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**The Use of Infringement Notices by ASIC
for Alleged Continuous Disclosure Contraventions:
Trends and Analysis**

Aakash Desai and Ian Ramsay

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Aakash Desai* and Ian M Ramsay**

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* Research Assistant, Centre for Corporate Law and Securities Regulation, Melbourne Law School, The University of Melbourne

** Harold Ford Professor of Commercial Law and Director, Centre for Corporate Law and Securities Regulation, Melbourne Law School, The University of Melbourne

I. INTRODUCTION

The existence and enforcement of Australia's continuous disclosure laws is said to be fundamental to the efficient operation and protection of its financial and securities markets.¹ It is now an established precept of market regulation that price-sensitive information should be disclosed in an accurate and timely manner in order to facilitate efficient price discovery and to promote market confidence and integrity.² It has been said by one court that the purpose of the continuous disclosure laws is:

“to enhance the integrity and efficiency of Australian capital markets by ensuring that the market is fully informed. The timely disclosure of market sensitive information is essential to maintaining and increasing the confidence of investors in Australian markets, and to improving the accountability of company management. It is also integral to minimising incidences of insider trading and other market distortions.”³

Australia's market operators, such as the Australian Securities Exchange (ASX),⁴ and the market regulator, the Australian Securities and Investments Commission (ASIC), each contribute to the monitoring and enforcement of continuous disclosure compliance by market participants through a variety of measures.

The most recently implemented enforcement measure, which falls solely within the purview of ASIC, is the power to issue infringement notices to non-compliant disclosing entities. This infringement notice regime was introduced to address the “less serious” breaches of continuous disclosure obligations where traditional alternative enforcement mechanisms might otherwise be less effective or relatively unsuitable given their associated costs.⁵ Although they are therefore not the most serious form of sanction that ASIC may pursue against a non-compliant entity,

¹ See, e.g., Explanatory Memorandum, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003* (Cth) (“CLERP 9”) at [4.219].

² *Ibid.*

³ *James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 81 ACSR 1; [2010] NSWCA 332 at [355].

⁴ The other market operators in Australia, such as the Bendigo Stock Exchange (BSX) and the Stock Exchange of Newcastle (NSX), each have their own listing rules that stipulate the continuous disclosure obligations applicable to their listed disclosing entities. Given the significant size and scope of the ASX, any reference in this article to “market operator” or “listing rules” refers to the ASX and the ASX Listing Rules, respectively.

⁵ For discussion of these other mechanisms, see Part IIB and Part V.

infringement notices have proven to be controversial.⁶ This article evaluates the practical application of the infringement notice regime since its inception. Such an inquiry is intended to be instructive not only for evaluating ASIC's current application of the regime, but also for administering its prospective operation given the expanded use of infringement notices in new contexts.⁷

In Part II we review briefly the background and mechanics involved in the infringement notice regime. This is followed by an outline of our research methodology in Part III and a trend-analysis in Part IV of all infringement notices issued by ASIC to date. In Part V we consider the regime in its wider context amongst the alternative enforcement mechanisms available to ASIC for a breach of continuous disclosure. In Part VI we explore the policy issues and future implications that emerge in light of how infringement notices are currently being employed by ASIC. Part VII concludes.

II. AUSTRALIA'S INFRINGEMENT NOTICE REGIME

A. Background

The infringement notice regime constitutes one of the more significant developments in Australia's continuous disclosure regulatory framework since a statutory framework was introduced in 1994. This framework itself evolved from a growing perception that the previous regulatory system, in which the ASX enforced the continuous disclosure requirements exclusively through its listing rules, was problematic and lacked effectiveness.⁸ The subsequent introduction of a statutory regime stipulating continuous disclosure requirements and sanctions to support the listing rules through the *Corporate Law Reform Act 1994* (Cth),⁹ combined with

⁶ See, e.g., Marina Nehme, Margaret Hyland and Michael Adams, 'Enforcement of Continuous Disclosure: The Use of Infringement Notice and Alternative Sanctions' (2007) 21 *Australian Journal of Corporate Law* 112; 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.

⁷ One such change to the current law is the *Corporations Amendment (Financial Market Supervision) Act 2010*, which is discussed briefly in Part IIA.

⁸ See Companies and Securities Advisory Committee ("CASAC"), *Report on an Enhanced Statutory Disclosure System* (1991) (noting in particular that "market forces failed to guarantee adequate and timely disclosure"); Angie Zandstra, Jason Harris and Anil Hargovan, 'Widening the Net: Accessorial Liability for Continuous Disclosure Contraventions' (2008) 22 *Australian Journal of Corporate Law* 51, 54.

⁹ See Zandstra, Harris and Hargovan, above n 8, at 54.

gradual reforms to the regime, have over time resulted in a strengthening of ASIC's powers and ASIC gaining a far more prominent enforcement role than the ASX.¹⁰

Despite these gradual augmentations to the continuous disclosure laws and enforcement measures, there still existed a perceived gap in the enforcement framework.¹¹ Of particular concern was the lack of effective protection against "less serious [alleged] breaches" of ss 674(2) and 675(2) of the *Corporations Act 2001* (Cth).¹² This concern was partially driven by the existing enforcement actions that ASIC could pursue against non-compliant entities occasionally spiralling into lengthy, expensive and cumbersome court proceedings that were consequently not efficacious in addressing such minor breaches and in encouraging timely compliance by disclosing entities.¹³ As such, an underlying argument and rationale developed supporting an infringement notice enforcement regime which would offer an alternative, quicker, more responsive and efficient mechanism targeted towards those "less serious" continuous disclosure contraventions, and which would thereby encourage compliance amongst disclosing entities with respect to their continuous disclosure obligations.¹⁴ There was also a spate of highly publicised instances of listed entities failing to inform the market of material price-sensitive information.¹⁵ Accordingly, reforms to Ch 6CA of the *Corporations Act 2001* (Cth) included powers

¹⁰ R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, Sydney, 14th ed, 2010) [10.326]. In particular, civil penalty sanctions were introduced for financial services in 2001, paving the way for ASIC and third parties who had been damaged by a contravention to initiate civil proceedings against the relevant disclosing entity for a range of remedies, such as pecuniary penalties, compensation orders and publication orders. (Though third parties could only avail themselves of the compensation orders). The principal sanctions available to the ASX were comparatively limited, the primary ones being suspension or delisting of the contravening disclosing entity.

¹¹ ASIC, *Continuous Disclosure Obligations: Infringement Notices*, Regulatory Guide 73, May 2004, 4 ("Regulatory Guide 73").

¹² *Ibid.*

¹³ See especially Commonwealth Treasury, *Review of the Operation of the Infringement Notice Provisions of the Corporations Act 2001*, Consultation Paper, March 2007 at 2. See also Austin and Ramsay, above n 10, at [10.326] (observing that another reason for this growing perception was that "criminal prosecution was too slow and extreme to be a satisfactory response on most occasions.")

¹⁴ Explanatory Memorandum, *CLERP 9*, at [4.220]; Austin and Ramsay, above n 10, at [10.326].

¹⁵ Austin and Ramsay, above n 10, at [10.290], [10.326]. These instances included HIH, Enron, and Aristocrat Leisure. See, e.g., *Randall v Aristocrat Leisure Ltd* [2004] NSWSC 411 (noted in *ibid.*). In particular, some listed entities were singled out as failing to make full and timely disclosure of material price-sensitive information in relation to their listed securities. Explanatory Memorandum, *CLERP 9*, at [4.218]. As such, both ASIC and the ASX reportedly determined that an "improved culture of compliance" was required with respect to these listed companies and their continuous disclosure obligations: *ibid.* This consequently made the purpose of the infringement notice regime of particular significance to those listed disclosing entities that are the most actively traded and have the highest participation rates by retail shareholders: *ibid.* at [4.220].

for ASIC to issue infringement notices, thereby providing ASIC with an alternative remedy to (in particular) civil and criminal proceedings to address minor continuous disclosure contraventions.¹⁶ The infringement notice regime was introduced by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth).

Additional rationales have also been proffered for the regime, such as being “educative” in purpose.¹⁷ It is also designed to serve as a more effective signal to other disclosing entities in terms of demonstrating what ASIC considers to be acceptable disclosure practices.¹⁸ Some of these rationales also guide the operation of the infringement notice regime as its role expands with developments in Australia’s corporate law. This is evident, for instance, in the enactment of the *Corporations Amendment (Financial Market Supervision) Act 2010* (Cth), which amends the *Corporations Act 2001* (Cth) to transfer the responsibility for supervising trading on Australia’s domestic licensed financial markets from the market operators to ASIC.¹⁹ As part of this mandate, ASIC has the authority to create binding ‘market integrity rules’ covering the conduct of any licensed market operators, participants and entities (as prescribed by the *Corporations Regulations 2001*), the contravention of which can result in the application of enforcement mechanisms such as infringement notices.²⁰ ASIC proposes to utilise its power to issue infringement notices through the establishment of a new ‘Markets Disciplinary Panel’, which will determine whether the issuance of an infringement notice (or other measure) is appropriate.²¹ Reviewing the operation of the current regime is therefore instructive for the future application of infringement notices in these emerging contexts.

¹⁶ See Austin and Ramsay, above n 10, at [10.326]; Explanatory Memorandum, *CLERP 9*, at [5.458].

