

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**



Australasian Law Teachers Association – ALTA

Annual Conference

62nd Annual ALTA Conference

University of Western Australia, Perth, Western Australia
23rd- 26th September 2007

Law and Public Policy: Taming the Unruly Horse?

Published Conference Papers

This paper was presented at the 2007 ALTA Conference in the
Company Law Interest Group

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

The Australasian Law Teachers Association (ALTA) is a professional body which represents the interests of law teachers in Australia, New Zealand, Papua New Guinea and the Pacific Islands.

Its overall focus is to promote excellence in legal academic teaching and research with particular emphasis on supporting early career academics, throughout Australasia, in the areas of:

- (a) Legal research and scholarship;
- (b) Curriculum refinements and pedagogical improvements in view of national and international developments, including law reform;
- (c) Government policies and practices that relate to legal education and research;
- (d) Professional development opportunities for legal academics;
- (e) Professional legal education and practices programs.

*Conference Papers published by the ALTA Secretariat
2007*

Edited by Professor Michael Adams, Professor David Barker AM and Ms Katherine Poludniewski

ALTA Secretariat

PO Box 222

Lindfield NSW 2070

AUSTRALIA

Tel: +61 (2) 9514 5414

Fax: +61 (2) 9514 5175

admin@alta.edu.au

www.alta.edu.au

THE CONSTITUTIONALITY OF ASIC'S POWER TO ISSUE INFRINGEMENT NOTICES: A CRITICAL APPRAISAL

MARGARET HYLAND*

Currently there appears to be a trend to increasingly expand the power of regulators by limiting the availability of independent review of their determinations. Consequently, it is crucial that the powers exercised by administrative bodies, such as the Australian Securities and Investments Commission (ASIC), are closely monitored to guard against an abuse of power and the undermining of the rule of law. Unless the powers of such regulators are carefully scrutinised there is a risk that the separation of powers doctrine will be further blurred, making it increasingly difficult to hold the administrative arm accountable for its decisions.

ASIC's power to issue infringement notices under Part 9.4AA of the *Corporations Act 2001* (Cth) (the Act) will be analysed within the context of the Commonwealth's doctrine of separation of powers and the constitutional limitations thereby imposed on commonwealth administrative bodies. An argument will be formulated concluding that empowering ASIC to issue infringement notices is an *unconstitutional* exercise of commonwealth judicial power by an administrative body. In reaching this conclusion, the High Court's definition of the criteria necessary to constitute an exercise of commonwealth judicial power, which is necessarily limited by the constitutional separation of powers, will be applied to infringement notices under Part 9.4AA of the Act. From such analysis it will be concluded that the legislative scheme should either be repealed or at least substantially amended to limit ASIC's powers to an administrative function.

Part 9.4AA, which deals with infringement notices was introduced into the *Corporations Act 2001* (Cth) in 2004 through the Corporate Law Economic Reform Program 9

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

(CLERP 9). Although ASIC and the Australian Stock Exchange supported the proposal, there was strong opposition to allowing ASIC to impose financial penalties.¹ For example the Australian Law Reform Commission (ALRC) considered that the sanction escaped the scrutiny of the court.² This concern was not addressed at the time and today still presents an unresolved issue. The legislative purpose of the scheme was to provide a faster, less expensive and more flexible method of enforcing the continuous disclosure provisions, rather than resorting to the courts³. After a lengthy debate, Part 9.4AA was introduced, with the government of the day conceding that the legislative scheme should be reviewed a few years after its introduction.⁴ Subsequently in March 2007 the Treasury issued a consultation paper on infringement notices and their application to the continuous disclosure regime. In response to this Treasury enquiry, this paper attempts to argue that permitting ASIC to issue infringement notices is an unconstitutional vesting of commonwealth judicial power in an administrative body.

The constitutional validity of infringement notices to date has not been challenged in the High Court. However, there have been a number of recent High Court decisions, where one of the issues raised was whether there had been an invalid conferral of commonwealth judicial power on an administrative body. In nearly all of these cases, the challenge was not successful.⁵ Despite the fact that few cases have succeeded, it is still

¹ Explanatory Memorandum, Corporate Law Economic Reform Program 9 Bill, 9.8 (CLERP 9).

² ALRC, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, Report No 95 (2002), [2.67].

³ Explanatory Memorandum, CLERP 9 Bill, 4.255.

⁴ Baxt Robert, 'The New Fining Power for the Australian Securities and Investments Commission' (2004) 32 *ABLR* 61, 61.

⁵ See for example *A-G (Cth) v Alinta Ltd* [2008] HCA 2; *Visnic v ASIC* (2007) 234 ALR 413 ('*Visnic*'); *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board and Another* ((2007) 234 ALR 618 ('*Albarran*')); *A-G (Cth) v Breckler* (1999) 197 CLR 83 ('*Breckler*'); Note however, *Brandy*

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

vital to question the conferral of powers by Parliament on administrative bodies to safeguard the separation of powers doctrine and to ensure that the executive remains accountable for its actions.

