

A History of the Infringement Notice Mechanism and its Use in the Enforcement of Australia's Continuous Disclosure Regime

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In modern markets the need for the timely disclosure of detailed, accurate financial information is born of the radical separation of management and control apparent in the majority of large modern organisations. Inadequate disclosure of material information concerning the future and fortunes of listed companies can detract from the integrity of the market and its ability to provide a fair and efficient mechanism for participation in securities markets, while also impacting upon the perceived credibility of financial markets and the corporations constituting them. Reduced confidence in financial markets can in turn have longer-term flow on effects which can be felt throughout the economy. It follows that the effective operation of Australia's continuous disclosure regime is of great consequence in the Australian economic, political and social landscape. This paper details the history of the regime, the reasons for its introduction, and features of its recent enforcement by the Australian Securities and Investments Commission (ASIC). It uses this history to assess whether the most recently created and most often employed enforcement tool, the infringement notice mechanism, is achieving the goals set for it at its inception.

1. Introduction

A crucial element of financial market regulation in Australia geared towards achieving and maintaining market integrity is the obligation of listed and other disclosing entities to continuously disclose material information to the market. The continuous disclosure obligation is found in Listing Rule 3.1 of the Australian Securities Exchange listing rules which currently states:

Once 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 the ASX that information.¹

If, as posited by Golding and Kalfus, 'the vigour of enforcement is the key to the effectiveness of continuous disclosure requirements'² then it is important to determine whether regulatory enforcement activity is keeping the market in check. This paper details the history of the regime, the reasons for its introduction, and features of its recent enforcement by the Australian Securities and Investments Commission (ASIC), focussing on the efficacy of the most recently created and most often employed enforcement tool, the infringement notice mechanism.

2. The Theoretical Foundations of Continuous Disclosure

Market integrity can be defined in different ways. A positivist approach might characterise it simply as 'the extent to which trading participants do not engage in prohibited trading behaviours'.³ A more general normative ideal is that market integrity refers to 'the ability of

investors to transact in a fair and informed market'.⁴ This implies transparency and equal access to information and conjures the spectre of the efficient markets hypothesis.

Founded on this (somewhat discredited) ground is the ideal of continuous disclosure, which is seen as an essential structural component in the informational matrix of corporate disclosure. In the absence of continuous disclosure, there would only exist mandatory periodic disclosure, where companies disclose material information to markets at set intervals. This has come to be considered somewhat unacceptable in a climate where business conditions and fortunes change with unprecedented speed, causing volatility in the prices of listed securities. The risk of sharp dips in investor confidence in the markets in which they participate (including importantly, international investors) and the resulting choice to take their money out of play entirely can leave the game itself bereft of the essential oil turning the cogs of advanced industrial economies – liquid capital. This is seen as anathema to continued steady economic growth and our 'economic well-being'.⁵ Such price fluctuations are therefore seen as undesirable in the management of the economic cycle and consumer confidence. The potential for shadier practices such as insider trading and market manipulation also become more feasible and indeed potentially more bountiful when crucial material information, as yet unknown to the market, might be used by company insiders for their own benefit.

Other desired effects of an effective continuous disclosure regime include a lower cost of capital, increased liquidity and the societal buy-in to capitalist modes of economic management (think superannuation)⁶, all born of increased or at least steady investor confidence in financial markets and their potential to deliver consistent economic growth and desired living standards. An effective continuous disclosure regime also assists market efficiency in the sense that it aids price and value discovery by investors and effects the allocation of resources to companies most 'deserving' on financial criteria and the withdrawal of funds from poorly performing investments, ensuring the 'best' use of available funds and thus fostering allocative efficiency.

It follows then that the effective operation of the continuous disclosure regime is of great consequence in the Australian economic, political and social landscape. In its absence, the consumption and enjoyment of financial securities might become nasty, brutish and short.

3. The Historical Foundations of Continuous Disclosure

In October 1989, at the request of the then Attorney-General Lionel Bowen, the House of Representatives Standing Committee of Legal and Constitutional Affairs began an inquiry into corporate practices and the rights of shareholders. At this time, after the market crash of 1987 and the collapse of several 'prominent' Australian businesses (Rothwells Limited, the Hooker Corporation, Qintex Australia Limited) Australian corporate regulation was coming under increasing scrutiny. The abuse of reporting requirements then in existence and the employment of off balance sheet reporting to conceal risky or unfavourable transactions misled individual investors and the wider market, one of the consequences being 'a significant loss of investor confidence, both amongst Australian and overseas investors, in the reliability of corporate financial information in Australia'.⁷