¹⁷ Jeremy Cooper, ASIC Deputy Chairman, ‘Corporate Wrongdoing: ASIC’s Enforcement Role’ (Keynote address delivered at the International Class Actions Conference 2005, Melbourne, 2 December 2005) 12 (observing that “[t]he purpose of the regime is substantially “educative” because compliance is effectively voluntary” and describing “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”).

¹⁸ Explanatory Memorandum, *CLERP 9*, at [5.458].

¹⁹ The amendment is effected by the insertion of Part 7.2A into the *Corporations Act 2001* (Cth). Domestic licensed financial markets are those operated by persons licensed under s 795B(1) of the *Corporations Act 2001* (Cth).

²⁰ Section 798K of the *Corporations Act 2001* (Cth) provides that the contravention of the market integrity rules may be subject to alternative proceedings such as an infringement notice.

²¹ See ASIC, *Markets Disciplinary Panel*, Regulatory Guide 216, July 2010 and ASIC, *Markets Disciplinary Panel Practices and Procedures*, Regulatory Guide 225, May 2011. Based on these Regulatory Guides, the infringement notices to be issued by the Markets Disciplinary Panel will have some different characteristics to those issued under the original regime (such as the procedure involved in the issuance and the penalty amount applied).

B. Mechanics

Having described the background to the introduction of infringement notices, it is useful to briefly note what they are and how they work. An infringement notice is a notice to an allegedly contravening disclosing entity (the “issuee”) containing an attached voluntary financial penalty.²² In practice, the infringement notice regime operates within ss 1317DAA–DAJ of the *Corporations Act 2001* (Cth). ASIC has the authority under Part 9.4AA of the *Corporations Act 2001* (Cth) to issue an infringement notice if it has reasonable grounds to believe that a disclosing entity has breached s 674(2) (for listed disclosing entities) or s 675(2) (for unlisted disclosing entities).²³

In summary, s 674(2) provides that a listed entity must comply with the continuous disclosure rules of the securities exchange on which its securities are listed where the relevant information is not generally available and a reasonable person would expect, if the information were generally available, that it would have a material effect on the price or value of the securities. In the case of ASX, the relevant rule is Listing Rule 3.1 which provides that “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 ASX that information.” There are exceptions to this rule in Listing Rule 3.1A, and these exceptions allow certain information to be withheld by the disclosing entity.

Section 675(2) applies to unlisted disclosing entities (this includes an entity that has issued securities pursuant to a disclosure document lodged with ASIC and there are at least 100 investors holding these securities). In summary, the section requires such an entity, where it becomes aware of information that is not generally available and a reasonable person would expect, if the information were generally available, that it would have a material effect on the price or value of the securities, to disclose the information to ASIC as soon as practicable.

²² See Explanatory Memorandum, *CLERP 9*, at [5.454]-[5.465]. Crucially, this voluntary characteristic differentiates infringement notices from ASIC’s alternative power to impose a compulsory financial penalty on entities in certain circumstances.

²³ See also Austin and Ramsay, above n 10, at [10.326].

As previously indicated, ASIC states in Regulatory Guide 73 that the infringement notice regime is intended to apply to less serious breaches of continuous disclosure obligations.

At its core, the regime comprises a tiered system of fixed financial penalties that apply to an issuee based on factors relating to its market capitalisation on the “relevant day.”²⁴ The quantum of the voluntary penalty that applies to an issuee for the alleged contravention of ss 674(2) or 675(2) is categorised in Table 1:

TABLE 1 – QUANTUM OF PENALTY

Disclosing entity	Market capitalisation on “relevant day”	Tier	Penalty
Listed	> \$1,000 million	Tier 1	\$100,000
Listed	> \$100 million but ≤ \$1,000 million	Tier 2	\$66,000
Listed	≤ \$100 million, or value cannot be determined because entity has not lodged its financial report with ASIC before the “relevant day”	Tier 3	\$33,000
Unlisted	Market capitalisation is not applicable. Designation is per ss 675(2) and 1317DAE(4)	Tier 3	\$33,000

Source: ss 1317DAE(2) and (6), 674(2), 675(2).²⁵

ASIC can activate the procedure to issue an infringement notice by acting on its own observations or on information referred to it by the ASX. This procedure involves 10 stages, which are summarised below:²⁶

²⁴ “Relevant day” is defined in s 1317DAE(6) as “the last day of the financial year in relation to which the latest financial report by the disclosing entity has been lodged with ASIC before the infringement notice is issued”.

²⁵ A disclosing entity that has previously contravened its ss 674(2) or 675(2) obligations will be subject to the subsequently higher penalty tier than would otherwise apply. In the case of a listed Tier 1 disclosing entity in this situation, it is likely in practice to move beyond the infringement notice regime and instead become predisposed to civil or criminal sanctions. See Cooper, above n 17, at 13. Pursuant to s 1317DAE(3), for an alleged breach of s 674(2) the penalty for a Tier 2 entity is \$100,000 and for a Tier 3 entity is \$66,000, and pursuant to s 1317DAE(5), for an alleged breach of s 675(2) the penalty is \$66,000 if: “the disclosing entity has at any time been convicted of an offence based on subsection 674(2) or 675(2),” or “a civil penalty order under Part 9.4B has at any time been made against the disclosing entity in relation to a contravention of subsection 674(2) or 675(2),” or “the disclosing entity has at any time breached an enforceable undertaking given to ASIC under section 93AA of the ASIC Act in relation to the requirements of subsection 674(2) or 675(2).”

1. *Investigation* – ASIC conducts an investigation into the suspected breach of the continuous disclosure provisions.
2. *Briefing* – an ASIC delegate who is not involved in the initial investigation is briefed for the examination in the next step (if pursued).
3. *Examination* – the briefed ASIC delegate examines the matter. In order to ensure that both ASIC and the ASX’s interpretation of what constitutes a breach of the continuous disclosure obligations are consistent, ASIC must consult the ASX if the suspected entity is listed.²⁷
4. *Hearing notice issued* – a written statement is sent to the entity if the delegate concludes that there has been a contravention, which must detail ASIC’s reasons for reaching this conclusion.²⁸
5. *Private hearing* – the delegate conducts a private hearing to determine whether an infringement notice is warranted. This provides the entity with a (voluntary) opportunity to present evidence and make submissions in its defence.²⁹
6. *Decision* – on completion of the hearing, ASIC may issue an infringement notice for that specific contravention if it has reasonable grounds to believe that the entity has breached ss 674(2) or 675(2).³⁰ This decision is not subject to review by the Administrative Appeals Tribunal.³¹
7. *Infringement notice issued* – ASIC serves the infringement notice on the issuee in accordance with the content that s 1317DAE requires be delineated, including: a description of the alleged contravention, the applicable penalty amount, the maximum civil pecuniary penalty that may be imposed by a court under Pt 9.4B, the 28-day compliance period and possibility of an extension, the effect of compliance and non-compliance, and that the issuee may request ASIC to withdraw the infringement notice.

²⁶ ASIC, Regulatory Guide 73, 5.

²⁷ *Corporations Act 2001* (Cth) s 1317DAD(2).

²⁸ *Corporations Act 2001* (Cth) s 1317DAD(1)(a).

²⁹ *Corporations Act 2001* (Cth) s 1317DAD(1)(b).

³⁰ *Corporations Act 2001* (Cth) ss 1317DAC(1), (2) and (4). ASIC must also have regard to the market operator’s guidelines relating to compliance with the continuous disclosure obligations and any other relevant matter: *Corporations Act 2001* (Cth) s 1317DAC(4).

³¹ See *Corporations Act 2001* (Cth) s 1317C. The rationale underlying this is the voluntary nature of the compliance — as the entity does not have to comply with an infringement notice once it is issued, review is not available of any decision to impose it: ASIC, Regulatory Guide 73, 4. The decision to not withdraw an infringement notice is also not subject to review by the Administrative Appeals Tribunal (see stage 10 above).

8. *Issuee's response* – the issuee either complies, refuses to comply, seeks an extension of time to comply or attempts to have the infringement notice withdrawn.
9. *ASIC's reaction to response* – ASIC considers the issuee's response in stage 8 and reacts accordingly given the particular circumstances.
10. *Publication* – ASIC publishes details of the infringement notice if it is complied with, or of its decision (if taken in stage 9) to pursue alternative enforcement action against the issuee if the notice is not complied with, or of its decision to withdraw the infringement notice.

If the issuee opts to comply with the infringement notice in stage 8 above, its compliance will not be considered as an admission of guilt or liability, nor will it constitute a conviction against the issuee.³² These factors can act as considerable incentives for an issuee to comply (even if it is not in fact guilty of the breach),³³ particularly if doing so will be likely to conclude the actions that ASIC will pursue based on the matter.³⁴ Issuees may also perceive compliance as a means of preserving their market reputation in light of their alleged contravention, and as a strategic means of avoiding the potentially considerable costs³⁵ of contending any other measures that ASIC might instead pursue to enforce disclosure if the issuee opts for non-compliance.

