportunity to:
>
> (i) appear at a private hearing before ASIC; and
>
> (ii) give evidence to ASIC; and
>
> (iii) make submissions to ASIC;
>
> in relation to the alleged contravention of subsection 674(2) or 675(2).[65]

ASIC will appoint a delegate to conduct the hearing. The hearing before the ASIC delegate must be conducted in accordance with the *ASIC Act 2001* (Cth). The Explanatory Memorandum to the CLERP 9 Bill 2003 notes that this means that ASIC will be bound by the rules of natural justice and will be required to allow persons appearing at the hearing to be legally represented.[66] A corporate officer may appear as a representative of the entity.[67] In relation to the hearing the ASIC Guide notes that while the disclosing entity has the right to appear it is not obliged to do so. If it decides not to appear at the hearing the disclosing entity may choose to make written submissions or not to make any representation at all.[68]

The ASIC Guide notes that the hearings are to be conducted as informally and as quickly as possible. The usual rules of evidence and court rules of practice and procedure do not apply.[69] ASIC will comply with the rules of procedural fairness that require it to allow entities appearing before it to put their submissions.[70] ASIC states that in most cases it will not be necessary to call witnesses however if witnesses are required, usually a written statement will be adequate. ASIC may rely on evidence from independent expert witnesses.[71]

At the conclusion of the hearing the ASIC delegate may issue an infringement notice if he or she has reasonable grounds to believe that a disclosing entity has breached the continuous disclosure provisions. The infringement notice must stipulate the amount of the penalty to be paid and if appropriate the notice may require the entity to disclose certain information or lodge certain documents. The quantum of the penalty is not determined by ASIC. Rather, it is determined by the *Corporations Act 2001* (Cth). The Act determines the amount of the penalty to be paid by reference to the disclosing entity's market capitalisation and whether or not the disclosing entity has any prior criminal convictions, been the subject of a civil penalty order or has provided an

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65 *Corporations Act 2001* (Cth), s 1317DAD(1)(b).

66 Explanatory Memorandum to the CLERP Bill, n 2, at para 5.477.

67 Australian Securities and Investments Commission, *An ASIC Guide*, n 60, at 8.

68 Australian Securities and Investments Commission, *An ASIC Guide*, n 60, at 8.

69 *ASIC Act 2001* (Cth), s 59(2)(a) and Australian Securities and Investments Commission, *An ASIC Guide*', n 60, at 9.

70 Australian Securities and Investments Commission, *An ASIC Guide,* n 60, at 9.

71 Australian Securities and Investments Commission, *An ASIC Guide*' May 2004, n 60, at 9.

enforceable undertaking to ASIC in relation to a prior contravention of the *Corporations Act 2001* (Cth), s 674(2) or s 675(2).[72]

In relation to the fixing of the quantum of the penalty under an infringement notice the Explanatory Memorandum, CLERP 9 Bill 2003 (Cth) states that

> The purpose of basing the financial penalty on an entity's market capitalisation is because the potential damage that results from an ill-informed market is proportional to both the amount of an entity's securities that can be traded and the value of those securities. Furthermore, ASIC has not been given discretion to set the financial penalty because flexible penalties for infringement notices are inconsistent with Commonwealth policy and could lead to legal problems.[73]

The ASIC guide states that ASIC aims to have proceeded to the stage of issuing the infringement notice within 3 months of commencing the investigation of the alleged contravention.[74]

2. *Compliance with the infringement notice*

Once an infringement notice is issued the disclosing entity has four options. It can comply with the notice within 28 days by paying the stipulated penalty, disclosing the required information to the market and/or lodging any required documents. [75] Alternatively the disclosing entity can seek an extension of the compliance period, can write to ASIC requesting that the notice be withdrawn or it can decline to satisfy the infringement notice.

If the disclosing entity complies with the infringement notice ASIC is precluded from taking any further action against it in relation to the contravention. A disclosing entity is not to be regarded as having contravened the continuous disclosure provisions or having been convicted of an offence under the continuous disclosure provisions simply because the entity has complied with an infringement notice.[76]

Compliance with an infringement notice does not preclude third parties who have suffered a loss as a result of the contravention from instituting proceedings against the disclosing entity to recover compensation nor does it preclude ASIC from issuing civil penalty proceedings against persons who were involved in the contravention.[77] Golding and Kalfus argue that this factor will provide disclosing entities with a strong incentive to negotiate outcomes with ASIC whereby ASIC agrees not to proceed against persons involved in the entities contravention in exchange for the entity agreeing to comply with the infringement notice.[78]

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[72] *Corporations Act 2001* (Cth), s 1317DAE(2) to 1317DAE(7).
[73] Explanatory Memorandum, CLERP 9 Bill, n 2, at para 5.487.
[74] Australian Securities and Investments Commission, *An ASIC Guide,* n 60, at 5.
[75] *Corporations Act 2001* (Cth), s 1317DAH.
[76] *Corporations Act 2001* (Cth), s 1317DAF(4).
[77] *Corporations Act 2001* (Cth), s 1317DAF(6).
[78] Golding G et al, n 35, at 406.