While the inquiry continued, in June 1991 a new Attorney-General Michael Duffy requested an examination by the Companies and Securities Advisory Committee (a prior incarnation of CAMAC, the Corporations and Markets Advisory Committee) of the potential need for a strengthening of the disclosure requirements of listed corporations. While continuous disclosure existed as part of the ASX listing rules at the time, they were not backed by statute. As explained in an ASX reflection on the regime released 2002, 'a

spate of Australian corporate collapses in the 1980s resulted in significant withdrawal of capital (especially foreign capital) from the Australian market. This experience highlighted the importance of integrity to the Australian capital markets'.⁸ This is reflected in a news release from the Attorney-General's office which stated 'there is a great deal of concern amongst investors that they may not be as well informed as they ought to be regarding the ongoing state of companies in which they have invested'.⁹

At the time there did not exist in the corporations act 'a comprehensive scheme for the full and accurate disclosure of material matters on a timely basis ... there is no general continuous disclosure requirement for the benefit of those engaged in the secondary trading of securities',¹⁰ except in relation to particular circumstances such as the issuing of a prospectus, entry into takeover actions, and entry into schemes of arrangement.

In a report released September 1991 CASAC recommended that statutory support be given to an enhanced disclosure system where organisations deemed 'disclosing entities' would be required to lodge half yearly reports (in addition to their existing obligation to provide annual reports), as well as disclose any material information affecting the organisations' securities to the Australian Securities Commission (ASC) within 24 hours. CASAC preferred this latter requirement over another option on the table at the time to require companies to report to the market quarterly. To ensure the new requirements had enough force behind them CASAC advocated statutory backing of the continuous disclosure regime as it was argued that a disclosure system relying upon the ASX listing rules alone (as had been the case previously), mainly it would seem for the reasons that there would remain uncertainty as to the enforceability of the rules, and that the requirements as they existed in ASX form alone imposed no criminal or civil liability in the case of a breach, whereas statutory force would 'ensure a more comprehensive, accurate and easily accessible reporting and information retrieval system [which should also be] supported by appropriate criminal liabilities and civil remedies'.¹¹ Accordingly CASAC recommended that the Australian Securities Commission should be given powers to enforce compliance with the statutory continuous disclosure obligations and obtain remedies for those affected by contravention.¹²

Some of the benefits cited by CASAC at the time relating to the integrity of Australian capital markets concerned the supposed ability of such a regime to

- overcome the inability of general market forces to guarantee adequate and timely disclosure by disclosing entities;
- encourage greater securities research by investors and advisors, thereby ensuring that securities prices more closely, and quickly, reflect underlying economic values;
- ensure that equity and loan resources in the Australian market are more effectively channelled into appropriate investments, and that funds are withheld or withdrawn from poorly performing disclosing entities. This will promote capital market efficiency;
- assist debtholders in monitoring the performance of disclosing entities and thereby determine whether, or when, to exercise any right to withdraw or reinvest their loan funds, or convert debt to equity;
- act as a further, or substitute, warning device for holders of charges over corporate assets, that breaches in covenants may have taken place, or the risk of default has increased;
- assist potential equity or debt holders of disclosing entities to better evaluate their investment alternatives;
- lessen the possible distorting effects of rumour on securities prices;

- minimize the opportunities for perpetrating insider trading or similar market abuses;
- improve managerial performance and accountability by providing the market with more timely indicators of corporate performance;
- encourage the growth of information systems within disclosing entities, thereby assisting directors in their decision making and compliance with their fiduciary duties; and reduce the time and costs involved in preparing takeover and prospectuses documents.¹³

In November 1991, just two months later, the House of Representatives Standing Committee of Legal and Constitutional Affairs released its final report entitled 'Corporate practices and the rights of shareholders', recommending a regime of continuous disclosure be implemented and enforced through the ASX listing rules, rather than through new legislation in the corporations law as advocated by CASAC on the basis that if the ASX listing rules in force at the time were amended with their enforceability in mind¹⁴ that changes to the corporations law would be unnecessary. The Committee was concerned not to create fetters on businesses struggling their way out of the recession of the early 1990s. They expressed the view that the listing rules were preferable to 'black letter law' in such areas largely due to their flexibility.¹⁵

In its response to the Lavarch report tabled December 1992, the Federal government stated it was 'not satisfied that an ASX administered disclosure scheme is sufficient and is therefore committed to a legislative scheme'.¹⁶ The government had recently introduced into Parliament the Corporate Law Reform Bill (No.2) 1992 which contained an enhanced corporate disclosure scheme encompassing periodic and continuous disclosure.¹⁷ The government was of the view that legislative support would lend the regime greater weight than the listing rules would alone:

It is considered appropriate that enforceable obligations with civil and criminal consequences should be contained in legislation rather than in stock exchange rules which form part of a private contract between the exchange and listed entities. In addition, a legislative scheme has the advantage of enabling investors to claim damages against a company which does not comply with the disclosure obligations.¹⁸

Despite this commitment to a statutory backed regime, following 'extensive public debate',¹⁹ the government decided not to legislate directly for continuous disclosure, but rather, to reinforce the listing rules of the ASX already in existence, though legislation was created for unlisted disclosing entities which are obviously not caught by the ASX listing rules (s675). Speaking with the benefit of hindsight in 2002, the ASX stated 'Australia's experience is that, without the legislative support for continuous disclosure and a regulator with an appetite to enforce it, the regime may be perceived as being ineffectual in encouraging compliance'.²⁰

4. Enforcement Options and the Granting of the Power to Fine

The effect of this blending of market operator and legislative control has had the effect that the great responsibility for administering the continuous disclosure regime is at the feet of the (currently) sole market operator, the ASX, and Australia's corporate cop the Australian Securities and Investments Commission.²¹ While the ASX's role as a market operator listed on its own exchange is relatively technical and is restricted to setting the rules, monitoring

trading activity and potential continuous disclosure breaches before informing ASIC, there are several layers to the enforcement options available to ASIC which it is worth exploring in understanding the hitherto more frequently used infringement notice.

To do this however, a basic understanding of the continuous disclosure regime is necessary. As noted above, the rule in its current form states that an entity must inform the ASX once it becomes aware of information which a reasonable person would expect to have a material effect on the price or value of the entity's securities. Exceptions to the rule are set out in 3.1A.²² The reinforcement provided by s674(2) states that if the entity has information which listing rules of the market operator require the entity to inform it of and the information is not generally available, and if a reasonable person would expect the information to have a material effect on the price or value of the entity's securities if it were generally available, that the entity must notify the market operator, effectively swallowing up listing rule 3.1.²³

Several aspects of the rules require unpacking. Firstly, s677 states that a 'reasonable person' would be taken to expect information to have a 'material effect' on the price or value of an entity's securities if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the Enhanced Disclosure securities.²⁴ By way of further clarification, Guidance Note 8, released by the ASX, indicates that 'a reasonable person would not expect information to be disclosed if the result would be unreasonably prejudicial to the company or disclosure would result in an inordinate amount of detail'.²⁵

According to the definitions in the listing rules at 19.12 an entity becomes 'aware' of information if a director or executive officer 'has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as a director or executive of that entity'.

As for the statutory supplementation of the listing rule, information is considered 'generally available' in s676 if it consists of 'readily observable matter' or if 'it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information'. The management of these requirements by disclosing entities can prove tricky in practice.

In 1996 CASAC was asked to examine the effectiveness of the operation of the continuous disclosure regime. While concluding the regime was operating effectively, it suggested several avenues for procedural and technical reform of the provisions and their enforcement.²⁶ Of interest to the development of enforcement actions in policing the regime were recommendations 11 and 12, which sought to clarify the conceptual content of intention, recklessness and negligent breach of the provisions in relation to civil and criminal liability, and in response to the ASCs submission for a wider range of enforcement options to 'encourage compliance' in addition to criminal and civil actions, CASAC recommended that the ASC be able to enter enforceable undertakings with companies and impose small administrative fines for minor contraventions of the regime.

The earliest action undertaken by ASIC in its enforcement of the continuous disclosure regime occurred in 1998 where ASIC pursued Crown Limited for its failure to inform the market of poor performance in late 1997. As noted by Golding and Kalfus, the situation 'marked the end of the time where disclosing entities could take the attitude that the interests of shareholders are best protected by trying to deal privately with likely negative information until a solution resolves itself'.²⁷ Reasons for the movement away from the use of enforceable undertakings may have stemmed from the difficulties ASIC encountered in enforcing the regime in 2001, where ASIC launched a number of inquiries into suspected contraventions of the regime by Brambles Industries Limited, AMP Limited, WMC Limited but failed to come up with any enforcement results.