ASIC may proceed with its alternative remedies because it has no power to enforce an infringement notice if the issuee elects not to comply with it.³⁶ Such remedies include accepting an enforceable undertaking under s 93AA of the *Australian Securities and Investments Commission Act 2001* (Cth), initiating civil proceedings seeking a declaration that the issuee committed the alleged breach, or initiating

³² *Corporations Act 2001* (Cth) ss 1317DAF and 1317DAH. In order to comply with the infringement notice, the issuee must pay the penalty amount and either make a disclosure to the market or lodge a document containing any specific information that is required by the infringement notice, within the compliance period (28 days, unless an extension has been granted).

³³ Nehme, Hyland and Adams, above n 6, at 116.

³⁴ See ASIC, Regulatory Guide 73, 11. Compliance does not, however, afford complete protection against certain types of further proceedings, such as, for example, civil penalty actions against individuals involved in the contravention (s 674(2A) or s 675(2A)) or proceedings brought by third parties adversely affected by the breach (s 1317DAF(6)): see *Corporations Act 2001* (Cth) s 1317DAF(5). Pursuant to s 1317DAG(4), third parties may still initiate proceedings against the issuee for the alleged contravention.

³⁵ Costs can typically extend beyond monetary expenses to include considerable human effort, time and company resources.

³⁶ These are addressed in Part V.

proceedings for a pecuniary penalty order of up to \$1 million, or an order under s 1324B of the *Corporations Act 2001* (Cth) mandating the disclosure of certain information in the manner stipulated by the infringement notice, or seeking criminal sanctions in the most severe cases.

Against this background and context of infringement notices, we now examine ASIC's use of this enforcement action to date.

III. RESEARCH METHODOLOGY

A. Overview

During the period from the commencement of the infringement notice regime in 2004 until 30 June 2011, ASIC issued a total of 14 infringement notices that were complied with by the issuee. It is important to note that the data relating to infringement notices published by ASIC is limited to infringement notices with which the issuee has complied. This is because s 1317DAJ of the *Corporations Act 2001* (Cth) provides that ASIC may only publish details of an infringement notice where there is compliance with the notice.

As summarised in Table 2, the issuees are (or were at the time) all listed companies operating in a variety of industries and contexts.

TABLE 2 – SECTOR AND BUSINESS OF COMPANY AND PENALTY

Company	Sector, (Industry Group) [Business]	Penalty (\$)
Solbec Pharmaceuticals Limited (now FYI Resources Ltd)	Health Care (Pharmaceuticals, Biotechnology & Life Sciences) [Pharmaceuticals, drug development]	33,000
QRSciences Holdings Limited (now Q Technology Group Ltd)	Information Technology (Technology Hardware & Equipment) [Systems, software and components design and development for security related applications]	33,000
SDI Ltd	Health Care (Health Care Equipment & Services) [Dental care products and equipment manufacturing]	33,000
Avastra Limited	Health Care	33,000

(now Avastra Sleep Centres Limited in liquidation)	(Health Care Equipment & Services) [Life sciences]	
Astron Limited	Materials (Chemicals, Metals & Mining) [Development and manufacturing of advanced metals and chemical products]	66,000
Avantogen Limited (now Acuvax Ltd)	Health Care (Pharmaceuticals, Biotechnology & Life Sciences) [Drug development]	33,000
Promina Group Limited (now merged with Suncorp-Metway Limited)	Financials (Insurance) [Insurance and financial services]	100,000
Raw Capital Partners Limited (now delisted)	Information Technology (Software & Services) [Information technology services]	33,000
Centrex Metals Limited	Materials (Metals & Mining) [Mineral exploration]	33,000
Rio Tinto Limited	Materials (Metals & Mining, Energy) [Mining, diversified production of minerals and metals]	100,000
Sub-Sahara Resources NL (now delisted, merged into Chalice Gold Mines Limited)	Materials (Metals & Mining) [Mineral exploration]	33,000
Commonwealth Bank of Australia	Financials (Banks) [Banking]	100,000
Citigold Corporation	Materials (Metals & Mining) [Gold exploration, mine development and production]	33,000
Nufarm Ltd	Materials (Chemicals) [Agrichemical manufacturing]	66,000

There are two factors to bear in mind when considering this list of companies in relation to which ASIC has issued infringement notices. First, each issuance, to a substantial degree, depends upon the unique facts surrounding each particular (alleged) contravention. Accordingly, any analysis must be sensitive to the importance of context in each instance. A broader trend-based methodology that

incorporates context as a factor is therefore adopted in this analysis. Second, it is important to acknowledge that a higher number of infringement notices would lend greater certainty to the trends that we can extract from our analysis.

B. Methodology

In order to evaluate how ASIC has utilised its power to issue infringement notices, we assess (i) the operation of the regime itself, and (ii) its operation within the broader context of the other continuous disclosure enforcement actions that have been available to ASIC since the inception of the regime. The first part of the analysis in Part IV examines six factors within the list of companies that have received infringement notices and extrapolates the trends that emerge. From a range of possible factors, the following appear most instructive:

1. The type of company and industry involved ('Company/Industry' factor);
2. The quantum of the penalty applied ('Penalty quantum' factor);
3. Incidence of issuance and whether the rate has increased or decreased by year ('Year of issuance' factor);
4. Rapidity of ASIC's response ('Time to issuance' factor);
5. How long it takes ASIC to publicly announce that the infringement notice has been issued ('Time to announcement' factor); and
6. The context of the alleged breach and its substance ('Context' factor).

The second part of the analysis in Part V compares the operation of the infringement notice regime with ASIC's use of other enforcement actions for alleged continuous disclosure breaches. In particular, we apply strategic regulation theory and an adapted model of the "pyramid of enforcement" to consider ASIC's other relevant enforcement powers - enforceable undertakings, civil penalties and criminal penalties.

IV. TRENDS IN ASIC'S USE OF THE INFRINGEMENT NOTICE REGIME

A. Company/Industry Factor

The company/industry factor identifies the areas of the Australian stock market and economy that the issues derive from. This information is summarised in the first two columns of Table 2 according to the Global Industry Classification Standard ("GICS") for sectors and industries.³⁷

Of immediate notice is the concentration and confinement of infringement notice issuances to only a few specific sectors and industries. Approximately 43 per cent (6) of the infringement notices were issued to companies in the Materials sector (Astron Ltd, Centrex Metals Ltd, Rio Tinto Ltd, Sub-Sahara Resources NL, Citigold Corporation, Nufarm Ltd), approximately 29 per cent (four) were issued to issues operating in the Health Care sector (Solbec Pharmaceuticals Ltd, SDI Ltd, Avastra Ltd, Avantogen Ltd), approximately 14 per cent (two) of the notices were issued to companies in the Financials sector (Promina Group Ltd, Commonwealth Bank of Australia), and the remaining approximate 14 per cent (two) of the notices were issued to companies in the Information Technology sector (QRSciences Holdings Ltd, Raw Capital Partners Ltd).

This trend of application of the infringement notice regime solely towards these four sectors might suggest that these particular sectors are potentially susceptible to higher rates of non-compliance with continuous disclosure obligations. This is reinforced by the observation that each sector has incurred multiple issuances of infringement notices. It may also be indicative of the sectors in which ASX and ASIC particularly focus their monitoring and enforcement activities.

B. Penalty Quantum Factor

As discussed in Part IIB, the penalty amount for an infringement notice for listed entities is a function of the market capitalisation of the issuee, and whether it has previously contravened its continuous disclosure obligations.

³⁷ All ASX listed entities have been reclassified in conformity with GICS, a joint Standard & Poor's and Morgan Stanley Capital International product designed to standardise industry definitions internationally. For further information, see <http://www.asx.com.au/products/indices/gics.htm> (accessed 31 May 2011).

Approximately 21 per cent (three) of the notices issued invoked the maximum Tier 1 penalty of \$100,000 (Rio Tinto, Promina Group Ltd, Commonwealth Bank of Australia). One hundred per cent of the Financials sector infringement notices were therefore Tier 1 issuances, with the remaining Tier 1 notice issued to a company in the Materials sector. Approximately 14 per cent (two notices) involved a Tier 2 penalty of \$66,000 (Astron Ltd, Nufarm Ltd), both issued to companies in the Materials sector. The majority of penalties were Tier 3 penalties, meaning that approximately 64 per cent of issuees were smaller companies (in terms of market capitalisation) within three of the four sectors identified above (Health Care, Materials and Information Technology).

The data may indicate that smaller companies have more difficulties complying with their continuous disclosure obligations – although even very large companies have been issued with infringement notices. ASIC has applied its infringement notice regime across the entire spectrum of disclosing entities in terms of market capitalisation. Even larger companies with significant resources to ensure compliance can still (allegedly) commit minor infractions of their continuous disclosure obligations, suggesting that the size of the disclosing entity is not solely determinative of an alleged contravention occurring or the eventual issuance of an infringement notice.