I WHAT ARE INFRINGEMENT NOTICES?

Under s1317DAC of the Act, ASIC may issue such notices where it reasonably believes that the disclosing entity has allegedly failed to comply with the continuous disclosure requirements under s674 (2) or s 675 (2) of the Act. Should ASIC elect to issue an infringement notice, the disclosing entity has 28 days to comply.⁶ An infringement notice imposes a fine⁷ and the disclosing entity may also be required to provide specific information to either ASIC or the market operator.⁸ Where the disclosing entity fails to comply with an infringement notice or ASIC withdraws the notice, then ASIC may commence court proceedings against the disclosing entity for a declaration of contravention of the continuous disclosure provisions and seek a pecuniary penalty order⁹ or a publication and disclosure order.¹⁰

A The Functional Approach

In determining whether infringement notices are constitutionally invalid, it is important to analyse the High Court's current approach to the exercise of commonwealth judicial power against the Constitution's separation of powers. To date the Court has adopted a

v Human Rights & Equal Opportunity Commission (1994) 183 CLR 243 ('Brandy'), where it was held that there had been an invalid conferral of commonwealth judicial power on an administrative body.

⁶ *Corporations Act 2001* (Cth), s1317DAH (1).

⁷ *Corporations Act 2001* (Cth), s 1317DAE (1) (g).

⁸ *Corporations Act 2001* (Cth), s 1317DAE (1) (i) (j).

⁹ *Corporations Act 2001* (Cth), s 1317G.

¹⁰ *Corporations Act 2001* (Cth), s1324B.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

functional analysis, which has been criticised as having a ‘chameleon’ effect.¹¹ However, as this is the approach currently endorsed by the Court, it will be applied in critically evaluating ASIC’s powers to issue infringement notices under the Act.

The High Court tends to focus on the repository of the power, when determining whether there has been an unconstitutional conferral of judicial power on an administrative body. The Court considers those features, which may be exercised by both courts and administrative bodies and weighs them against those features that are more unique to administrative decision-making.¹² Some functions are easily defined as judicial power, while others require more careful consideration¹³ and some functions are defined as judicial because ‘their performance has been committed to a court in the strict sense.’¹⁴

In *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board and Another* (‘*Albarran*’)¹⁵ Kirby J acknowledged the criticisms of the High Court’s decisions within this context suggesting a lack of any coherent doctrine and the application of criteria, which were difficult to predict and not readily supported by any identified principle or policy.¹⁶ This grey area in defining the division between executive and judicial power has been labeled the ‘double aspect,’¹⁷ the ‘borderland’¹⁸, the ‘overlap

¹¹ *Visnic* (2007) 234 ALR 413, 424.

¹² *Breckler* (1999) 197 CLR 83, 125 (Kirby J).

¹³ *Peacock v Newtown Marrickville & General Co-operative Building Society* (1943) 67 CLR 25.

¹⁴ *R v Davison* (1954) 90 CLR 353,388 (Taylor J) (‘*Davison*’).

¹⁵ (2007) 234 ALR 618.

¹⁶ *Ibid* 633.

¹⁷ *Davison* (1954) 90 CLR 353, 369 (Dixon CJ, McTiernan J); *Luton v Lessels* (2002) 210 CLR 333, 373 (Kirby J).

¹⁸ *Davison* (1954) 90 CLR 353, 387 (Taylor J).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

area’¹⁹ or the ‘chameleon’ principle²⁰. In summary, there appear to be a number of ad hoc determinations lacking any consistent rule.²¹

The strongest criticism of the High Court’s decisions is the ‘chameleon’ principle, which suggests ‘that a parliamentary assignment of a particular function may, in certain circumstances, colour the constitutional characterisation of the exercise of that function.’²² If left unrestrained, this principle may subvert the constitutional separation of powers by suggesting that it is Parliament and not the Courts that define the constitutional boundary.²³ This was rejected by Justice Kirby in *Albarran*, who stated that it is always the Court and not Parliament that determines this question.²⁴

It appears that commonwealth judicial power cannot be defined by a ‘single model or unique subject matter’.²⁵ Consequently, its characterisation as ‘judicial power’ tends to be based on what the tribunal is authorised to do, whether those affected by its determinations are denied access to the courts and whether the tribunal’s determinations once made are directly enforceable in the same manner as decisions made by the courts.²⁶

¹⁹ *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361,373 (Kitto J) (*Tasmanian Breweries*’).

²⁰ *Neil Wilkinson, Tony Tuohey & Marita Wall v Clerical Administrative & Related Employees Superannuation Pty Ltd & Ors* [1998] 51 FCA[124] (McHugh J); *Albarran* (2007) 234 ALR 618, 634 (Kirby J) ; *Visnic* (2007) 234 ALR 413, 422 (Kirby J).