If the disclosing entity does not comply with the infringement notice ASIC cannot enforce the notice. However, ASIC can institute proceedings seeking civil penalty orders pursuant to *Corporations Act 2001* (Cth), Part 9.4B and can seek an order that the entity disclose certain information pursuant to *Corporations Act 2001* (Cth), s 1324B. No other proceedings whether civil or criminal can be commenced against the entity unless the infringement notice is withdrawn.[79]

The Explanatory memorandum to the CLERP 9 Bill 2003 (Cth) states that

> The reason for limiting an entity's liability to civil proceedings is because the infringement notice mechanism is intended:
>
> - for use only in relation to relatively minor contraventions; and
> - to bring the process for enforcing the alleged contravention to an end upon compliance with the infringement notice.[80]

3. Withdrawal of the infringement notice

If ASIC believes that it is appropriate to do so it may withdraw an infringement notice that has not been satisfied. ASIC may withdraw the infringement notice on its own accord or after receipt of a written request from the disclosing entity. The Explanatory memorandum to the CLERP 9 Bill 2003 states that

> ASIC may withdraw the infringement notice with the intention of not pursuing the alleged contravention, in which case ASIC would not commence proceedings against the entity. Alternatively, the rationale behind the withdrawal may be that ASIC considers that the alleged contravention is more serious that ASIC initially believed and warrants proceedings unavailable under the infringement notice mechanism.[81]

If an infringement notice is withdrawn prior to it being satisfied ASIC is not restricted in any action it can take against the disclosing entity. If the infringement notice is withdrawn because ASIC believes that it should not pursue any enforcement action in relation to the alleged contravention it can choose to take no further action against the entity. However, if the infringement notice is withdrawn because ASIC believes that the alleged contravention is more serious than it first thought it can issue civil penalty or criminal proceedings against the disclosing entity.[82]

ASIC will be required to give careful consideration to the seriousness of the alleged contravention because once the decision to pursue administrative penalties is made the enforcement options are limited. If the infringement notice is complied with the penalty imposed will be the administrative penalty stipulated in the notice. If the infringement notice is not complied with ASIC is limited to an application for civil penalty orders and

[79] *Corporations Act 2001* (Cth), s 1317DAG.
[80] The Explanatory memorandum to the CLERP 9 Bill, n 2, at para 5.509.
[81] Explanatory Memorandum, CLERP 9 Bill 2003, n 2, at para 5.504.
[82] *Corporations Act 2001* (Cth), s 1317DAI.

later criminal penalties cannot be issued. However, this bar against the issuing of later criminal proceedings is not absolute. If an infringement notice is issued and is not complied with ASIC may choose to withdraw it. If ASIC withdraws an infringement notice that has not been complied with ASIC is then free to institute either civil penalty or criminal proceedings against the disclosing entity.[83]

4. Publication of the Infringement Notice

The *Corporations Act 2001* (Cth) provides that if ASIC has issued an infringement notice and the infringement notice has been complied with ASIC may publish details of the disclosing entity's compliance with the infringement notice.[84] The ASIC Guide notes that under these circumstances ASIC will publish details of the notice. The publication will contain a statement that the entity has complied with the infringement notice and either a copy of the infringement notice or an accurate summary of the infringement notice. In either case the publication will state that compliance with the notice is neither an admission of guilt nor liability and that the disclosing entity is not regarded as having breached the provision specified in the notice.[85]

The Explanatory memorandum to the CLERP 9 Bill 2003 (Cth) states that publication of the details of the disclosing entity's compliance with the infringement notice is designed to 'induce entities to comply with their continuous disclosure obligations. Publicity will send a signal to the market that ASIC is taking prompt action to deal with inadequate disclosure.'[86] The next section of this paper will consider the advantages of and the criticisms that have been leveled against the administrative penalty regime.

VI. ADVANTAGES OF THE ADMINISTRATIVE PENALTY REGIME

Commentators have argued that there are various advantages associated with the introduction of the administrative penalty regime. The main advantage identified is that the regime should assist ASIC in the enforcement of minor contraventions of the continuous disclosure provisions. Cassidy and Chapple argued that

> [r]egardless of how strong Australia's disclosure law appears on paper, the absence of enforcing breaches means Australian companies have less pressure to provide information, which ultimately leads to a culture of inadequate disclosure.[87]

Despite the fact that the continuous disclosure provisions were enforced by the criminal law from 1994 there has been very few criminal prosecutions launched. In 2002 the Department of Treasury noted that no criminal prosecutions had been launched at that

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83 *Corporations Act 2001* (Cth), s 1317DAB(2)(b)(ii).
84 *Corporations Act 2001* (Cth), s 1317DAJ.
85 Australian Securities and Investments Commission, *An ASIC Guide,* n 60, at 13-4.
86 Explanatory Memorandum, CLERP 9 Bill, n 2, at para 5.506.
87 Cassidy et al, n 36, at 87.

time.[88] As stated previously the continuous disclosure provisions became subject to the civil penalty regime on 11 March 2002. Only two civil penalty applications alleging a contravention of the continuous disclosure provisions were issued by ASIC before the introduction of the administrative penalty regime in July 2004.[89] A total of three civil penalty applications have been issued as at 31 July 2006.