C. Year of Issuance Factor

TABLE 3 – TIMING

Company	Time of "Offence"	Issue Date	"Offence" to Issue Date	Announcement Date	"Offence" to Announcement	Issue Date to Announcement Date
Solbec Pharmaceuticals Limited	10.19am 23 Nov 2004	14 June 2005	203 days	1 Aug 2005	251 days	48 days
QRSciences Holdings Limited	10.28am 31 Jan 2005	20 Dec 2005	323 days	17 Feb 2006	382 days	59 days
SDI Ltd	10am 2 May 2005	Unclear	-	21 Apr 2006	354 days	-
Avastra Limited	26 Apr 2005	18 April 2006	357 days	15 May 2006	384 days	27 days

Astron Limited	6 Jan 2006	21 Jun 2006	166 days	18 Jul 2006	193 days	27 days
Avantogen Limited	12 Apr 2006	13 Nov 2006	215 days	8 Dec 2006	240 days	25 days
Promina Group Limited	12.03pm 11 Oct 2006	21 Feb 2007	133 days	20 Mar 2007	160 days	27 days
Raw Capital Partners Limited	31 Oct 2006	18 Jun 2007	230 days	1 Aug 2007	274 days	44 days
Centrex Metals Limited	25 May 2007	12 Feb 2008	263 days	12 Mar 2008	292 days	29 days
Rio Tinto Limited	2.30pm 12 Jul 2007	10 Apr 2008	273 days	5 Jun 2008	329 days	56 days
Sub-Sahara Resources NL	4.13pm 19 Jul 2007	16 Apr 2008	272 days	29 Apr 2008	285 days	13 days
Commonwealth Bank of Australia	3pm 16 Dec 2008	Unclear	-	14 Oct 2009	302 days	-
Citigold Corporation	1.00pm 11 Dec 2009	19 Aug 2010	251 days	22 Sep 2010	285 days	34 days
Nufarm Ltd	11 Feb 2010	30 Nov 2010	292 days	1 Dec 2010	293 days	1 day
Average			248 days		287 days	32.5 days

The year of issuance factor illustrates the annual incidence and annual rate of issuance of infringement notices since the inception of the regime. As indicated in Table 3, ASIC issued two infringement notices in 2005 (Solbec Pharmaceuticals Ltd, QRSciences Holdings Ltd), four in 2006 (SDI Ltd, Avastra Ltd, Astron Ltd, Avantogen Ltd), two in 2007 (Promina Group Ltd, Raw Capital Partners Ltd), three in 2008 (Centrex Metals Ltd, Rio Tinto Ltd, Sub-Sahara Resources NL), only one in 2009 (Commonwealth Bank of Australia) and two in 2010 (Citigold Corporation and Nufarm Ltd).

With respect to the annual rate of issuance, although ASIC has issued infringement notices at least once each year since 2005, the annual utilisation is on average very low. How the use of infringement notices compares to the use of other enforcement actions available to ASIC for continuous disclosure breaches is considered in Part V. However, the annual incidence suggests a possible trend that should be monitored over a longer time-scale: there is some evidence that issuances within a sector occur in “clumps”. For instance, 2006 involved three issuances to the Health Care sector, while 2008 and 2010 saw three issuances and two issuances to the Materials sector, respectively. This may indicate that certain events occur within sectors that trigger multiple instances of sector-specific market participant non-compliance of disclosure obligations within a short period of time. Or it may highlight a pattern in the ASX and ASIC’s enforcement behaviour with respect to focusing on certain sectors at certain times when monitoring and enforcing contraventions of the continuous disclosure laws. A larger population size and longer timescale will determine whether this is in fact a trend in ASIC’s utilisation of the regime.

D. Time to Issuance Factor

Another factor to consider is the time taken between the alleged continuous disclosure breach occurring and ASIC issuing the infringement notice. This indicates the rapidity of ASIC’s response and provides insight into whether the infringement notice regime is achieving one of its intended primary goals — to deliver a quicker and more efficient remedy against relatively minor continuous disclosure law infractions.³⁸ ASIC has stated that it will generally aim to issue an infringement notice within 3 months (90 days) of identifying an alleged breach.³⁹ As depicted in Table 3, however, the average time that ASIC has taken to respond to a contravention by issuing an infringement notice is 248 days, with a minimum time of 133 days (Promina Group Ltd) and a maximum of 357 days (Avastra Ltd).

There are a number of implications to draw from these findings. First, with an average time to issuance of 248 days (approximately 2.8 times over the stated target), we cannot conclude that infringement notices are typically a more efficient and/or quicker enforcement mechanism than the alternative measures available to ASIC. Other methods, such as for example certain enforceable undertakings,⁴⁰ could

³⁸ See Explanatory Memorandum, *CLERP 9*, at [4.220]; Austin and Ramsay, above n 10, at [10.326].

³⁹ ASIC, Regulatory Guide 73, 10.

⁴⁰ Discussed in Part V.

potentially take less time to design and implement than the average 8.2 months that the infringement notice regime currently takes.⁴¹ Second, the fact that every infringement notice issued has taken longer than the stated goal of 90 days suggests that this is likely a systemic problem inherent in the procedure rather than due to any extraneous or contextual factors (such as the particular issuee, its industry, sector, size, and the circumstances of the alleged breach). As such, we can infer that the time between the alleged contravention and the investigation commencing and/or the ‘Investigation’ to ‘Infringement notice issued’ stages of the issuance process⁴² are taking longer than anticipated by ASIC to complete, impeding the rapidity of ASIC’s response to the alleged contraventions in question.

E. Time to Announcement Factor

This factor indicates the time that ASIC takes to publicly announce its issuance of an infringement notice after the alleged contravention (time of “offence” to Announcement Date). It also provides an insight into the time each issuee takes to decide on its course of action — that is, whether to voluntarily accept the penalty or refuse to comply with the infringement notice — and the time that ASIC generally takes to evaluate the entity’s response (Issue Date to Announcement Date).

The total announcement period (time of “offence” to Announcement Date) is intrinsically linked to the Time to Issuance Factor discussed above, and as such we observe similarly lengthy timeframes in the range (160 days (Promina Group Ltd) to 382 days (QRSciences Holdings Limited)) and in the average time period (287 days). Isolating the Issue Date to Announcement Date yields an average decision-making and response time by the issuee and ASIC respectively of 32.5 days.⁴³ It therefore takes, on average, slightly over one month for an issuee to decide upon its course of action, and for ASIC to decide upon an appropriate response to this action and publish the details of the infringement notice (if complied with) or the action taken by ASIC (if it decides to escalate proceedings after non-compliance with the infringement notice).⁴⁴ As 32.5 days is slightly longer than the general 28-day compliance period offered to issuees, this could indicate that on average an issuee may need an extension of approximately one week to reply, and that the 28-day

⁴¹ For instance, the Nufarm Ltd infringement notice was issued at the same time as the enforceable undertaking was issued, suggesting the possibility that enforceable undertakings could potentially take less time than infringement notices.

⁴² Stages 1 to 7, as described in Part IIB above.

⁴³ Based on the calculation using the sample of 12 known Issue Dates from the population.

⁴⁴ See stages 8 to 10 in Part IIB above.

compliance period may not always be sufficient. However, there is a wide range in the decision-response times from 1 day (Nufarm Ltd) to 59 days (QRSciences Holdings Ltd). Additionally, there is no apparent correlative trend with company sector, penalty amount, year of issuance or time to issuance, indicating that this variable is primarily dependent on the issuee's decision and ASIC's response rather than on any other discernable factor.

F. Context Factor

Extracting trends from the contexts of the alleged breaches is perhaps the most challenging aspect of this analysis. As Table 4 indicates, although infringement notices have only been issued in four sectors so far, the contexts underlying these issuances are very diverse.

TABLE 4 – CONTEXT AND DURATION OF NON-DISCLOSURE

Company	Type of breach	Context of alleged breach	+/- News	Duration of non-disclosure
Solbec Pharmaceuticals Limited (Health Care)	Non-disclosure	Failing to notify ASX about the structure, size and limited nature of the results of an animal study relating to its cancer drug, Coramsine	Negative	10.19am 23 Nov 2004 – 2.06pm 26 Nov 2004 = approx 3 days
QRSciences Holdings Limited (Information Technology)	Non-disclosure	Failing to notify ASX of the withdrawal by Ord Minnett Limited from its commitment to underwrite any shortfall in the exercise of QRSciences Holdings' options up to a certain amount	Negative	10.28am 31 Jan 2005 – 7 Feb 2005 = approx 7 days
SDI Ltd (Health Care)	Non-disclosure	Failing to keep the market informed regarding its profit announcement made in February 2005 (adverse deviation from profit forecast)	Negative	10am 2 May 2005 – 11 May 2005 = approx 9 days
Avastra Limited (Health Care)	Non-disclosure	Failing to inform ASX of significant delay in publication of a clinical trial's results that the company was conducting	Negative	26 Apr 2005 – 13 May 2005 = approx 17 days
Astron Limited (Materials)	Non-disclosure	Failing to immediately inform ASX of positive news (significant increase in mineral resource estimate) for company's Donald Mineral Sands Project	Positive	6 Jan 2006 – 6.44pm 12 Jan 2006 = approx 6 days