²¹ *Albarran* (2007) 234 ALR 618, 634 (Kirby J).

²² *Albarran* (2007) 234 ALR 618,634 (Kirby J); *Visnic* (2007) 234 ALR 413, 634 (Kirby J).

²³ *Albarran* (2007) 234 ALR 618, 634 (Kirby J).

²⁴ *Ibid* 635.

²⁵ *Breckler* (1999) 197 CLR 83, 126 (Kirby J).

²⁶ *Ibid* 127.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

1 *Separation of powers*

Evidently the definition of judicial power and the application of the functional approach are confined by the separation of powers doctrine. Where it is alleged that Parliament has invalidly conferred judicial power on an administrative body, the High Court's approach appears to support institutional flexibility rather than theoretical or conceptual clarity. Consequently, it has been criticised as creating a theory more focused on 'overlap' than on the separation of powers.²⁷ Although the Court considers the doctrine of the separation of powers as important today as when the Constitution was first framed, in practice it appears to be quite difficult to precisely determine where to draw the line.²⁸

The rationale for the separation of powers is partly to make the executive accountable for its decisions by ensuring there is judicial oversight of its determinations. In the area of public law a minimum level of judicial review of administrative decision making has been held by the High Court to be a basic constitutional requirement.²⁹ The enactment of privative or ouster clauses to exclude judicial review of executive decisions arguably undermines the rule of law³⁰ and is unconstitutional where the High Court itself is targeted.³¹ Judicial oversight of the executive encourages accountability, thereby guarding against the abuse of power and supporting the notion of the constitutional separation of powers by ensuring that the executive does not itself determine the legality of its actions.³²

²⁷ Airo-Farulla G & White S 'Separation of Powers, Traditional Administration and Responsive Regulation' [2004] *MqLJ* 4, p 4.

²⁸ *Albarran* (2007) 234 ALR 618, 633 (Kirby J); *Breckler* (1999) 197 CLR 83,124 (Kirby J).

²⁹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 511.

³⁰ Airo-Farulla G & White S, n 28 above, 2; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

³¹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 511.

³² *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 511; Meyerson D, 'The Rule of Law and the Separation of Powers' [2004] *MqLJ*, 2.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

(a) Definition of Judicial Power

The Commonwealth Constitution does not define judicial power and only weakly explains what is meant by ‘matters’. Consequently, the High Court has had the difficult task of attempting to define judicial power.³³ The High Court’s definition of judicial power has been described as being somewhat circular. In summary, it appears to be the power that is conferred on a court simply because it is a court.³⁴

In the case of infringement notices, where it is alleged that Parliament has breached the doctrine of separation of powers by conferring ‘judicial’ power on an administrative body, evidently the definition of judicial power becomes very significant. This focus on what constitutes ‘judicial power’, within the context of a constitutional challenge to the powers conferred on an administrative body, has arisen in several recent High Court cases. For example as in the cases of *Attorney-General (Cth) v Alinta Ltd*³⁵, *Visnic v ASIC*³⁶ and *Albarran*.³⁷ An accepted starting point for defining commonwealth judicial power appears to be the definition provided by Chief Justice Griffith in *Huddart, Parker & Co. Pty Ltd v Moorehead*³⁸ who stated that:

the words judicial power as used in s. 71 of the *Constitution* mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

³³ *A-G (Cth) v Alinta Ltd* [2008] HCA 2 [93] (Haynes J); *Brandy* (1994) 183 CLR 245, 267; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188, 189 (‘*Precision Data*’).

³⁴ Airo-Farulla G & White S, above n 28, 3.

³⁵ [2008] HCA 2 [20].

³⁶ (2007) 234 ALR 413,424.

³⁷ (2007) 234 ALR 618,634.

³⁸ (1909) 8 CLR 330,357.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

Although the High Court has considered the definition of commonwealth judicial power on a number of occasions, to date, an exclusive and exhaustive definition of judicial power remains elusive.³⁹ However, there are a number of characteristics that have been judicially considered as being indicative of such power. These will now be considered and applied to infringement notices in order to support the argument that ASIC is unconstitutionally exercising commonwealth judicial power. These characteristics are as follows:

(i) Final and Binding Orders

An essential feature of judicial power has been held to be the authority to make a ‘final and binding order’ against one or more of the parties in dispute and the power to enforce that order.⁴⁰ Decisions made by reference to the application of principles and standards that already exist are considered binding and authoritative, as they give rise to an ‘immediately enforceable liability’⁴¹. Where an administrative body can enforce its own determination without requiring any independent judicial review, arguably it would be invalidly exercising commonwealth judicial power.⁴²

³⁹ *Breckler* (1999) 197 CLR 83, 113 (Kirby J); *Labour Relation Board of Saskatchewan v John East Iron Works Ltd* (1949) AC 134, per Lord Simonds.