While failure to comply with Listing rule 3.1 is a criminal offence under s674(2) for the disclosing entity (s1311) (the punishment being in the order of 200 penalty units, imprisonment for 5 years, or both), the section was also made a financial services civil penalty provision in 2002 when the Corporations Act was modified by the enactment of the Financial Services Reform Act 2001 (Cth) (commencing 11 March 2002) which extended the civil penalty regime to cover market misconduct provisions, including continuous disclosure (s1317E).²⁸

Amendments in 2004 as part of the CLERP 9 Act increased the maximum penalty for corporations from \$200,000 to \$1 million,²⁹ and extended civil liability to persons involved in an organisation's contravention (s674(2A) and 675(2A)), meaning that civil penalties could be sought against directors and executive officers involved in a contravention of the continuous disclosure rules (s1317E(1) and 1317DA).³⁰ The reasoning behind this change was that it may act as a more forceful and hopefully effective deterrent than financial penalties imposed solely on the entity.

Up until the enactment of the CLERP 9 Act, no criminal prosecutions relating to continuous disclosure breaches had been launched (the first was not launched until June 2006 in relation to Harts Australasia Limited) and only three civil penalty applications had been launched between the extension of civil penalty regime to market misconduct provisions including continuous disclosure breaches in 2002 and introduction of the CLERP 9 Act on 1 July 2004.

The difficulties encountered by ASIC in its policing of the continuous disclosure regime and subsequent requests from ASIC for less unwieldy firepower to be added to its enforcement armoury, which could be directed at quickly responding to less serious continuous disclosure contraventions marked the naissance of the infringement notice. The tool was supposed to supplement existing criminal and civil enforcement measures and function as an 'on the spot fine' for continuous disclosure breaches. Through s1317DAC ASIC has the power to issue an infringement notice if it has reasonable grounds to believe that a disclosing entity has contravened s674(2) or 675(2).

The infringement notice was introduced to remedy

a significant gap in the current enforcement framework by facilitating the imposition of a relatively small financial penalty and requiring information disclosure in relation to relatively minor contraventions of the continuous disclosure provisions of the Corporations Act that would not otherwise be pursued through the courts. The capacity to issue an infringement notice also allows ASIC to signal its views concerning appropriate disclosure practices to listed entities more effectively than through court action alone.³¹

The infringement notice mechanism has been said to represent a policy reversal³² from an initial position which saw the primary responsibility for enforcing contraventions of the regime as lying squarely on the ASX's shoulders with the support of the legislative backing of the rule, the threat of criminal penalties flowing from which were expected to have preventative force. With the passing of time and legislative review however ASIC has come to play an ever more significant role in the policing of the continuous disclosure regime. The reasons underlying this policy reversal stem from the difficulties in enforcement faced by the ASX and ASIC³³ whose earlier penalties had an 'all or nothing' character about them (suspension, delisting, criminal sanctions, civil penalties), resulting in a reluctance in their employ, and a resulting lack of faith in the continuous disclosure regime in the face of questionable company disclosure practices. Indeed, the ASX stated two years prior to its introduction that '[t]he tools of prosecution under the Corporations Act do not necessarily deliver the swiftness of regulatory response needed to encourage a change in behaviour and

elevate market awareness about appropriate behaviour. A power ... to impose an appropriate financial penalty is currently being examined and is strongly supported by ASX'.³⁴

In addition to its less cumbersome employment, according to the then Deputy Chairman of ASIC Jeremy Cooper,

the purpose of the [infringement notice] regime is substantially 'educative' because compliance is effectively voluntary. I have described the issue of a notice as a 'chess' move which sets in train a series of strategic decisions on the part of both ASIC and the company involved. I say this because ASIC cannot enforce the notice itself (ie sue to recover the amount of the penalty or take any action in relation to a failure on the part of the company to respond to the notice per se).³⁵

In its Regulatory Guide 73, ASIC explained that infringement notices were 'designed to provide a fast and effective remedy so that redress is proportionate and proximate in time to the alleged breach. The matter will be dealt with in a timely and efficient way, while still providing significant protection to the disclosing entity'.³⁶

The regulatory guide also set out ten steps in the infringement notice process, which begins with an ASIC investigation, and if an infringement notice is deemed appropriate, moves to the briefing of an ASIC delegate who will examine the matter with a fresh set of eyes (not having been involved in initial investigation). If the delegate believes a breach has occurred, a hearing notice is issued to the entity where evidence may be presented, and a hearing is held to determine whether to issue an infringement notice. If reasonable grounds exist for believing a breach has occurred, an infringement notice will be issued served with the entity being given 28 days to comply.

If the notice is complied with, ASIC is not able to begin civil or criminal proceedings against the entity. If it does not comply within this time frame, the entity may seek an extension or seek to have the notice withdrawn (s1317DAI(1)), or choose not to comply with the notice at all. If it chooses the latter, ASIC faces a tough decision as to whether to commence civil proceedings against the entity under Pt 9.4B and/or s1324B of the Corporations Act, with the maximum civil penalty being \$1million. ASIC can choose to withdraw the notice, and if it does so, it is not restricted in the action it may take against the entity.