Avantogen Limited (Health Care)	Non-disclosure	Failing to notify ASX of unfavourable information regarding the unsuccessful outcome of its cancer vaccine clinical trials	Negative	12 Apr 2006 – afternoon of 6 June 2006 = approx 55 days
Promina Group Limited (Financials)	Non-disclosure	Failing to inform ASX of receiving proposal to acquire all the ordinary shares of the company (takeover negotiations)	Positive/ Negative	12.03pm 11 Oct 2006 – 8.29am 12 Oct 2006 = approx 20.5h
Raw Capital Partners Limited (Information Technology)	Non-disclosure	Failing to immediately notify ASX of loss of a significant IT service contract with Optus (which provided approximately 67% of Raw Capital's revenue for 2005-06 financial years)	Negative	Afternoon 31 Oct 2006 – 5.41pm 24 Nov 2006 = approx 24 days
Centrex Metals Limited (Materials)	Non-disclosure	Failing to immediately notify ASX of favourable news (signing of a binding Heads of Agreement with Baotou)	Positive	25 May 2007 – 12.11pm 30 May 2007 = approx 5 days
Rio Tinto Limited (Materials)	Non-disclosure	Failing to immediately notify ASX of no longer confidential information about its acquisition of Alcan.	Positive/ Negative	2.30pm 12 Jul 2007 – 3.42pm 12 Jul 2007 = approx 1h 12 mins
Sub-Sahara Resources NL (Materials)	Non-disclosure	Failing to immediately notify ASX of favourable news (positive metallurgical test results obtained from its joint Zara Gold Project)	Positive	4.13pm 19 Jul 2007 – 11.44am 24 Jul 2007 = approx 5 days
Commonwealth Bank of Australia (Financials)	Non-disclosure	Failing to notify ASX of negative price-sensitive information regarding the significant deterioration in its expected LIE ratio (expected loan impairment expense (LIE) to gross loans and acceptances ratio) for the financial year ending 30 June 2009	Negative	3pm 16 Dec 2008 – 7.14pm 16 Dec 2008 = 4h 14mins
Citigold Corporation (Materials)	Non-disclosure	Failing to immediately notify ASX of lower gold production figures and a revised 2010 gold production target	Negative	1pm 11 Dec 2009 – 8.19am 16 Dec 2009 = approx 5 days

Nufarm Ltd (Materials)	Non-disclosure	Failing to notify ASX of variations in financial forecasts and expectations in the 2010 financial year	Negative	11 Feb 2010 – 2 Mar 2010 = approx 19 days
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There are several matters that arise for discussion from this data. First, all 14 infringement notices concern contraventions involving *non-disclosures* of material information rather than contraventions for *misleading disclosures*. This may suggest that ASIC does not consider infringement notices to be an effective response to misleading disclosure violations of the continuous disclosure laws.⁴⁵

Second, these infringement notices have been issued for non-disclosures of *both* positive and negative types of news. In fact, at least 21 per cent of the population (three) infringement notices involved positive news that was not disclosed in a timely and comprehensive fashion to the market (Astron, Centrex Metals, Sub-Sahara Resources), and this number could potentially be higher – up to 36 per cent (5 notices) – if the two positive/negative news infringements are included as positive news instances.⁴⁶ It is also worth noting that all three positive news-related issues belonged to the Materials sector, and if the positive/negative news infringements are again counted as positive, then four out of five Materials sector issues received infringement notices for not immediately disclosing positive news to the market. These findings are significant for several reasons. They indicate that companies from the four sectors identified in Part IVA can be inefficient at distributing *both* positive and negative news in compliance with the continuous disclosure provisions, and do commit minor contraventions in relation to both types of news. In addition, these findings may suggest a possible pattern that disclosing entities in the Materials sector are particularly imperfect at distributing positive news to the market in a compliant fashion, and that such entities may be more likely to attract infringement notices for this reason.⁴⁷ The findings may also indicate that the ASX and ASIC’s monitoring and enforcement of minor continuous disclosure contraventions is effective for detecting both positive and negative types of non-disclosure.

⁴⁵ This is further discussed in Part V.

⁴⁶ The Promina Group Ltd and Rio Tinto Ltd infringement notices involved news relating to merger and takeover discussions respectively which could be viewed positively or negatively depending on the particular market participant. We have therefore classified them in a separate positive/negative non-disclosure category.

⁴⁷ Indeed, this may be an underlying reason for the “clumping” observed in the Materials sector in Part IVC above.

The third matter that can be drawn from Table 4 is the high degree of variability in the duration of the non-disclosures (the time between the issuee becoming aware of the price-sensitive news and the time it actually announced it to the market). The average duration of non-disclosure is (very approximately) 11 days, or approximately 8 days on average if we exclude Avantogen from the calculation.⁴⁸ The range is 1 hour and 12 minutes (Rio Tinto Ltd) to 55 days (Avantogen), reinforcing how dependent infringement notice issuance is on the particular context. It is notable that the three shortest durations of non-disclosure (each lasting under 24 hours) correlate with the three Tier 1 penalty infringement notices that were issued. Two of these notices pertained to a merger context (Promina Group Ltd) and a takeover context (Rio Tinto Ltd) respectively, suggesting that ASIC's tolerance for non-disclosure is particularly short-lived in such situations. The remaining Tier 1 notice concerned the Commonwealth Bank of Australia's failure to immediately disclose significant deteriorations in its 'loan impairment expense' ratio during the global financial crisis, which also suggests that in such contexts ASIC is particularly stringent in the standards it requires regarding continuous disclosure.

Taking a broader perspective, the contexts identified above suggest possible areas in which it may be more difficult for a disclosing entity to satisfy its continuous disclosure obligations to the standards expected by ASIC. That is, it may be more challenging for companies involved in takeovers, mergers, drug trials or the Materials sector in general (for instance), to maintain continuous compliance to the required standards. This raises the more fundamental question of just how long companies should have to disclose relevant information, particularly as it appears so heavily dependent upon the prevailing context.⁴⁹

In summary, our analysis of the application of the infringement notice regime suggests that infringement notices have so far been narrowly applied to the Materials, Information Technology, Health Care and Financials sectors of the economy; are not as efficient or responsive as intended (especially with respect to stages 1 – 7 of the issuance process or commencement of the process after the alleged contravention); are being applied to both positive and negative non-

⁴⁸ The Avantogen infringement notice may be an outlier with respect to this variable considering the significantly shorter durations of non-disclosure for all of the other notices issued.

⁴⁹ This question, along with other policy considerations drawn from this section of the analysis, is examined in Part VI.

disclosure events; and are being applied to all types of companies in terms of market capitalisation (size) in a variety of contexts.

V. ANALYSIS OF COMPARATIVE UTILISATION OF ENFORCEMENT MEASURES

In this part of the article, we undertake a broader-level analysis by examining how the infringement notice regime has been utilised compared with ASIC's alternative continuous disclosure enforcement measures. We review ASIC's application of its alternative enforcement measures to continuous disclosure contraventions since the inception of the infringement notice regime. As part of this analysis, we consider strategic regulation theory and apply it to derive a continuous disclosure enforcement pyramid model, which encapsulates the key sanctions that we focus on in the analysis: enforceable undertakings, civil penalties and criminal penalties.

A. Strategic Regulation Theory

Applying strategic regulation theory to various aspects of ASIC's enforcement framework has been undertaken in earlier studies.⁵⁰ Since its original exposition by Ian Ayres and John Braithwaite, strategic regulation theory has been applied to a broad range of regulatory fields,⁵¹ including aspects of Australia's corporate law.⁵² At its core, strategic regulation theory promotes 'responsive' or 'strategic' supervision by regulators with the goal of achieving maximum regulatory compliance.⁵³ The theory stipulates that methods such as persuasion and education are more effective than legal enforcement measures for ensuring voluntary regulatory compliance by regulatees.⁵⁴ In order to enable these persuasive and educative measures to act as effective responses, however, the regulator should have at its disposal a set of

⁵⁰ See, especially, Helen Bird, Davin Chow, Jarrod Lenne and Ian Ramsay, 'Strategic Regulation and ASIC Enforcement Patterns: Results of an Empirical Study' (2005) 5 *Journal of Corporate Law Studies* 191; George Gilligan, Helen Bird and Ian Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties' (1999) 22 *University of New South Wales Law Journal* 417.

⁵¹ Gilligan, Bird and Ramsay, above n 50.

⁵² For example, strategic regulation theory was pivotal to the incorporation of civil penalties into Australia's corporate law as an element of the strategy to regulate the conduct of company directors: *ibid.* For criticisms of strategic regulation theory, however, see Bird, Chow, Lenne and Ramsay, above n 50.

⁵³ Bird, Chow, Lenne and Ramsay, above n 50.

⁵⁴ Gilligan, Bird and Ramsay, above n 50; Bird, Chow, Lenne and Ramsay, above n 50; Ian Ayres and John Braithwaite, *Responsive Regulation* (Oxford University Press, Oxford, 1992) 35.

credible sanctions — of escalating degrees of severity and compulsoriness — that it can threaten to utilise and deploy whenever a contravention occurs.