⁴⁰ *Davison* (1954) 90 CLR 353, 354 where reliance was placed upon Blackstone’s Commentaries, the dicta of Griffith CJ in *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 and Isaacs J in *FCT v Munro* (1926) 38 CLR 153, 176 to support the concept of ‘enforcement’ being essential to the exercise of judicial power.

⁴¹ *Brandy* (1994) 183 CLR 245, 259 (Mason CJ, Brennan and Toohey JJ); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 175 (Isaacs J).

⁴² *Brandy* (1994) 183 CLR 245, 269.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

Often administrative determinations are obeyed, however, if independent judicial review is available should they be contested, then generally such determinations will not be characterised as an invalid exercise of commonwealth judicial power.⁴³

When ASIC issues an infringement notice under Part 9.4AA it does so by reference to s 674 (2) or s 675 (2) of the Act, which define existing standards and principles for offences and wrongful conduct by disclosing entities. After consulting the relevant market operator of a listed disclosing entity⁴⁴ and providing the disclosing entity with ASIC's reasons as to why the disclosing entity may have breached the relevant provisions⁴⁵, it allows the disclosing entity an opportunity to be heard before making its determination to issue a notice.⁴⁶ The infringement notice may impose a fine⁴⁷ and an order specifying what the disclosing entity must do in terms of the production of information to either the relevant market operator⁴⁸ or ASIC itself⁴⁹ to rectify or address the 'wrong' found to have been *allegedly* committed by reference to its past conduct.⁵⁰ The penalties become an immediate liability that the disclosing entity must comply with within 28 days.⁵¹

In reality, there is no independent judicial review of ASIC's decision to *issue* an infringement notice. Section 1317DAG states that where a disclosing entity fails to

⁴³ *Tasmanian Breweries* (1970) 123 CLR 361, 415 ; *Luton v Lessel* (2002) 210 CLR 333, 374-375; *Brandy* (1994) 183 CLR 268, 269,270.

⁴⁴ *Corporations Act 2001* (Cth), s1317DAD (2).

⁴⁵ *Corporations Act 2001* (Cth), s1317DAD (1) (a).

⁴⁶ *Corporations Act 2001* (Cth), s1317DAD (1) (b).

⁴⁷ *Corporations Act 2001* (Cth), s1317DAE (1) (g).

⁴⁸ *Corporations Act 2001* (Cth), s1317DAE (1) (i).

⁴⁹ *Corporations Act 2001* (Cth), s1317DAE (1) (j).

⁵⁰ *Corporations Act 2001* (Cth), s1317DAE (1) (c).

⁵¹ *Corporations Act 2001* (Cth), s1317DAH (1).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

comply with an infringement notice, ASIC may seek various court orders, *not* however, to enforce the infringement notice, which is based on an *alleged* breach of the Act but rather to seek a court declaration that the disclosing entity has *actually* contravened the continuous disclosure provisions. On proof of contravention of an *actual* breach of the disclosing provisions, the court may grant a pecuniary penalty order⁵² or an order to disclose or publish information.⁵³ The onus and standard of proof used by the court is different to that used by ASIC in reaching its determination of *alleged* breach.⁵⁴ If ASIC seeks a pecuniary penalty order against the disclosing entity for breach of the continuous disclosure provisions, then ASIC must prove to the court on the balance of probabilities that the disclosing entity in fact has breached the relevant provisions. If criminal action is brought against the disclosing entity for a breach of the continuous disclosure provisions, then the criminal standard of proof must be met and the disclosing entity does not have the onus of proof. With infringement notices, if ASIC, after it conducts its own investigations, reasonably believes that a disclosing entity may have breached the continuous disclosure provisions, then before it issues an infringement notice, it must provide that entity with an opportunity to be heard and to persuade ASIC that there is no reasonable basis for its belief. Although it is recognised that the representative that conducts the hearing is a different person from the one who initially investigated the matter, nevertheless the disclosing entity is placed in a position wherein they must *satisfy* ASIC that they have not breached the continuous disclosure provisions or risk ASIC issuing an infringement notice against them.⁵⁵

⁵² *Corporations Act 2001* (Cth), s1317G.

⁵³ *Corporations Act 2001* (Cth), s1324B.

⁵⁴ ASIC, Continuous Disclosure Obligations: infringement notices, Regulatory Guide 73; ASIC Hearing Manual, [4-7].

⁵⁵ *Corporations Act 2001* (Cth), s 1317 DAC.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

Before the introduction of Part 9.4AA into the Act, ASIC could and still can, seek orders against the disclosing entity under the civil penalty regime.⁵⁶ If ASIC withdraws an infringement notice for an alleged contravention of the continuous disclosure provisions, then section 1317DAI (1) (d) and (e) permit it to commence legal proceedings against the disclosing entity for *actual* contravention of the same provisions.