Given the difficulty experienced by ASIC in enforcing these provisions Cassidy and Chapple noted that it is not surprising that the changes brought about by the *CLERP 9 Act* concentrate on enforcement of the continuous disclosure provisions rather than on a rewrite of the provisions themselves.[90]

The new administrative penalty regime should enable ASIC to take action to enforce minor contraventions of the continuous disclosure provisions. Cassidy and Chapple noted that administrative penalty notices issued by ASIC may lead to the perception that ASIC was able to pursue contraventions of the continuous disclosure provisions. This is more likely to lead to voluntary compliance. Cassidy and Chapple noted that '(i)n the current Australian setting it is the increased threat of enforcement that will drive firms into action, as opposed to the punishment itself.'[91]

It is apparent from an examination of ASIC's use of the civil and administrative penalty regimes that there has been an increase in the number of enforcement actions undertaken in recent years. Between 1 July 2004, when the administrative penalty regime was introduced and 31 July 2006 ASIC has taken enforcement action in relation to non criminal contraventions of the continuous disclosure provisions on six separate occasions.[92] Prior to this date only two civil enforcement actions had been issued. They were the civil penalty proceedings issued against Southcorp Ltd and Chemeq Ltd.[93]

Another advantage of the administrative penalty regime is that it complies with strategic regulation theory. Strategic regulation theory is an economic theory of regulation under which a regulator's goal is defined as the need to secure compliance with the law. This

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88 Department of Treasury, n 8, at 147. A search of the ASIC media releases indicates that a criminal prosecution alleging contraventions of the continuous disclosure provisions was heard on 2 June 2006. ASIC Media Release 06-176.

89 The first application was issued against Southcorp Limited. See ASIC Media Release 03/070. The second civil penalty application was issued against Chemeq Ltd. See ASIC Media Release 04-426.

90 Cassidy et al, n 36, p 81, at 88.

91 Cassidy et al, n 36, 81, at 102. The Explanatory memorandum to the CLERP 9 Bill 2003 notes that the increased likelihood of a penalty being imposed should provide an incentive for disclosing entities to comply with the provisions. Explanatory Memorandum, CLERP 9 Bill 2003 (Cth), at para 4.255.

92 A further civil penalty application was against Chemeq Ltd on 23 December 2004. See ASIC Media Release 04-426. This application related to alleged contraventions of the continuous disclosure provisions occurring on seven occasions between February 2003 and 6 October 2004. This application has not been included in the analysis because most of the alleged contraventions occurred prior to 1 July 2004 and therefore the administrative penalty regime would not have been available to ASIC.

93 ASIC Media Releases 03/070 and 04/426.

theory offers guidelines as to how that compliance may be best secured.[94] It requires the regulator to be equipped with a range of sanctions that are ordered from the least to the most severe.

Strategic regulation theory is usually graphically represented by the pyramid model.[95] The pyramid model was developed and expanded by John Braithwaite, Brent Fisse and Ian Ayres.[96] The pyramid model requires the regulator to be armed with a range of sanctions that escalate in severity from education and persuasion at the base, through various other stages in the middle to incapacitation at the apex. The regulatory agency should move from one level to another, commencing at the lowest level in the majority of cases.

The introduction of the administrative penalty regime provides ASIC with a new sanction in the lower range of the enforcement pyramid for contraventions of the continuous disclosure provisions. Prior to the introduction of this regime ASIC's enforcement options were situated towards the apex of the enforcement pyramid. ASIC did not have the ability to utilize any enforcement mechanisms at the base or lower level of the pyramid. ASIC's choice for non criminal contraventions was limited to civil penalty applications. The lack of a base or lower level enforcement mechanism could account for the lack of enforcement activity.

Another advantage of the administrative penalty regime identified by Raykovski is that it provides a less harsh and discriminatory way of dealing with minor offences. The matter should be dealt with in less time and for lower costs than other penalty applications. The stigma that normally follows a criminal conviction would not apply.[97]

Dixon argued that administrative penalties are considered to be acceptable options, when considered in the context of the other enforcement options that are available. Some other options are not ideal because they effect shareholders adversely. These options include trading halts or suspensions. Civil penalty proceedings and to a greater degree, criminal proceedings are not ideal because they are cumbersome and can take years.[98]

Another argument in favour of administrative penalties is that these types of penalties are used by many foreign regulators such as those in the United Kingdom and the United States of America.[99] ASIC noted that it is important that Australia be able to encourage

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94 Gilligan G, Bird H and Ramsay I, 'Civil Penalties and the Enforcement of Directors' Duties' (1999) 22 (2) UNSW Law Journal 417 – 461, at 419.

95 Gilligan et al, n 94, at 425.

96 Fisse B and Braithwaite J, *Corporations Crime and Accountability* (1993) Cambridge University Press, Cambridge.

97 Raykovski E, 'Continuous Disclosure: has Regulation Enhanced the Australian Securities Market? (2004) 30 (2) Monash University Law Review 269, at 294-5.