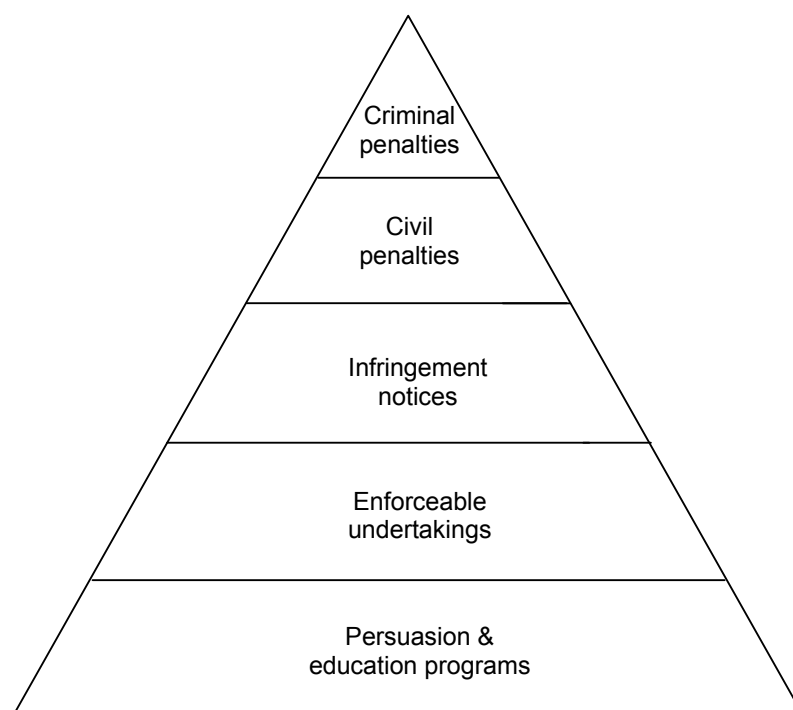
This hierarchy of sanctions is traditionally depicted as an ‘enforcement pyramid’, with each vertical position indicating the severity and voluntariness of each sanction (with the more severe and mandatory measures towards the apex), and the width of each punishment row indicating its theoretical rate of use and, inversely, its expected deterrent value (greater width signifies higher use though the measure has less deterrent effect).⁵⁵

We employ this concept for the purposes of our analysis to create a ‘continuous disclosure enforcement pyramid’ in order to analyse the infringement notice regime within the context of ASIC’s other main enforcement actions relating to continuous disclosure contraventions.

⁵⁵ See Gilligan, Bird and Ramsay, above n 50; Bird, Chow, Lenne and Ramsay, above n 50.

*B. Continuous Disclosure Enforcement Pyramid*⁵⁶

FIGURE 1 – CONTINUOUS DISCLOSURE ENFORCEMENT PYRAMID



According to this model, education and persuasion are (theoretically) ASIC's least severe and more commonly utilised enforcement responses against continuous disclosure breaches, followed by enforceable undertakings, infringement notices, civil penalties (compensation and monetary sanctions) and lastly criminal penalties, representing the most severe and mandatory sanction. It is possible for the response against a non-compliant disclosing entity to move higher up the pyramid if its contravention is severe enough to justify this or if it has already incurred lower-level sanctions and these have not been complied with.⁵⁷ Of most relevance for our analysis are enforceable undertakings, civil penalties and criminal penalties given that they have comparable or higher levels of severity to infringement notices.

⁵⁶ This continuous disclosure enforcement pyramid only reflects ASIC's available enforcement sanctions within the continuous disclosure context, not those sanctions available to the ASX in this context or those available to ASIC in other areas (that is, in non-continuous disclosure law contravention scenarios).

⁵⁷ See Gilligan, Bird and Ramsay, above n 50.

Two points can be made in relation to the continuous disclosure enforcement pyramid. First, other authors have devised similar pyramids.⁵⁸ However, there is disagreement about the structure of the pyramid with some having enforceable undertakings above infringement notices and others having them on the same level. The fact that authors cannot agree on the structure of the pyramid may indicate some limitations in its use. Second, our later analysis indicates there are limitations in endeavouring to classify the alternative enforcement measures in a hierarchy as reflected in the enforcement pyramid – it seems as though ASIC may move one above the other depending on the context of the alleged contravention.

(i) Enforceable Undertakings

Enforceable undertakings are a particularly useful comparison because, like infringement notices, they are voluntary and are invoked by breaches involving similar magnitudes of severity.⁵⁹

An enforceable undertaking is a flexible enforcement remedy that gives effect to an administrative settlement between ASIC and the contravening disclosing entity.⁶⁰ Since their introduction in 1998, enforceable undertakings have been employed as an alternative to court proceedings and other administrative actions in order to influence behaviour and instil a ‘culture of compliance’ amongst market participants.⁶¹ Enforceable undertakings are a court-enforceable agreement voluntarily accepted by ASIC and the party involved (and can be initiated by either) to perform or not perform certain agreed upon actions to remedy the alleged breach.⁶² Their advantage lies in their ability to reflect a negotiated and tailored resolution in a timely and cost-effective manner that is agreeable to both parties.⁶³ They also can compel disclosing entities to improve their internal compliance arrangements to minimise the chances of any contraventions occurring in the future.⁶⁴

⁵⁸ See Nehme, Hyland and Adams, above n 6, at 116; Josephine Coffey, ‘Enforcement of Continuous Disclosure in the Australian Stock Market’ (2007) 20 *Australian Journal of Corporate Law* 301, at 304-306; Elizabeth Boros, ‘Public and Private Enforcement of Disclosure Breaches in Australia’ (2009) 9 *Journal of Corporate Law Studies* 409, at 416-417.

⁵⁹ See Nehme, Hyland and Adams, above n 6, at 120.

⁶⁰ *Ibid*; ASIC, *Enforceable Undertakings*, Regulatory Guide 100, March 2007, 7 (“Regulatory Guide 100”).

⁶¹ ASIC, Regulatory Guide 100, 4.

⁶² *Ibid*, 5.

⁶³ Marina Nehme, ‘Enforceable Undertakings in Australia and Beyond’ (2005) 18 *Australian Journal of Corporate Law* 68.

⁶⁴ *Ibid*; ASIC, Regulatory Guide 100, 7; ASIC, *Enforceable Undertaking: Nufarm Ltd*, (1 December 2010).

Evincing the utility of this enforcement mechanism, ASIC has so far agreed to 303 enforceable undertakings since 1998. However, as summarised in Table 5, only nine (approximately three per cent) of these concern alleged breaches of continuous disclosure obligations.⁶⁵ Only three enforceable undertakings of this subset (Multiplex Ltd, TZ Ltd and Nufarm Ltd) were accepted during the operation of the infringement notice regime.

TABLE 5 – CONTINUOUS DISCLOSURE ENFORCEABLE UNDERTAKINGS

Company	Type of breach	Context of alleged breach from ASIC's investigation	Summary of relevant undertakings	Date of acceptance by ASIC
Crown Casino Ltd	Non-disclosure	<ul style="list-style-type: none"> • Did not formally announce its poor trading results for its first four months of operations in the 1997/98 financial year immediately upon becoming aware of them (seems only did so on 19 Dec. 1997) • Did not formally disclose a Notice received from the Victorian Casino and Gaming Authority immediately after its receipt on 10 Nov. 1997 • These failures to disclose were largely due to an inadequate internal system for compliance with ASX Listing Rule 3.1, and not due to any dishonesty on the part of the company. Therefore company's judgment at the time was that it was acting in accordance with ASX Listing Rules 	<ul style="list-style-type: none"> • Implement an appropriate system of quarterly reporting to remain in effect for at least 3 years • Establish an internal compliance program and Charter 	11 Sep. 1998
Nomura International Plc	Misleading disclosure	<ul style="list-style-type: none"> • ASIC accepted enforceable undertakings from Nomura in conjunction with a previous Federal Court judgment against Nomura 	<ul style="list-style-type: none"> • Agreement not to engage in the contravening conduct again. (i.e. knowingly in the conduct of its 	16 Feb. 1999

⁶⁵ Based on the ASIC enforceable undertakings register, available at <http://www.asic.gov.au/asic/asic.nsf/byheadline/Enforceable+undertaking+register%3A+list?openDocument#1998> (last visited 7 January 2011). These are: ASIC, Enforceable Undertaking: Crown Casino Ltd, (11 September 1998); ASIC, Enforceable Undertaking: Nomura International Plc, (16 February 1999); ASIC, Enforceable Undertaking: Uecomm Ltd, (17 October 2002); ASIC, Enforceable Undertaking: Pahth Telecommunications Ltd, (2 February 2001); ASIC, Enforceable Undertaking: Plexus International Ltd, (30 March 2001); ASIC, Enforceable Undertaking: SMEC Holdings Ltd, (4 June 2001); ASIC, Enforceable Undertaking: Multiplex Ltd, (20 December 2006), ASIC, Enforceable Undertaking: TZ Ltd, (3 July 2008), ASIC, Enforceable Undertaking: Nufarm Ltd, (1 December 2010).

		and Federal Court declarations that in closing out its arbitrage position on 29 March 1996, Nomura contravened ss 995, 998 and 1260 of the Corporations Law and s 52 of the Trade Practices Act 1974 (Cth), and a Federal Court order that Nomura pay ASIC's costs of its investigation and of the proceedings	Australian index arbitrage activities)	
Uecomm Limited	Non-disclosure and misleading disclosure	<ul style="list-style-type: none"> • May have breached continuous disclosure obligations by failing to announce poor first quarter trading results for 2001 immediately after becoming aware of them • May have engaged in misleading and deceptive conduct by announcing a profit downgrade in April 2001, as it did not have reasonable grounds for the revised forecast revenue • Conclusion drawn that the company may not have had appropriate corporate governance and compliance procedures and controls operating to ensure compliance with continuous disclosure obligations 	<ul style="list-style-type: none"> • Engage an ASIC-approved external consultant to review its continuous disclosure practices, policies and procedures • Implement suggested improvements to the relevant Australian standard • Not rely on the reduced prospectus content rule for continuously quoted securities for 12 months 	17 Oct. 2002
Pahth Telecommunications Ltd	Non-disclosure	<ul style="list-style-type: none"> • Failed to disclose that its financial performance for financial year to 30 June 2000 would be significantly worse than initially set out in an earlier projection as soon as it became aware of this fact (i.e. failed to issue a revenue and profit downgrade when it announced to the market that key strategic negotiations would not be proceeding) • Concern that the company may not have appropriate corporate governance and compliance procedures and controls in place to ensure future compliance with its continuous disclosure obligations 	<ul style="list-style-type: none"> • Review its corporate governance practices for ensuring compliance with its continuous disclosure obligations • Have those procedures independently audited by a senior member of the stockbroking profession. • Review, formalise and annually audit its own corporate governance practices 	2 Feb. 2001