A disclosing entity can either comply with ASIC's determination or risk it initiating new and different proceedings against it for *actual* breach. The criteria applied by the court under sections 674(2) or 675(2) of the Act in declaring that the disclosing entity has breached the continuous disclosure provisions are identical to those used by ASIC in determining an *alleged* breach of the provisions,⁵⁷ although as stated above the onus and standard of proof are not the same.

ASIC's determination to issue an infringement notice for an *alleged* contravention of the disclosure provisions is authoritative and conclusive, as there is no independent judicial oversight of *that* decision. If the disclosing entity ignores the infringement notice, there is a risk that ASIC may now take court action against the disclosing entity for actual breach of the relevant provisions, not for an alleged breach. This differs from other situations where 'on the spot fines' have been issued. For example, where an 'on the spot fine' is issued for a speeding or parking infringement, then the determination is made that the person has not complied with the law and a 'fine', calculated on the basis of a formula, is applied. There is limited interpretation and discretion in terms of the application of the law to the facts as found. For example, a person 'fined' for speeding was recorded as exceeding the speed limit and the relevant fine is then applied. If a person contests the 'fine', then they may refuse to pay and court proceedings may be initiated to consider the initial decision of imposing a fine for exceeding the speed limit.

⁵⁶ *Corporations Act 2001* (Cth), Part 9.4B.

⁵⁷ *Corporations Act 2001* (Cth), s1317DAD (1) (a).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

Infringement notices, however, are not such simple ‘on the spot fines’.⁵⁸ The process is quite lengthy and complex. There is an investigation, followed by a hearing at which the disclosing entity may be legally represented and then a decision may be made to issue an infringement notice. If the disclosing entity considers this determination to be incorrect, they may elect not to pay the fine and wait to see if ASIC takes any further action against them. However, such action is *not* in relation to the infringement notice itself but rather to prove to the court that the disclosing entity in fact breached the continuous disclosure provisions. There is a chance that ASIC may simply do nothing. This was evidenced in Telstra’s case, where it ignored an infringement notice issued to it and ASIC decided not to take any further legal action against it. However, representatives of ASIC publicly announced to the Senate Economic Legislation Committee that Telstra had in fact *breached* the continuous disclosure provisions, despite such a breach never having been established.⁵⁹ These representatives further stated that as the breach was only minor, ASIC was not going to expend its limited litigation funds to pursue Telstra any further.⁶⁰ It should also be noted that no action was taken against ASIC for publicly announcing that Telstra had failed to comply with an infringement notice, even though the legislative scheme states that such information cannot be disclosed.⁶¹

(ii) Adjudicate

NSW v Commonwealth (the Wheat case)⁶² held that ‘adjudicate’ does not necessarily involve an oral or adversarial hearing and was not the exclusive power of Chapter III Courts. Although the executive may ‘adjudicate’ and make decisions just as effective and

⁵⁸ Nehme M, Hyland M and Adams M, ‘Enforcement of Continuous Disclosure’, (2007) *AJCL*, 120.

⁵⁹ Baxt Robert, ‘Editorial’, (2006) 34 *ABLR* 85, 86.

⁶⁰ *Ibid.*

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

⁶² (1915) 20 CLR 54.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

binding as a court, by so doing, it does not become a court.⁶³ It has been held that the judicial process ‘adjudicates on claims that rights conferred by law have been breached’,⁶⁴ which involves ‘the operation of the law on past events or conduct’ and does not involve the creation of new rights.⁶⁵

Before issuing an infringement notice, ASIC must provide a statement of its reasons to the disclosing entity as to why ASIC believes it may have breached the relevant disclosure provisions under the Act.⁶⁶ The disclosing entity is then given an opportunity to appear at a private hearing and give evidence and make submissions to ASIC before it makes its determination.⁶⁷ According to ASIC’s guidelines the delegate involved in the initial investigation, which resulted in the statement of reasons being sent to the disclosing entity, is not the same person, who conducts the hearing or reviews the submissions⁶⁸. The Act itself is silent with respect to any internal review mechanisms, apart from the fact that the disclosing entity may make a written representation to ASIC under s1317DAI (1) requesting the infringement notice be withdrawn. Even where the

⁶³*NSW v Commonwealth* (1915) 20 CLR 54, 87 (Isaacs J); *Tasmanian Breweries* (1970) 123 CLR 361, 371 (McTiernan J) citing dicta from Isaacs J in *FCT v Munro* (1926) 38 CLR 153, 176 and judgment *In re The Navigation Act 1912-1920* (1921) 29 CLR 257, 265.

⁶⁴ *Neil Wilkinson, Tony Tuohey & Marita Wall v Clerical Administrative & Related Employees Superannuation Pty Ltd & Ors* [1998] 51 FCA at [17].