5. The Employment of the Infringement Notice Mechanism Since 2004

Has the infringement notice mechanism lived up to the expectations set for it at its inception? The only public information available as far as infringement notices are concerned involves only the entities which have complied with one. ASIC publishes details of infringement notices which have been complied with when finalised, presumably keeping with the educative goals of the mechanism. Most companies studied (though not all) also make their own announcement in relation to the payment of the fine. Unfortunately information regarding infringement notices issued but not complied with is, strictly speaking, unavailable. While s 1317DAJ(1) of the Corporations Act prohibits ASIC from publicising details of companies who fail to comply with an infringement notice, this has not stopped ASIC revealing its suspicion of Telstra on one occasion, though despite issuing an infringement notice which was not complied with, ASIC chose not to pursue the

company.³⁷ Nevertheless, there is no real way of knowing whether a company has been issued an infringement notice if it has chosen not to comply with it.

The table below tracks compliance with infringement notices issued since the introduction of the measure to July 2010.

Infringement Notices Complied with 2004-10

Company	Name	Fine Amount	Date Finalised	GICS Industry Group
SBP	Solbec	\$33,000	1 August 2005	Pharmaceuticals, Biotechnology & Life Sciences
QRS	QRSciences	\$33,000	17 February 2006	Technology Hardware & Equipment
SDI	SDI	\$33,000	21 April 2006	Health Care Equipment & Services
AVS	Avastra	\$33,000	15 May 2006	Pharmaceuticals, Biotechnology & Life Sciences
ATR	Astron	\$66,000	18 July 2006	Materials
ACU	Avantogen	\$33,000	8 December 2006	Pharmaceuticals, Biotechnology & Life Sciences
PMN	Promina	\$100,000	20 March 2007	Insurance
RCA	Raw Capital Partners	\$33,000	1 August 2007	Software & Services
SBS	Sub-Sahara Resources NL	\$33,000	29 April 2008	Materials
RIO	Rio Tinto	\$100,000	5 June 2008	Materials
CBA	Commonwealth Bank	\$100,000	14 October 2009	Financials

Collecting each instance of infringement notice issuance together it is possible to conduct simple empirical analyses to gain a more generalised picture of the operation of the mechanism in the Australian market. This allows the development of tentative (given there are only 11 companies in the sample) or provisional insights into the profile of companies involved in continuous disclosure breaches and ASIC's response times to alleged breaches.

Company Size

As at July 2010 some \$597,000 has been paid to ASIC in satisfaction of infringement notices. Of this figure, \$231,000 has been paid by seven of the smaller companies in the enforcement penalty hierarchy with a market capitalisation below \$100 million, while there has only been one \$66,000 fine for a mid-tier company with a market cap above \$100 million. The remaining \$300,000 has been paid by the three of Australia's largest organisations with market capitalisations exceeding \$1000 million. While in absolute terms the larger companies have forked out more in infringement notice penalties due to the higher quantum of penalty (a little over half the total amount received by ASIC), smaller companies seem somewhat disproportionately represented with seven of the eleven (63 per cent) companies fined being Tier 3 companies with market capitalisation under \$100 million.

In 2007, Langley found that smaller companies had a greater propensity for non-disclosure – 71 per cent of companies in the seven company sample available at the time had a market capitalisation below \$100 million when fined. The reason posited for this was that 'effective implementation of continuous disclosure programs [at smaller companies] would seem to be less successful than in large publicly listed companies'.³⁸

Despite ASIC having built a reputation early on for chasing the minnows rather than the big guns of the Australian market, a closer look shows this may not be the case. Of the 1924 securities listed on the ASX, only 166 have a market capitalisation in excess of \$1000 million, 368 fall between \$100 and \$1000 million, while the overwhelming majority, 1390 or 72 per cent, of companies have a market cap below \$100 million. While the infringement notice data set is extremely small at present, at this stage ASICs fining of smaller companies seems consistent with market capitalisation. Indeed, due to recent infringement activity, it seems the opposite might be said – that ASIC is chasing the big guns since 27 per cent of fines have been issued to companies with market capitalisations over \$100 million despite the fact they only represent 8 per cent of the market. Again, the available data set is not really conducive to any reliable generalisability on this question, but it is interesting nonetheless given previous conjectures concerning ASICs fining tendencies. In relation to Langley’s hypothesis that smaller companies might not have established the systems around effective continuous disclosure compliance leading to their having poor disclosure performance and being fined, which practically speaking may be no less true, the breakdown of companies constituting the Australian market suggests this may simply be due to the fact there are just more smaller companies around to be inadequately dealing with their continuous disclosure obligations.