Plexus International Ltd	Non-disclosure	<ul style="list-style-type: none"> • Should have disclosed that its financial performance for the year ended 30 June 2000 would be significantly worse than that set out in the projections as soon as Plexus became aware of that fact • Concern that company may not have appropriate corporate governance and compliance procedures and controls 	<ul style="list-style-type: none"> • Review its internal procedures for ensuring compliance with its continuous disclosure obligations • Have those procedures independently audited by a senior member of the corporate finance industry • Review, formalise and annually audit its own corporate governance practices 	30 Mar. 2001
SMEC Holdings Ltd	Non-disclosure	<ul style="list-style-type: none"> • Public company not listed on the ASX failed to lodge its half-yearly accounts since 1996 as required • Concern that the company does not have appropriate compliance procedures and controls in place to ensure future compliance with continuous disclosure obligations 	<ul style="list-style-type: none"> • Establish procedures that will ensure the company's compliance with its disclosure obligations, including quarterly directors' meetings and audit committee reviews of this compliance • Undertake to produce and comply with written compliance procedures 	4 Jun. 2001
Multiplex Ltd	Non-disclosure	<ul style="list-style-type: none"> • On 2 February 2005 the Multiplex Board decided to downgrade the profit forecast from its Wembley project from £35.7 million to zero. However, this material and price-sensitive information causing a significant change in financial position was not disclosed to the market until 24 February 2005 (after announcement, Multiplex's share price dropped from the 23 February price of \$5.57 (Volume Weighted Average Price) to \$4.76) 	<ul style="list-style-type: none"> • Establish a (maximum) \$32 million compensation fund for those investors affected by Multiplex's non disclosure • Engage an external consultant to review its continuous disclosure policies and procedures • Implement such recommended improvements • Not seek to rely on the special prospectus content rules in s 713 of the Corporations Act • Pay costs of compliance with the undertaking • Intention to move to 	20 Dec. 2006

			<p>a majority of independent directors within 12 months</p> <ul style="list-style-type: none"> • Commit to accelerate payment by Roberts family of \$50 million indemnity extended to Multiplex for any losses emerging on the Wembley project 	
TZ Ltd	Non-disclosure	<ul style="list-style-type: none"> • Failed to disclose price-sensitive information to the market when on 20 September 2007, the company received purchase orders from a global automotive supplier and a global aircraft manufacturer, but did not disclose this until 26 September 2007 • The company did not regard the information as price-sensitive and so sought its client's consent under confidentiality agreements (which required such consent before TZ Limited could make a market announcement about the contracts) • Under ASX Listing Rule 3.1, such confidentiality agreements do not remove the obligation for companies to disclose material information to the market, and so the market was uninformed for those 6 days despite the company's endeavors to obtain consent • ASIC was also concerned that TZ Limited did not have formal written policies or procedures regarding its continuous disclosure obligations 	<ul style="list-style-type: none"> • Improve compliance with its disclosure obligations through the engagement of an external consultant to review its policies and procedures • Implement subsequent recommendations in accordance with industry best practice • Send to ASIC a 6 month progress report of its improvements 	3 Jul. 2008
Nufarm Ltd	Non-disclosure	<ul style="list-style-type: none"> • On 11 Feb. 2010 directors and senior managers became aware of financial year-to-date results from 1 Aug 2009 – 31 Dec 2009 of after-tax net loss and operating net loss. There was subsequent uncertainty over Nufarm's expected 	<ul style="list-style-type: none"> • Improve compliance with its disclosure obligations through the engagement of an external consultant to review Nufarm's financial reporting and continuous disclosure systems 	1 Dec. 2010

		<p>half-year profit</p> <ul style="list-style-type: none"> • ASX Guidance Note 8 on Continuous Disclosure states that a variation in previously released financial forecasts of 10-15% may be material and should be publicly announced as soon as the company becomes aware of the variation • Nufarm failed to disclose this information until 2 March 2010 	<ul style="list-style-type: none"> • Implement subsequent recommendations • Send reports to ASIC prepared by the external consultant regarding the deficiencies identified, the recommendations made and the effectiveness of the remedies • Conduct training in relation to continuous disclosure obligations 	
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There are several points that can be made regarding this use of enforceable undertakings. First, although both enforcement measures (infringement notices and enforceable undertakings) involve breaches regarding both positive and negative news (for example, non-disclosures of material price-sensitive information such as profit downgrades),⁶⁶ ASIC has issued a greater number of infringement notices (14 to date since 2004) than enforceable undertakings for alleged continuous disclosure contraventions (nine to date since 1998). ASIC may therefore prefer infringement notices as the comparative enforcement remedy of choice when such contraventions occur.

ASIC has stated that it will only enter into enforceable undertakings that offer a 'more effective regulatory outcome' than could otherwise be achieved through other enforcement mechanisms.⁶⁷ This is determined by factors such as the interests of the community, consumers, investors and the regulated population to be served by the remedy, as well as the regulated party's likely future conduct, the capacity for deterrence, the effects on integrity and public confidence and the potential for the ongoing benefit of creating improved compliance programs.⁶⁸ ASIC's tendency to issue infringement notices rather than accept enforceable undertakings suggests that minor continuous disclosure breaches do not often lend themselves to these 'more effective regulatory outcomes' via enforceable undertakings, and that ASIC is willing to resolve most matters where possible by issuing voluntary financial penalties rather

⁶⁶ Although enforceable undertakings have been issued in different sectors to the four sectors in which infringement notices have been issued.

⁶⁷ ASIC, Regulatory Guide 100, 4.

⁶⁸ Ibid, 7.

than agree to a tailored undertaking with the contravening entity. This also suggests that in the majority of breaches to date (except for Nufarm Ltd), ASIC has been satisfied with issuing a voluntary financial penalty and has not felt compelled to address the improvement of the issuees' internal compliance systems.

Second, we can observe that these two enforcement measures are not always 'true alternatives' for each other in minor continuous disclosure contravention cases. In the first two enforceable undertakings issued when both measures were available (TZ Ltd and Multiplex Ltd), ASIC has demonstrated almost polar approaches to the application of one remedy over the other. The TZ Ltd enforceable undertaking concerned the company's non-disclosure of price-sensitive information regarding its receipt of substantial purchase orders. In this case, ASIC explicitly stated that it agreed to accept the particular undertakings proposed by TZ Ltd '[a]s an alternative to proceeding to a hearing to determine whether [it] would issue an infringement notice'.⁶⁹ This appears to be an instance of a 'true alternatives' situation arising, in which ASIC was prepared to follow the enforceable undertakings path as a direct alternative to issuing an infringement notice.

In contrast, ASIC made no such declaration of 'alternatives' when providing its reasoning for accepting the Multiplex Ltd enforceable undertaking. Its response to this contravention, which concerned Multiplex's non-disclosure of a significant profit downgrade on its Wembley Project, instead only posited enforceable undertakings as an alternative to pursuing a civil penalties claim against the company, and did not mention or appear to consider infringement notices at all.⁷⁰ Hence, this may represent a practical example of the limitations of the infringement notice regime; that

⁶⁹ ASIC, Enforceable Undertaking: TZ Ltd, (3 July 2008) [3.1].

⁷⁰ ASIC, Enforceable Undertaking: Multiplex Ltd, (20 December 2006), [1.24] (observing that '[i]n considering whether to accept this Enforceable Undertaking ASIC has taken into account that the undertaking would provide a more appropriate regulatory outcome than a civil penalty proceeding in that:

(a) The undertaking produces a swift result that offers compensation to persons who have suffered loss or damage as a result of the alleged contravention;
(b) Unless the compensation offered is at least (approximately) sixty (60) percent of an agreed amount, as quantified in this Enforceable Undertaking, the registered holders of the eligible securities can elect not to proceed with the offer;
(c) If ASIC had proceeded, court orders would have been confined to a declaration of contravention and a maximum pecuniary penalty of \$1 million; and
(d) The undertaking provides an ongoing benefit by way of improved Disclosure Policies and Procedures that Multiplex has agreed to put in place, which are to be consistent with industry best practice, monitored by an independent expert.') Additionally, it was noted that 'ASIC has agreed to accept an enforceable undertaking...as an alternative to taking a civil penalty proceeding...' at [1.23]).

is, it demonstrates an instance where infringement notices are a 'non-alternative' sanction for ASIC to administer when such a continuous disclosure breach has occurred. One question that should be asked, however, is whether Multiplex's alleged contravention in fact constituted a 'minor' contravention of the continuous disclosure laws,⁷¹ and therefore whether infringement notices could reasonably be regarded as a viable option at all in this situation. Nevertheless, the fact that ASIC pursued an enforceable undertaking rather than a more severe penalty in the form of civil proceedings does indicate ASIC's opinion that the breach was minor enough to warrant such a remedy, and therefore illustrates a limitation of infringement notices in their application to certain minor breaches of continuous disclosure obligations.