⁶⁵ *Neil Wilkinson, Tony Tuohey & Marita Wall v Clerical Administrative & Related Employees Superannuation Pty Ltd & Ors* [1998] 51 FCA [17] (Heerey J); *Precision Data* (1991) 173 CLR 167, 188; *Tasmanian Breweries* (1970) 123 CLR 361, 396 (Windeyer J) cited in support Holmes J in *Prentis Atlantic Coast Line Co* (1908) 211 US 210, 226 who stated that a ‘judicial enquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed to already exist.’

⁶⁶ *Corporations Act 2001* (Cth), s1317DAD (1) (a).

⁶⁷ *Corporations Act 2001* (Cth), s1317DAD (1) (b).

⁶⁸ ASIC, Continuous Disclosure Obligations: infringement notices in Regulatory Guide (RG 73).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

disclosing entity makes no representations, ASIC may withdraw the notice⁶⁹. The disclosing entity, however, cannot appeal against that decision to either ASIC or the AAT.⁷⁰

As a delegate of ASIC ‘investigates’ and finds facts suggesting that the disclosing entity may have breached the disclosure provisions and then another delegate of ASIC hears the matter⁷¹, this suggests that the proceedings are adversarial, despite ASIC’s guidelines expressly negating this.⁷² As ASIC serves the disclosing entity with a statement of findings outlining the case against it⁷³, conducts a hearing, which may be oral⁷⁴ and at which the disclosing entity may be legally represented, this indicates that ASIC is adjudicating with respect to a claim being made that the disclosing entity has breached the continuous disclosure provisions by applying the legislative criteria to the past conduct of the entity.⁷⁵

Infringement notice do not relate to future rights. They involve ‘an enquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined’⁷⁶ requiring the disclosing entity to comply with an obligation set out in the infringement notice, which the application of the law to the facts has shown is required. Also as the subject of the hearing or procedure conducted by ASIC under s1317DAD relates to a ‘matter’, this being the ‘prevention, redress or punishment

⁶⁹ *Corporations Act 2001* (Cth), s1317DAI (3).

⁷⁰ *Corporations Act 2001* (Cth), s1317C (j).

⁷¹ ASIC, Continuous Disclosure Obligations: infringement notices, Regulatory Guide (RG 73).

⁷² *Ibid* [19].

⁷³ *Corporations Act 2001* (Cth), s1317DAD (1).

⁷⁴ *Corporations Act 2001* (Cth), s1317DAD (1) (i).

⁷⁵ See n 70 above.

⁷⁶ *Tasmanian Breweries* (1970) 123 CLR 361,374 (Kitto J), where a definition of judicial power was discussed.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

of some act inhibited by law'⁷⁷, this supports the argument that ASIC may be exercising commonwealth judicial power.

(iii) Ascertainable Criteria

For a tribunal's determination to be deemed an exercise of judicial power, the cases suggest that it must apply ascertainable criterion and not 'ultimately its own idiosyncratic conceptions and modes of thought' in reaching that determination.⁷⁸ Such criteria should be 'an objective test or standard applied by the legislature'.⁷⁹

Where determinations are based on policy or other matters not specified by the legislation or create new rights and obligations based primarily on policy considerations, then such a body is not exercising judicial power.⁸⁰

However, Chapter III courts, when developing precedents may often create norms to resolve a particular dispute or class of disputes.⁸¹ Also, courts frequently apply criteria,

⁷⁷ *In re the Navigation Act 1912-1920* (1921) 29 CLR 257, 265.

⁷⁸ *Tasmanian Breweries* (1970) 123 CLR 361, 376; *Brandy* (1994) 183 CLR 245, 268.

⁷⁹ *Davison* (1954), 90 CLR 353, 366 (Dixon CJ, McTiernan J); *R v Spicer; ex parte Waterside Workers Federation* (1957) 100 CLR 312,317 where a distinction was made between a discretion of an arbitrary nature and one governed by an ascertained test or criteria ; *Precision Data* (1971) 173 CLR 167, 191 where a distinction was made between discretionary authority by reference to policy considerations on matters not included in the legislation and those exercised in accordance with legal principles or legal tests or standards; *Brandy* (1994) 183 CLR 245, 268 (Gaudron, Dawson, McHugh & Deane JJ) citing with approval Justice Kitto in *R v Gallagher; Ex Parte Aberdare Collieries* 69 (1963) 37 ALJR 40,45.

⁸⁰ *Visnic* (2007) 234 ALR 413, 416-417 relied on dicta in *Precision Data* (1991) 173 CLR 167; *Tasmanian Breweries* (1970) 123 CLR 361,395 (Windeyer J).