Industry Group

On the basis of ASICs identification of speculative sectors as ‘being most at risk of non-disclosure’ Langley found supporting evidence in the fact that ‘[d]isclosure issues have generally arisen from entities operating in speculative industries, like mining, energy, pharmaceuticals and biotechnology’.³⁹ As at the middle of 2010, a total of three Pharmaceuticals, Biotechnology & Life Sciences companies, three Materials (read mining) companies, one Technology Hardware and Equipment company, one Software and Services company, one Health Care Equipment & Services company, one Insurer and one Financial company have been issued infringement notices. ASICs prediction concerning speculative ‘sectors’ has explained six out of the eleven infringement notices issued to companies in the mining and biotechnology sectors. Despite this however, not all of those companies could readily be classed as ‘speculative’ securities as such. Further, the presence of institutions from sectors not usually regarded as being speculative including insurance and banking is cause for concern, especially in view of the fact they were also amongst the largest companies to have received an infringement notice, who presumably have the resources to deal with such issues.

ASIC Response Times

An important issue surrounds the proximity of ASICs enforcement action to the breach of the regime. As noted above, the infringement notice regime was designed to avail ASIC of a speedier tool through which to educate the market and effectively process and police contraventions as soon as possible in a bid to assuage any loss in confidence in the integrity of the market. While ASICs stated goal was to issue infringement notices within 3 months of the alleged breach⁴⁰ (though it has a maximum period of 12 months in which to do so (1317DAC(5))), Langley found in 2007 that ‘the average time for ASIC to issue an infringement notice from the date of the alleged breach is between seven and eight months, but the time period appears to be improving’.⁴¹

The evidence from the 11 infringement notices issued to date illustrates that this average has remained constant with the addition of the most recent infringement notices issued, with an average of 8 months from the date the company became aware and the date the infringement notice was issued (not including SDI and CBA). While there was a period of improvement when Promina was fined, since then ASICs response time has been

running at around 8 months, though this does not include the fine issued to the Commonwealth Bank as there is no extant information as to the date the infringement notice was issued. To date, the longest amount of time taken to issue an infringement notice has been 11 months and 23 days in relation to Avastra, while the shortest has been 4 months and 11 days (Promina).

6. Conclusions

According to the 2006 Australian Securities Exchange (ASX) Share Ownership Survey some 7.3 million Australians or 46 per cent of the Australian population own shares either directly or indirectly through superannuation. It is of the utmost importance therefore to ensure the fair and efficient operation of Australian capital markets and the resulting allocation of scarce resources to their best uses. Inadequate disclosure of material information concerning the future and fortunes of listed companies can detract from the integrity of the market and its ability to provide a fair and efficient mechanism for participation in securities markets, while also impacting upon the perceived credibility of financial markets and the corporations constituting them. Reduced confidence in financial markets can in turn have longer-term flow on effects which can be felt throughout the economy.

This analysis has demonstrated that the infringement notice regime is currently functioning as it ever was, not necessarily as it was intended to when the history of the measure is taken into account. ASIC response times (with the CBA and SDI examples for which there is no infringement notice date aside) are extremely slow and have never really come close to the three months expected when the mechanism was introduced. This effectively steals away much the force of this powerful administrative mechanism holds in protecting the integrity of Australian financial markets, driving the development of solid corporate governance practices, and encouraging accountability to organisational stakeholders.

Nevertheless, ASIC has shaken off an early reputation for going after smaller companies by recently taking three large scalps, with two being amongst the top ten in terms of capitalisation in the Australian market, potentially providing important educative examples to the rest of the market. While analysis of the factual circumstances of each case is necessary make more detailed conclusions as to whether an infringement notice was warranted, or indeed if more serious enforcement action should have been pursued, ASICs fining activity does send out the message (however weakly) that information management is of serious importance and that companies must discharge their disclosure obligations with continuous disclosure obligations front of mind.