98 Dixon J, n 6, at 83.

99 Explanatory Memorandum, CLERP 9 Bill, n 2, para 5.463 and Australian Securities and Investments Commission, n 34, at para 3.15. ASIC notes that in addition to the UK and the USA similar administrative penalties are used by regulators in Hong Kong, Ontario, Saskatchewan, Greece, Korea, China and Poland.

confident participation in its markets by international investors and financial service providers.[100]

VII. CRITICISMS OF THE ADMINISTRATIVE PENALTY REGIME

The main criticism leveled against the administrative penalty regime is that it allows ASIC to be 'both prosecutor and judge in its own cause of action.'[101] ASIC is able to impose penalties via a process that is not subject to scrutiny by a court.[102] ASIC and the Department of Treasury argued that the fact that the new regime required ASIC to seek a court order before it could enforce any administrative penalty notice it had issued provided a significant safeguard to ensure that it did not abuse its power or make erroneous decisions.[103] In addition, the Explanatory Memorandum to the CLEPP 9 Bill (2003) notes that ASIC already had the dual roles of investigating a breach, determining whether or not a contravention had occurred and imposing a penalty in relation to other provisions of the *Corporations Act 2001* (Cth).[104]

Raykovski argued that the risk imposed by some administrative penalty regimes that the regulator is both the prosecutor and judge was reduced in the regime introduced by the *CLERP 9 Act*. The new administrative penalty regime reduced the risk by providing that ASIC must hold a hearing and give the affected party an opportunity to be heard before any penalty is imposed.[105] However, McConvill argued that it is possible that the public will perceive that the purpose of the hearing held by ASIC is to give the accused party an opportunity to establish their innocence rather than requiring ASIC to establish their guilt, thereby reversing the onus of proof.[106]

The introduction of the administrative penalty regime by the *CLERP 9 Act* has been criticised as being premature. The regime was introduced before ASIC had been given sufficient opportunity to test fully the civil penalty enforcement powers that it had been given in relation to continuous disclosure in 2002. Civil penalty proceedings had proved to be successful enforcement mechanisms for other provisions of the *Corporations Act 2001* (Cth) and ASIC had not been given the opportunity to test these provisions in

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100 Australian Securities and Investments Commission, n 34, at para 3.16.

101 Golding G et al, n 35, at 405. See also Commonwealth, *Parliamentary Debates,* Senate, 21 June 2004, 24312 (Senator Ian Campbell, Minister for Local Government, Territories and Roads). McConvill has argued that the administrative penalties allow ASIC to exercise judicial power and would thus fall foul of Chapter 111 of the Constitution. See McConville J, 'Australian Securities and Investments Commission's proposed power to issue infringement notices: Another slap in the face to s 1324 of the Corporations Act or an undermining of corporate civil liberties?' (2003) 31 Australian Business Law Review 36, at 42.

102 Raykovski E, n 38, at 295.

103 Australian Securities and Investments Commission, n 34, at para 3.14 and Department of Treasury, n 8, at 150.

104 Those other provisions include provisions regulating licences granted under the *Corporations Act 2001* (Cth) and directors involved in multiple insolvent companies. Explanatory Memorandum, CLERP 9 Bill, n 2, at paras 5.461-2. See also Department of Treasury, n 8, at 149.

105 Raykovski E, n 38, at 295.

106 McConville J, n 101, at 42.

relation to continuous disclosure.[107] Furthermore, ASIC was not given the opportunity to test the amendments made to the civil penalty regime by the *CLERP 9 Act*. These amendments were the increase in the maximum penalty for corporations to $1 million and the extension of liability to individuals knowingly involved in a corporation's contravention of the continuous disclosure provisions.

There is evidence to support this argument. ASIC has achieved successful outcomes in most of the civil penalty applications it has issued. From March 1993 to May 2004 nineteen applications for civil penalty orders issued by ASIC were finalised. In all but one of these nineteen cases ASIC obtained a declaration that a contravention of a civil penalty provision had occurred and civil penalty orders were imposed on the defendant.[108]

However it was some years after the introduction of the regime before this success was achieved. The civil penalty regime was introduced in March 1993 but the first civil penalty orders were not obtained until three years later in 1996.[109] The share capital provisions became subject to the civil penalty regime in 1998.[110] The first civil penalty application alleging a contravention of the share capital provisions was not issued until three years later in 2001.[111]

Therefore it would be expected that some time would pass between the expansion of the civil penalty regime to the continuous disclosure provisions in 2002 and the first civil penalty application. However, the first civil penalty application alleging a contravention of the continuous disclosure provisions was issued in 2003.[112] The period of time from the expansion of the civil penalty regime to the continuous disclosure provisions in 2002 and the first civil penalty proceeding alleging a contravention of these provisions in 2003 is short when compared to the relevant time period for other provisions enforced by the civil penalty regime. It is arguable that ASIC was not given sufficient time to test the civil penalty regime as an enforcement mechanism for contraventions of the continuous disclosure provisions. ASIC was given no time to test the enforcement capabilities of the

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[107] Golding G, n 35, at 405. See also the editorial comments of Professor Robert Baxt, (2006) 24 *C&SLJ* 73 in which he argues that the power to issue infringement notices under the administrative penalty regime is not necessary nor warranted in light of the other enforcement powers available to ASIC.

[108] For a discussion of ASIC's use of the civil penalty regime see Welsh M, 'Eleven Years On – An Examination of ASIC's Use of an Expanding Civil Penalty Regime' (2004) 17 Australian Journal of Corporate Law 175.