⁸¹ Airo-Farulla G and White S, 'Separation of Powers, 'Traditional' Administration and Responsive Regulation', (2004) *MqLJ*, 11, where the authors rejected the statement in *Viper Communications* (2001) 183 ALR 735, 758 (Sackville J) that the free creation of norms is contrary to a finding of judicial power.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

such as ‘fair and reasonable’, which are considered objective standards and not policy, as well as they often exercise discretionary power.⁸²

When ASIC determines that a disclosing entity has *allegedly* breached either s 674 (2) or s 675 (2) of the *Act*, unlike in *Visnic*, it applies the same criteria as the court⁸³, although the court makes a declaration of *actual* breach⁸⁴, while ASIC makes a determination of *alleged* breach. The criteria in sections 674(2) and 675(2) make reference to the obligation to disclose information that a ‘reasonable person would expect’ to have a ‘material’ effect on the price or value of ED securities of the entity. Such criteria have been held to be objective and ascertainable.⁸⁵

The legislative scheme⁸⁶ repeatedly uses the word *alleged* in an attempt to protect it from being a constitutionally invalid conferral of commonwealth judicial power. If the word *alleged* was removed, it would be difficult, if not impossible to conclude anything other than ASIC was exercising commonwealth judicial power.

Under the legislative scheme, ASIC determines existing legal duties of disclosing entities by applying the legislative criteria in s 674(2) or s 675 (2) rather than simply applying policy. The legislative criteria are the same as the court uses when it makes its determination of an actual breach of the continuous disclosure provisions.

(iv) Determination of Existing Rights.

⁸² *Breckler* (1999) 197 CLR 83, 126; *Neil Wilkinson, Tony Tuohey & Marita Wall v Clerical Administrative & Related Employees Superannuation Pty Ltd & Ors* [1998] 51 FCA [18]; *Precision Data* (1991) 173 CLR 167, 191.

⁸³ *Corporations Act 2001* (2001), s1317DAD (1).

⁸⁴ *Corporations Act 2001* (2001), s1317E.

⁸⁵ *Neil Wilkinson, Tony Tuohey & Marita Wall v Clerical Administrative & Related Employees Superannuation Pty Ltd & Ors* [1998] 51 FCA[18;] *Breckler* (1999) 197 CLR 83, 126.

⁸⁶ Part 9.4AA is headed ‘Infringement Notices For Alleged Contraventions of Continuous Disclosure Provisions’.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

As courts sometimes define future rights and duties, pragmatically this limitation cannot be used as the defining line between judicial and administrative powers.⁸⁷

In *Luton v Lessels*⁸⁸ it was stated that the application of legal criteria to existing facts is characteristic of but not exclusive to judicial power. However, where new rights or obligations are created, generally this is indicative of administrative power.⁸⁹ Further, where decisions are based on subjective evaluation and value judgments often this is more characteristic of administrative decision-making than the exercise of judicial power.⁹⁰ Where a determination is made in relation to the findings of fact made before an application and the provisions of the Act are applied in a similar way to the courts, then this indicates a judicial function.⁹¹ An injunction to restrain what is found to be an unlawful practice is also a traditional judicial function, particularly where damage to an individual or his property result from that act.⁹²

When ASIC determines that a disclosing entity has *allegedly* breached sections 674(2) or 675(2), it makes findings of fact with respect to acts committed by the disclosing entity prior to issuing the infringement notice. ASIC must have ‘reasonable grounds’ before it

⁸⁷ Airo-Farulla, G & White, S, n 87 above, 6.

⁸⁸ *Luton v Lessels* (2002) 210 CLR 333,346 (Gleeson CJ) (*‘Luton’*).

⁸⁹ *Ibid* 345 (Gleeson CJ).

⁹⁰ *Luton* (2002) 210 CLR 333, 345; *Australian Pipeline Limited v Alinta Limited* [2007] FCAFC 55 [94]

(Finklestein J) ; similar to *Precision Data* (1991) 173 CLR 167, which substantially followed *Tasmanian Breweries* (1970) 123 CLR 361, 373-378 (Kitto J).

⁹¹ *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617, 631 cited in *Australian Pipeline Limited v Alinta Limited* [2007] FCAFC 55 [382] (Gyles J).

⁹² *Australian Pipeline Limited v Alinta Limited* [2007] FCAFC 55 [384] (Gyles J) ; Justice Menzies, with Stephens J agreeing, held in *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617 that judicial power involved ‘proceedings between parties with respect to a matter at issue between them, to grant an injunction to restrain what, in such proceedings, is found to be an unlawful practice.’

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

issues an infringement notice.⁹³ It obtains the facts pointing to an alleged breach of the disclosure provisions from its own investigations. Where a disclosing entity is a listed entity, then before ASIC issues its statement of reasons as to why it considers that the disclosing entity allegedly breached s674 (2) or s675 (2),⁹⁴ it must consult the relevant market operator and any guidelines they have issued.⁹⁵ The disclosing entity can answer the case against it by appearing and giving evidence and submissions to ASIC to persuade it not to issue an infringement notice.⁹⁶ Evidence provided by the disclosing entity, although relevant to ASIC's determination to issue an infringement notice, subject to limited exceptions, cannot be used against the entity in any proceedings.⁹⁷

On the basis of the facts, as found, ASIC then applies the legislative ascertainable criteria⁹⁸ to determine whether there is an *alleged* breach of the provisions. ASIC can then impose a penalty on the disclosing entity, which consists of a fine⁹⁹ and may also include a requirement that the disclosing entity disclose specific information to the relevant market operator¹⁰⁰ or to ASIC itself.¹⁰¹ Such penalties are an attempt to prohibit an *alleged* unlawful practice by the disclosing entity. The legislation specifically states that where the disclosing entity obeys the infringement, no admission of liability is to be implied.¹⁰² In addition, ASIC cannot bring future proceedings against the disclosing

⁹³ *Corporations Act 2001* (Cth), ss1317DAC, 1317DAD.