It is important to note that when the infringement notice mechanism was being passed through Parliament the Government agreed to review it after two years of its operation. Since releasing a consultation paper in March 2007 and receiving six responses (most recommending the withdrawal of ASICs power to fine) to which Treasury does not seem to have directly responded, the infringement notice mechanism continues to exist. This is despite the fact that it is not meeting the needs for which it was developed. While ASIC contended in its submission that the mechanism was quite swift when compared with court proceedings relating to continuous disclosure matters, strictly speaking this is not a relevant standard to compare against when considering the reasons for the introduction of the measure, with the former Chairman of ASIC Jeffrey Lucy stating that '[s]o much of the benefit is a quick resolution so the fact that it takes upwards of two months really does detract from it'.⁴² Criticism has also been levelled at the educative function of the mechanism, with enforceable undertakings being argued to provide a more fruitful source

of tuition. As expressed by the Chartered Secretaries of Australia, '[t]he infringement notice regime attempts to impose, with the benefit of hindsight, a "black and white" penalty on continuous disclosure value judgments made by companies where the subject matter is rarely black and white'.⁴³ Analysis of the facts surrounding the issuance of infringement notices bears this criticism out, and alerts to the need to comprehensively review the enforcement of the continuous disclosure provisions, especially in light of recent financial markets events.

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Endnotes

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- * This conference paper (full version) has been double-blind assessed by two referees.
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 2. Greg Golding and Natalie Kalfus, 'The continuous evolution of Australia's continuous disclosure laws' (2004) 22 *Company and Securities Law Journal* 385, 425.
 3. Michael Aitken, 'Tough task ahead in policing markets' 25 August 2009 *The Australian Financial Review Online Edition*.
 4. Belinda Gibson (ASIC Commissioner) 'Disclosure and the role of ASX and ASIC' ASX and ASIC Listed Companies Conference, 26 March 2008, available at http://www.asx.com.au/supervision/pdf/disclosure_belinda_gibson_march_08.pdf.
 5. Corporations and Markets Advisory Committee Aspects of Market Integrity Report June 2009, 7. Available at www.camac.gov.au.
 6. See Leo Strine 'Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labour in a More Rational System of Corporate Governance' (2007) 33 *Journal of Corporation Law* 1.
 7. The House of Representatives Standing Committee of Legal and Constitutional Affairs Report 'Corporate Practices and the Rights of Shareholders', November 1991, at 8.101 (Lavarch Report).
 8. 'Continuous Disclosure: The Australian Experience' released February 2002 at 3. Available at <http://203.15.147.66/about/pdf/Continuousdisclosure-TheAustExperience.pdf>.

The trigger for introduction of the continuous disclosure regime in Australia was a concern about the 'corporate excesses of the 1980s'. A need for enhanced disclosure was identified. As a result, legislation was introduced (Corporate Law Reform Bill 1993) containing provisions which enhanced periodic reporting requirements, imposed continuous disclosure obligations and streamlined prospectus requirements.

At the time of introduction of the regime in Australia, there were concerns that the benefits flowing from the enhanced disclosure regime would be outweighed by the cost to business of compliance. Business and industry groups were generally supportive of the final reforms and in the consultative process, fought for as sensible and economically rational a regime as possible. In particular, it was considered important that the enhanced disclosure regime build on the existing framework for disclosure and not require duplication of information lodgement requirements between government regulator (now ASIC) and market operator (ASX). [*ibid* at 6]
 9. News Release No 25/91, Attorney-General (19 June 1991). Cited by Mark Blair 'The debate over mandatory corporate disclosure rules' (1992) 15(1) *University of New South Wales Law Journal* 177, 178.
 10. CASAC 'Report on an enhanced statutory disclosure system' 1991 at p 3. Available at [http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+1991/\\$file/An_Enhanced_Statutory_Disclosure_System,_September_1991.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+1991/$file/An_Enhanced_Statutory_Disclosure_System,_September_1991.pdf).
 11. CASAC 1991, above n 12 at 24.
 12. Recommendation 9, CASAC 1991, above n 12 at 13
 13. CASAC 1991, above n 12 at 6-7. There is also empirical work from overseas jurisdictions evidencing the potential benefits (Leuz and Verrecchia, 2000) and costs (Bushee and Noe, 2000) of enhanced disclosure.
 14. The Lavarch Report, above n 9 at 4.5.23.
 15. The Lavarch Report, above n 9 at 4.5.20.
 16. Government response to the report by the House of Representatives Standing Committee on Legal and Constitutional Affairs December 1992, paragraph 48.