[109] The first civil penalty orders were issued against Gordon Leishman, a director of Medalion Homes on 18 October 1996. Leishman was found to have contravened the insolvent trading provisions. See ASIC Media Release 96/237.

[110] The civil penalty regime was expanded to include the share capital provisions by the *Company Law Review Act 1998* (Cth).

[111] The first civil penalty orders were issued in relation to a contravention of *Corporations Act 2001* (Cth), s 260A against the directors of the HIH group of companies on 14 March 2002. ASIC v Adler (No 3) (2002) 20 ACLC 576.

[112] This application was issued against Southcorp Ltd. See ASIC Media Release 03/070. As at 31 July 2006 a total of three civil penalty applications alleging a contravention of the continuous disclosure provisions have been issued.

increase in the maximum penalty for corporate defendants and the introduction of liability for individuals.

Another criticism of the administrative penalty regime is that it is problematic for persons who suffer as a result of a contravention of the continuous disclosure provisions. These victims include the disclosing entity's shareholders who decide to sell or purchase shares without the benefit of the price sensitive information that has not been disclosed.

The administrative penalty regime is problematic for these shareholders for two reasons. First, the administrative penalty regime does not allow ASIC to seek compensation on behalf of the victims of the contravention. The only remedy available is the penalty stipulated in the legislation. This penalty goes to consolidated revenue.

The issue of an administrative penalty notice by ASIC does not prevent victims from issuing proceedings seeking compensation. However, if ASIC chooses to utilise the administrative penalty regime rather than the civil penalty regime ASIC will not be in a position to seek compensation on behalf of those victims. If ASIC issues proceedings pursuant to the civil penalty regime it can, in addition to other orders, seek a compensation order.

The second problem faced by shareholders under the administrative penalty regime is the fact that any penalty imposed will be imposed on the disclosing entity itself. If the victims are the current shareholders of the disclosing entity those shareholders, who have already suffered as a result of the entities contravention of the continuous disclosure provisions, will be further disadvantaged by the payment of the penalty by the entity. However, if proceedings are issued pursuant to the civil penalty regime there is scope for ASIC to seek orders requiring persons knowingly concerned in the entity's contravention to compensate the entity for any penalty it is required to pay.

If ASIC issues an administrative penalty notice against a disclosing entity ASIC is not prevented from issuing civil penalty proceedings against the officers of the disclosing entity in relation to their involvement in the contravention. However, it has been argued that it is likely agreement will be reached whereby ASIC will not issue proceedings against officers of the entity in exchange for the company agreeing to satisfy infringement notice.[113] Potentially, this will disadvantage victims of the contravention.

Administrative penalty regimes have been criticised on other grounds. In 2002 the Australian Law Reform Commission ('the ALRC') released its report entitled 'Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation.' The ALRC noted there is a risk that some parties will be treated too harshly under an administrative penalty regime. Innocent people may pay the fine in order to save themselves the expense and other risks associated with the court processes.[114] The ALRC stated that '[i]nfringement notice schemes may be seen as an attempt to convince people

[113] Golding G et al, n 35, at 406.

[114] Australian Law Reform Commission 'Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation (ALRC 95) (2002), at para 12.10 and Raykovski E, n 38, at 295.

to voluntarily forego the procedural protections of the criminal process in the interests of allowing the state to collect fines more efficiently.'[115]

In addition to the risk that some offenders will be treated too harshly there is also a risk that some parties will be treated too leniently. The ALRC noted that one of the characteristics of administrative penalty regimes generally is that they allow persons to whom penalty notices are issued to make the problem go away by paying the penalty.[116] This may mean that some offenders are treated in a more lenient manner than they deserve. ASIC may be tempted to use administrative penalties for serious contraventions, rather than pursuing civil penalty proceedings. In an attempt to ensure that this does not occur the financial penalty that can be imposed under the *CLERP* 9 *Act* amendments is limited. The Explanatory Memorandum to the CLEPP 9 Bill (2003) states that

> [t]he limitation on the size of the financial penalty nominated in the notice and restrictions preventing ASIC from taking other action in relation to conduct dealt with using this mechanism are intended to ensure that it is not used for more serious contraventions as an alternative to existing court processes.[117]

While the restriction in the quantum of the penalty that may be imposed under the administrative penalty regime may encourage ASIC to restrict its use of the regime to non serious contraventions it is important to note that there is no requirement in the Act limiting the use of the regime to minor contraventions of the continuous disclosure provisions. This constitutes a further problem with the administrative penalty regime. The Explanatory memorandum, CLERP 9 Bill 2003 (Cth) states that the administrative penalty regime was designed to provide an enforcement mechanism for minor contraventions of the continuous disclosure provisions.[118] However there is no section in *Corporations Act 2001* (Cth), Part 9.4AA that limits the use of the regime to minor contraventions. *Corporations Act 2001* (Cth), s 1317DAB(1) states that the purpose of Part 9.4AA:

> is to provide for the issue of an infringement notice to a disclosing entity for an alleged contravention of subsection 674(2) or 675(2) as an alternative to proceedings for civil penalties under Part 9.4B. [119]