In terms of the continuous disclosure enforcement pyramid, we cannot therefore affix infringement notices definitively above enforceable undertakings for every continuous disclosure breach — ASIC may move one above the other depending on the context of the alleged contravention. Complicating this observation is the more recent Nufarm Ltd decision, which is the first instance of both an infringement notice and an enforceable undertaking being issued for the same alleged contravention. The enforceable undertaking was issued primarily to address Nufarm Ltd's purportedly deficient internal processes, whereas the infringement notice penalty appeared to be more targeted towards addressing the breach itself. This example not only highlights how interchangeable these two enforcement measures are in practice, but additionally how they can also be combined in this regulatory model to form a response to an alleged breach.

Overall, ASIC's use of the infringement notice regime appears to be reasonably high when compared to enforceable undertakings. However, the divergent application of the two enforceable undertakings in the TZ Ltd and Multiplex Ltd matters, coupled with the combined approach adopted by ASIC in the Nufarm Ltd matter, renders it unclear whether infringement notices and enforceable undertakings can be 'true alternatives' in resolving continuous disclosure contraventions.

(ii) Civil Penalties

There are only three matters in which ASIC has pursued civil proceedings for breach of the continuous disclosure requirements in the time since the infringement notice regime commenced operation.

⁷¹ Particularly as one of the terms of the undertaking required the establishment of a \$32 million compensation fund for investors.

ASIC initiated civil proceedings against Chemeq Ltd in 2004 for 7 alleged contraventions of its continuous disclosure obligations between February 2003 and October 2004. It reached a settlement, in which Chemeq agreed to a court declaration that it contravened its obligations on two occasions and also agreed to pay \$150,000 and \$350,000 in civil penalties, as well as \$170,000 for ASIC's costs.⁷² ASIC was also successful in its civil penalty proceedings against Fortescue Metals Group Ltd for contravening its continuous disclosure obligations and engaging in misleading and deceptive conduct by prematurely announcing its procurement of significant (though at the time, uncompleted) contracts to the market, and its civil proceedings against the chief executive officer, Andrew Forest, personally for allegedly being knowingly concerned in the company's contraventions.⁷³ Finally, as part of its action against James Hardie Industries NV, ASIC successfully sought civil penalties against the company for allegedly making misleading statements and contravening its continuous disclosure obligations.⁷⁴

Against this limited quantity of civil litigation, the comparative utilisation of infringement notices appears to be quite high. A point to note in these civil proceedings is that two of these cases involved misleading and deceptive conduct, which as we noted in Part IVF, are distinct from all infringement notice issuances for non-disclosure breaches. This prompts the question whether ASIC regards infringement notices as suitable for remedying these types of breaches, or whether this is another instance of a practical limitation of the infringement notice regime.

(iii) Criminal Penalties

There have been only two criminal penalties pursued by ASIC for breach of the continuous disclosure requirements in the time since the infringement notice regime commenced operation and these two prosecutions arose out of the same matter. The prosecutions involved two former directors of Harts Australasia Ltd for allegedly

⁷² *Australian Securities and Investments Commission v Chemeq Ltd* (2006) 58 ACSR 169; [2006] FCA 936; *ASIC Media Releases* 04-426 'ASIC Takes Action against Chemeq' 23 December 2004; 06-214 'ASIC Reaches Settlement in Civil Proceedings against Chemeq Limited' 30 June 2006; 06-246 'Chemeq Limited ordered to pay \$500,000 in fines for Breach of Continuous disclosure provisions' 25 July 2006.

⁷³ *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 81 ACSR 563; [2011] FCAFC 19. This judgment of the Full Federal Court of Australia has been appealed to the High Court of Australia.

⁷⁴ *James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 81 ACSR 1; [2010] NSWCA 332.

being knowingly concerned in the company's non-disclosure of its unexpected losses.⁷⁵ However, the prosecutions were unsuccessful.⁷⁶ As is theorised in the continuous disclosure enforcement pyramid, criminal sanctions are comparatively more severe and less commonly implemented than infringement notices.

VI. IN WHAT CIRCUMSTANCES IS ASIC TAKING INFRINGEMENT NOTICE ENFORCEMENT ACTION?

Several issues emerge from this analysis of the application of the infringement notice regime. In this Part, we tie our findings together to determine where ASIC is taking enforcement action with respect to minor continuous disclosure contraventions.

To begin with, an important issue emerging from our analysis is the length of time that is currently required to issue an infringement notice after an alleged breach has occurred. In Part IVD we found that ASIC currently takes 248 days on average to commence and complete stages 1 ('Investigation') to 7 ('Infringement notice issued') of the implementation process, which is far longer than the 90 day intended general target that ASIC is aiming for. As a result, we concluded that infringement notices are not a definitively quicker or more efficient alternative mechanism for less serious breaches of continuous disclosure obligations, thereby calling into question one of the regime's central justifications for its operation.⁷⁷ Furthermore, in our analysis we hypothesised that this length of time is largely a systemic issue; that is, due principally to imperfections within the procedure for issuing infringement notices rather than due to the influence of any exogenous factors. It would be appropriate for the infringement notice issuance procedure to be reviewed — it may be possible that the number of stages in the procedure is excessive and/or that aspects of specific stages are too time-intensive and inefficient. A detailed internal review of each stage of the process may yield a more effective approach to issuing infringement notices, allowing the regime to achieve one of its more important goals by reducing deployment time.

⁷⁵ *ASIC Media Releases* 06-176 'Former Harts Executives Charged with Continuous Disclosure Breach' 2 June 2006; 06-333 'Former Harts Executive Committed for Trial on Continuous Disclosure Breach' 21 September 2006.

⁷⁶ *ASIC Media Releases* 08-26 'Verdict on Charges Against Former Harts Executives' 25 September 2008; 09-06 'Prosecution of Brisbane Man Discontinued' 22 January 2009.

⁷⁷ See Austin and Ramsay, above n 10, at [10.326]; see also ASIC Regulatory Guide 73 which, at paragraph 6, states that infringement notices 'are 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'.

Another important result from our analysis concerns the influence of context on a company's continuous disclosure requirements. We found in Part IVF that the durations of non-disclosure varied significantly given the individual context. This is tied to the broader policy question of what the relevant standard required for companies to publicly disclose material price-sensitive information should be. The current standard for listed entities, operating through ASX Listing Rule 3.1, requires a disclosing entity to 'immediately' disclose such information to the market. The question is whether a more flexible standard is preferable when it comes to these minor contraventions, such that disclosure should be made 'as soon as practicable' in order to account for the specific context. A further research issue is whether a more flexible disclosure standard, as well as greater instruction from the regulator regarding these contextual considerations, may benefit disclosing entities (especially those belonging to the four sectors identified in Part IVA) as well as the transparency and consistency of the regime's application.

It also remains to be seen whether infringement notices can be applied to misleading and deceptive disclosure breaches of the continuous disclosure rules, rather than solely to non-disclosure breaches as is currently the case. ASIC has so far employed its alternative enforcement measures illustrated in the continuous disclosure enforcement pyramid, in particular enforceable undertakings and civil proceedings, to address these types of contraventions. With respect to enforceable undertakings, our comparative utilisation analysis suggests that they are not conclusively a 'true alternative' to infringement notices in all breach situations. Although ASIC did apply both measures to rectify Nufarm Ltd's alleged contravention, this raises a question as to how ASIC will select between the two in any given instance (that is, beyond the theoretical factors that ASIC takes into account when evaluating enforceable undertakings in general), or whether a combined approach is going to be more common. Based on the fact that the TZ Ltd and Multiplex Ltd undertakings each involved improvements to their apparently deficient compliance systems, it may be that if ASIC primarily perceives the opportunity to improve the internal compliance measures of a disclosing entity, it chooses an enforceable undertaking, whereas if it regards the disclosing entity's compliance systems as comparatively adequate and merely ineffectively utilised in a given instance, it issues an infringement notice (or implements both measures where some operational deficiency exists). The effect of an infringement notice is therefore mainly to ensure that a disclosing entity's compliance systems are properly employed, and as such, the greater number of

infringement notices issued over enforceable undertakings in the relevant time period may signal a higher incidence of non-effective systems use compared to deficient systems existing in the companies receiving infringement notices.

VII. CONCLUSION

ASIC's utilisation of its infringement notice regime against relatively minor contraventions of the continuous disclosure laws is fundamentally designed to promote the efficient operation and protection of Australia's securities markets. In our trend-based and comparative utilisation analyses of the 14 infringement notices issued to date, we extracted a number of notable trends and generated several policy questions that have implications for the operation of the regime going forward. There are areas of the regime's application that are appropriate for review, particularly in relation to the time to issuance, the efficiency of the issuance process, the need for contextual instruction as to disclosure, the relevant disclosure standard required in such contraventions, and the interplay between infringement notices and enforceable undertakings. Improvement of the regime is aimed at ensuring this enforcement mechanism is effective and relevant to ASIC's monitoring and enforcement activities.