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17. *Ibid.*
 18. *Ibid* at 49.
 19. Ford HAJ, Austin RP, Ramsay IM, *Ford's Principles of Corporations Law*, 14th Edition, LexisNexis, Chatswood NSW, 616.
 20. 'Continuous Disclosure: The Australian Experience' released February 2002 at 4. Available at <http://203.15.147.66/about/pdf/Continuousdisclosure-TheAustExperience.pdf>.
 21. is to create a legal structure of a shared regulatory role with respect to listed companies under which ASX *specifies* continuing disclosure requirements and *monitors* compliance with them and ASIC takes enforcement responsibility with respect to breaches. For unlisted disclosing entities, the Corporations Act specifies the disclosure obligations and ASIC has responsibility for monitoring compliance with and enforcement of those statutory obligations. [Redmond p. 743]
 22. 3.1A Listing rule 3.1 does not apply to particular information while all of the following are satisfied.
 - 3.1A.1 A reasonable person would not expect the information to be disclosed
 - 3.1A.2 The information is confidential and ASX has not formed the view that the information has ceased to be confidential.
 - 3.1A.3 One or more of the following applies.
 - It would be a breach of a law to disclose the information.
 - The information concerns an incomplete proposal or negotiation
 - The information comprises matters of supposition or is insufficiently definite to warrant disclosure
 - The information is generated for the internal management purposes of the entity
 - The information is a trade secret
 23. If the disclosing entity is unlisted, the Corporations Act at s675(1)(b) sets out the obligation for unlisted entities which will require the entity to make disclosure directly to ASIC.
 24. Similar definition in insider trading, standard of materiality broadly reflects standard developed judicially in US in context of proxy solicitation and applied in NZ and cited with approval in Aust says Paul Redmond 'Companies and Securities Law' (2009) Lawbook Co., Pyrmont NSW, 745:

What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.
 25. ASX Guidance Note 8 'Continuous Disclosure: Listing Rule 3.1', paragraph 31. Available at http://www.asx.net.au/ListingRules/guidance/gn08_continuous_disclosure.pdf.
 26. Companies and Securities Advisory Committee 'Report on continuous disclosure' November 1996, recommendations at Appendix 1. Available at [http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+1996/\\$file/Continuous_Disclosure_November_1996.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+1996/$file/Continuous_Disclosure_November_1996.pdf).
 27. Golding and Kalfus, above n 2 at 408.
 28. According to Treasury's report 'Corporate disclosure: Strengthening the financial reporting framework' a number of the amendments introduced by the FSR Act 'were based on the recommendations of CASAC's 1996 report on continuous disclosure' at 134
 29. Commonwealth Review in September 2002 saw the Department of Treasury release its report 'Corporate disclosure: Strengthening the financial reporting framework'. While concluding that the regime was 'fundamentally sound', (p 129), the review proposed measures with a view to enhancing the regime's effectiveness. In relation to a potential power to fine, when flagging the potential move to a \$1 million fine as a civil penalty, the report stated 'this proposed increase in the maximum financial penalty that may be imposed on a body corporate does not mean that substantially smaller financial penalties would not still be appropriate in many circumstances' (p 143).
 30. A person deemed 'involved' in the contravention can escape liability if they took all steps reasonable in the circumstances to ensure compliance by the entity, and believed on reasonable grounds that the entity had indeed complied with its obligations.
 31. 'Corporate disclosure: Strengthening the financial reporting framework', Treasury, Commonwealth of Australia, 2002, 149.
 32. Ford's Principles above n 22, 627.
 33. See further Golding and Kalfus, above n 2, 409.
 34. 'Continuous Disclosure: The Australian Experience' released February 2002 at 13. Available at <http://203.15.147.66/about/pdf/Continuousdisclosure-TheAustExperience.pdf>.

35. 'Corporate wrongdoing: ASIC's enforcement role' Jeremy Cooper (Deputy Chairman ASIC) 2 December 2005 at 12. Available at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ICAC2005_speech_021205.pdf/\\$file/ICAC2005_speech_021205.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ICAC2005_speech_021205.pdf/$file/ICAC2005_speech_021205.pdf).
36. ASIC Regulatory Guide 73 'Continuous disclosure obligations: infringement notices' (2004), 4. Available at [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/infringement_notice_guidelines.pdf/\\$file/infringement_notice_guidelines.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/infringement_notice_guidelines.pdf/$file/infringement_notice_guidelines.pdf).
37. Senate Estimates Committee hearing on 16 February 2006 available at <http://www.aph.gov.au/hansard/senate/commtee/S9100.pdf>.
38. Rebecca Langley 'Over three years on: Time for reconsideration of the corporate cop's power to issue infringement notices for breaches of continuous disclosure' (2007) 25 Company and Securities Law Journal 439, 453.
39. Langley above n 42, 454.
40. RG 73 at 5.
41. Langley above n 42, 457.
42. BCA submission 4 June at 2, quoting Patrick Durkin 'Secretaries give notice of regime's flaws' Australian Financial Review 16 May 2007.
43. CSA submission, 31 May 2007, at 3.