Corporations Act 2001 (Cth), s 1317DAC(1) states that

> [s]ubject to section 1317DAD, if ASIC has reasonable grounds to believe that a disclosing entity has contravened subsection 674(2) or 675(2), ASIC may issue an infringement notice to the disclosing entity.[120]

Not only is there no provision in the Act limiting the use of the administrative penalty regime to minor contraventions there is no definition of nor any guidance as to the meaning of a minor contravention. As there is no requirement in the Act limiting the use

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115 Australian Law Reform Commission, n 114, at para 12.13.
116 Australian Law Reform Commission, n 114, at para 12.6.
117 Explanatory Memorandum, CLERP 9 Bill, n 2, at paras 5.465.
118 Explanatory Memorandum, CLERP 9 Bill, n 2, at para 5.458.
119 Corporations Act 2001 (Cth), s 1317DAB(1).
120 Corporations Act 2001 (Cth), s 1317DAC(1).

of the regime to minor contraventions of the continuous disclosure provisions and no guidance as to what a minor contravention actually is there is a risk that ASIC may in fact use these provisions to enforce serious contraventions and that some parties will be treated too leniently.

The next section of this paper will examine ASIC's choice of enforcement regimes following an investigation of an alleged contravention of the continuous disclosure provisions. This paper will examine ASIC's use of both the civil and administrative penalty regimes. The purpose of this analysis is to identify the factors that are likely to lead to the conclusion by ASIC that a matter is minor and therefore should be enforced pursuant to the administrative penalty regime. Secondly the analysis will determine whether or not ASIC is limiting its use of the administrative penalty regime to minor contraventions of the continuous disclosure provisions. The analysis is limited because the only available information is the information contained in the ASIC media releases.

VIII. ASIC'S USE OF THE ADMINISTRATIVE PENALTY REGIME

The introduction of the administrative penalty regime in 2004 provided ASIC with a choice of that regime or the civil penalty regime for non criminal contraventions of the continuous disclosure provisions. After a suspected contravention of the continuous disclosure provisions has been investigated and a criminal prosecution has been ruled out ASIC will decide which of the two penalty regimes is the more appropriate. According to the ASIC guide ASIC will be required to assess whether the contravention in question is relatively minor or serious. If it is a relatively minor contravention, the administrative penalty regime will be the more appropriate. If it is a serious contravention the civil penalty regime will be the more appropriate.

The *Corporations Act 2001* (Cth) provides no guidance as to the types of contraventions that are to be considered to be serious and those that are to be considered to be minor. The only guidance comes from the ASIC guide. In relation to deciding which penalty regime is the more appropriate the ASIC guide states that ASIC will

> consider all of the relevant facts and circumstances of the matter and we will generally have regard to:
>
> (a) the seriousness of the alleged breach; and
>
> (b) the view of the relevant market operator. [121]

The ASIC guide states that

> In determining the seriousness of an alleged breach, ASIC will have regard to a number of different factors depending on the circumstances of the matter. The impact of the alleged breach on the market for the entity's securities may be a relevant consideration (including, for example,

[121] Australian Securities and Investments Commission, *An ASIC Guide*', n 60, at 6.

> any change in price of the securities and/or the number of securities traded during the period of the alleged breach). ASIC may also have regard to the materiality of the information the subject of the alleged breach, such as whether the information went to the heart of the entity's continued operations. The factual circumstances giving rise to the alleged breach (such as whether the conduct giving rise to the alleged breach was negligent, reckless or deliberate) will be considered by ASIC in determining its seriousness. The adequacy of the entity's internal controls, and whether they were complied with, may be a relevant consideration. The conduct of the entity before the alleged breach (including whether the entity sought and followed professional advice in relation to disclosure) and after the alleged breach (for example whether the entity took immediate steps to correct the failed disclosure) will be considered by ASIC in most cases.[122]

As stated previously ASIC has taken enforcement action in relation to non criminal contraventions of the continuous disclosure provisions on six separate occasions between 1 July 2004, when the administrative penalty regime was introduced and 31 July 2006.[123] The ASIC media releases indicate that five penalty notices have been issued pursuant to the administrative penalty regime and one application has been issued pursuant to the civil penalty regime. The five penalty notices issued pursuant to the administrative penalty regime were issued against Solbec Pharmaceuticals Limited (Solbec), QRSciences Holding Limited (QRS), SDI Ltd (SDI), Avastra Limited (Avastra) and Astron Limited (Astron). The application issued pursuant to the civil penalty regime was issued against Fortescue Metals Group Ltd (Fortescue) and its' Chief Executive Officer, Andrew Forrest.[124]

The first infringement notice was issued against Solbec on 14 June 2005. On 1 August 2005 ASIC issued a media release advising that Solbec had complied with the infringement notice. The media release advised that ASIC had issued the infringement notice because it believed that Solbec had contravened the continuous disclosure provisions of the *Corporations Act 2001* (Cth)

> in failing to notify the ASX about the structure, size and limited nature of the results of an animal study relating to its cancer drug, Coramsine™.
>
> In the announcement, Solbec told the ASX, among other things, that Coramsine™ brought about total remission of malignant mesothelioma in mice when combined with immunotherapy. Following that announcement, the share price of Solbec increased by some 92 per cent. Solbec later told the ASX that the study had tested Coramsine™ on five mice of which only two had gone into remission of malignant mesothelioma.[125]

The first announcement occurred at 10.19am on the 23 November 2004. The price of ordinary shares of Solbec increased from 12.5 cents to 24 cents before the close of trading on 23 November 2004. Several media papers containing additional details of the animal study were published between 23 November 2004 and 26 November 2004. During this period the price of the shares fell to 17.5 cents. A second announcement containing the full details of the trial was made at 2.06pm 26 November 2004.[126]

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[122] Australian Securities and Investments Commission, *An ASIC Guide*, n 60, at 6-7.
[123] See footnote 92.
[124] ASIC Media Release 06-062.
[125] ASIC Media Release 05-223.
[126] ASIC Media Release 05-223.

The second infringement notice was issued against QRS on 20 December 2005. On 17 February 2006 ASIC issued a media release advising that QRS had complied with the infringement notice. The media release advised that ASIC had issued the infringement notice because it believed that QRS had contravened the continuous disclosure provisions of the *Corporations Act 2001* (Cth) between 31 January and 7 February 2005 by failing to disclose price sensitive information to the securities market. On 12 January 2005 QRS announced to the market that Ord Minnett, an investment bank had made a commitment to underwrite any shortfall in the exercise of QRS options up to $1.8 million. The QRS options were due to expire on that day. Ord Minnett's commitment was subject to QRS being able to place $852,000 of this amount.[127]

On 28 January 2005 Ord Minnett advised QRS that as QRS had not been able to place the $852,000 Ord Minnett would not proceed with the underwriting commitments. This information was not disclosed to the market until 7 February 2005.[128]

The third infringement notice issued pursuant to the administrative penalty regime was issued against SDI. On 21 April 2006 ASIC issued a media release advising that SDI had complied with the notice.[129] The media release advised that ASIC had issued the infringement notice because it believed that SDI had contravened the continuous disclosure provisions of the *Corporations Act 2001* (Cth) between 2 May 2005 and 11 May 2005. ASIC alleged that during this period SDI was aware that a previously issued profit forecast was incorrect. This was price sensitive information that should have been disclosed to the market on 2 May 2005. It was not disclosed until 11 May 2005.

Avastra, a life sciences company was issued with the fourth infringement notice. Avastra complied with the infringement notice on 18 April 2006. ASIC alleged that Avastra failed to inform the ASX of a significant delay in the publication of the results of a clinical trial. On 12 April 2005 Avastra announced that the results of a clinical trial were expected to be available at the end of 2005. ASIC alleged that on the 26 April 2006 the Chief Executive Officer of Avastra became aware that the results would not be known by the end of the year. Despite this knowledge, the next day Avastra published a newsletter about the trials which confirmed the earlier announcement that the results of the clinical trials were expected by the end of 2005. The delay in the expected date of the results was not announced to the market until 13 May 2005.[130]

The fifth infringement notice was issued against Astron on 21 June 2006. ASIC announced that Astron had complied with the infringement notice on 18 July 2006. The notice alleged that Astron had failed to disclose immediately a significant increase in the mineral resource estimate of one of its mineral sands deposits. The initial estimate was contained in Astron's 2005 Annual Report. The notice alleges that on 6 January 2006

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127 ASIC Media Release 06-042.
128 ASIC Media Release 06-042.
129 ASIC Media Release 06-124.
130 ASIC Media Release 06-156.

Astron became aware of an increase of 270% in the material resource estimate for the deposit. This information was not disclosed to the market until 12 January 2006.[131]

The civil penalty application against Fortesque and Andrew Forest was issued on 2 March 2006. ASIC alleges that Fortescue engaged in misleading and deceptive conduct and contravened the continuous disclosure provisions when it made two announcements on 23 August 2004 and 5 November 2004. In both announcements Fortesque claimed to have entered binding contracts with various Chinese companies to build and finance a railway, a ship loading facility and stockyard and a mine processing plant.[132]

ASIC alleges that Fortesque failed to disclose important information about the nature of these agreements. In particular ASIC alleges that Fortesque did not disclose that the parties had merely agreed that they would develop and agree on these matters in the future and that concluded agreements had not been reached. ASIC alleges that the documents containing the agreements were not released until there had been media speculation and queries from the Australian Stock Exchange. The documents were not released until 29 March 2005 and 31 March 2005.[133]

ASIC alleges that Forest was knowingly concerned in the contraventions allegedly committed by Fortesque and that he contravened his duty as a director to exercise care and diligence by failing to ensure that the company complied with its continuous disclosure obligations.[134]

The media releases announcing the payment of administrative penalties by Solbec, QRS, SDI, Avastra and Aston do reveal the reasons why ASIC believed that these were minor contraventions and therefore should not be enforced pursuant to the civil penalty regime.[135] However, several factors point to the possible reasons for ASIC's choice of the administrative penalty regime in these cases. The most apparent difference between these matters and the Fortesque matter is the length of time between the initial contravention of the continuous disclosure provisions and the ultimate disclosure of the price sensitive information. In relation to Solbec, QRS, SDI, Avastra and Aston the relevant length of time was three, seven, nine, 17 and six days respectively.[136] In relation to Fortesque it is alleged that in excess of seven months elapsed from the date of the first misleading and deceptive announcement to the date that the final correct announcement was made.[137] The difference in the length of time that the contraventions continued leads to the conclusion that the Fortesque matter was more serious than the other matters.

In the QRS, SDI and Aston matters the contraventions of the continuous disclosure provisions did not occur because false information was disclosed to the market. The contraventions occurred because the companies omitted to advise the market when

131 ASIC Media Release 06-242.
132 ASIC Media Release 06-062.
133 ASIC Media Release 06-062.
134 ASIC Media Release 06-062.
135 ASIC Media Releases 05-223, 06-042, 06-124, 06-156 and 06-242.
136 ASIC Media Releases 05-223, 06-042, 06-124, 06-156 and 06-242.
137 ASIC Media release 06-062.

changed circumstances altered the accuracy of previous announcements. Probably this factor was influential in ASIC's decision that these contraventions were less serious than the contravention allegedly committed by Fortesque.

In the Solbec, Avastra and Fortesque matters the contravention of the continuous disclosure provisions were alleged to have occurred because false information was disclosed to the market. However, it is arguable that the contravention committed by Solbec was less serious that the contravention committed by Fortesque. ASIC alleges that Fortesque claimed that binding contracts existed when they did not in fact exist. This claim goes to the heart of the entity's continued operations. Whereas the fact that Solbec failed to disclose the structure, size and limited nature of the results of an animal study arguably did not go to the heart of the entity's continued operations. In addition Fortesque is alleged to have issued two incorrect statements to the market whereas Solbec issued only one.

Of the five matters that resulted in the issuing of an infringement notice the Avastra matter appears to be the most serious. This matter involved the release to the market of a newsletter which confirmed a statement that had been released previously. When the information had been released originally it was correct. The contravention arose because the day before the newsletter was released the company became aware that the information contained within it was not correct.

Arguably the Avastra matter is not as serious as the Fortesque matter. Avastra is alleged to have made one false statement to the market, whereas Fortesque is alleged to have made two. Fortesque's contravention continued from August 2004 until March 2005 whereas Avastra's alleged contravention continued for 17 days. As stated previously the false claims made by Fortesque go to the heart of the entity's continued operations. Arguably the fact that Avastra failed to disclose that the results of its clinical trials were delayed did not go to the heart of the entity's continued operations.

From the limited information that is available it appears that ASIC is likely to treat contraventions of the continuous disclosure provisions as minor if the contravention lasts for days rather than months. If a contravention continues for months it is likely to be regarded as serious. Failure to disclose a change in circumstances is likely to be regarded as a minor contravention. Release of information known to be false is likely to be regarded as minor if the mistake is corrected quickly. If more than one false announcement is made and a long period of time elapses before the mistake is corrected the contravention is likely to be considered to be serious. No information is available to test whether or not the other factors identified in the ASIC guide played any part in ASIC's choice of enforcement regime.

The analysis of ASIC's use of the civil and administrative penalty regimes suggests that ASIC is complying with the intention expressed by parliament in the Explanatory Memorandum and utilizing the administrative penalty regime only for non serious contraventions of the provisions. There is a clear difference between the Fortesque matter which was enforced by the civil penalty regime and the other matters that were enforced by the administrative penalty regime. However, the administrative penalty regime has

been available for only a short period of time and while *Corporations Act 2001* (Cth), Part 9.4AA does not contain a provision limiting its use to non serious contraventions there is a risk that in the future ASIC may use this regime to enforce serious contraventions.

IX. CONCLUSION

The administrative penalty regime contained in *Corporations Act 2001* (Cth), Part 9.4AA has provided an alternative to the civil penalty regime for the enforcement of minor contraventions of the continuous disclosure provisions. Very few enforcement actions were issued prior to the introduction of the administrative penalty regime. An examination of ASIC's use of the administrative and civil penalty regimes reveals that the administrative penalty regime has allowed ASIC to increase its enforcement activities in relation to contraventions of the continuous disclosure provisions.

The administrative penalty regime has been criticised. One of the problems with the regime is that although it was designed to provide an enforcement mechanism for minor contraventions of the continuous disclosure provisions there is no provision limiting the use of the regime to minor contraventions. Neither is there any definition of, nor any guidance as to what a minor contravention actually is. As there is no requirement in the Act limiting the use of the regime to non serious contraventions of the continuous disclosure provisions and no guidance as to what a non serious contravention actually is there is a risk that ASIC may in fact use these provisions to enforce serious contraventions of the continuous disclosure provisions. The consequence of this could be that some parties will be treated too leniently.

An examination of ASIC's use of the civil and administrative penalty regimes reveals the factors that will inform ASIC's decision as to whether a contravention is likely to be considered to be minor or serious. The examination also suggests that ASIC is complying with the intention expressed by parliament in the Explanatory Memorandum and utilizing the administrative penalty regime exclusively for non serious contraventions of the provisions. However, this is very early in the life of the administrative penalty regime and while the provisions do not contain a provision limiting its use to non serious contraventions there is a risk that in the future ASIC may use this regime to enforce serious contraventions.