⁹⁴ *Corporations Act 2001* (Cth), s1317DAD (2).

⁹⁵ *Corporations Act 2001* (Cth), s1317DAC (4) (a).

⁹⁶ *Corporations Act 2001* (Cth), s1317DAD (1) (b).

⁹⁷ *Corporations Act 2001* (Cth), s1317DAD (4).

⁹⁸ *Corporations Act 2001* (Cth), s 674 (2) or s 675 (2).

⁹⁹ *Corporations Act 2001* (Cth), s1317DAE (1) (g).

¹⁰⁰ *Corporations Act 2001* (Cth), s1317DAE (1) (i).

¹⁰¹ *Corporations Act 2001* (Cth), s1317DAE (1) (j).

¹⁰² *Corporations Act 2001* (Cth), s 1317DAF (4).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

entity for the same conduct that formed the basis of the infringement notice.¹⁰³ In effect the disclosing entity is penalised for its alleged 'unlawful' practices. If the disclosing entity obeys the notice, then ASIC may publish certain details about the fact that the disclosing entity has complied with the notice, which may serve as a deterrent to other disclosing entities and identify the type of conduct that ASIC considers 'unlawful'.¹⁰⁴

(v) Enforcement and Independent Judicial Review

Often an administrative body will not be seen as exercising judicial power, if judicial oversight or separate enforcement proceedings are required.¹⁰⁵ This focus on judicial oversight rather than a strict adherence to the separation of powers promotes flexibility and accountability.¹⁰⁶ However, an administrative body cannot determine its own jurisdiction.¹⁰⁷

A final determination that the provisions of the Act have been contravened clearly indicates the exercise of judicial power, as Chapter III courts have the jurisdiction and authority to determine whether 'a subject has or has not contravened a law or regulation of the Commonwealth.'¹⁰⁸ Where remedies include damages, as well as declaratory or injunctive relief, whether punitive or otherwise, this is closely analogous to what a court does.¹⁰⁹ In *Brandy v Human Rights and Equal Opportunity Commission*¹¹⁰ it was stated

¹⁰³ *Corporations Act 2001* (Cth), s1317 DAF (5).

¹⁰⁴ *Corporations Act 2001*, s 1317 DAJ.

¹⁰⁵ Airo-Farulla, G & White, S, Separation of Powers, Traditional Administration and Responsive Regulation, [2004] *MqLJ*, 8.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Plaintiff s157/2002 v Commonwealth* (2003) 211 CLR 476, 511.

¹⁰⁸ *Brandy* (1994) 183 CLR 245,269 where Stake J in *Victoria Chamber of Manufacturers v the Commonwealth* (Industrial Lighting Regulations) (77) (1943) 67 CLR 413, 422 was cited in support.

¹⁰⁹ See Isaacs J in *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 175 cited in *Brandy* (1994) 183 CLR 245, 269.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

that if a tribunal cannot enforce its own orders, this it is a ‘strong factor’ weighing against its powers being characterised as judicial, although it is not an ‘exclusive test.’

The High Court has repeatedly held that where enforcement of a determination depends upon an independent exercise of judicial power to give it effect or to overturn it, then the determination is not an invalid conferral of judicial power.¹¹¹

ASIC, after it conducts its investigation and considers the disclosing entities oral or written submissions, can issue an infringement notice, which imposes a penalty on the entity for an alleged breach of the relevant disclosure provision. Section 1317DAE states that the notice, among other things, must stipulate the maximum amount the Court can impose for a proven breach of the relevant provisions under Part 9.4B¹¹²; state the amount of the penalty to be imposed by ASIC¹¹³; direct that the penalty must be paid to ASIC on behalf of the Commonwealth¹¹⁴; specify any information that it must supply to either the relevant market operator or to ASIC for an alleged breach of the continuous disclosure provisions¹¹⁵; and state the effect of sections 1317DAF and 1317DAG and the time frames, as set out in s1317DAH. It must also advise the disclosing entity that it can make a written submission to ASIC requesting that the infringement notice be withdrawn.¹¹⁶

¹¹⁰ *Brandy* (1994) 183 CLR 245, 257.

¹¹¹ *Luton* (2002) 210 CLR 333, 346 (Gleeson CJ); in line with *Brandy* (1994) 183 CLR 245, *Breckler* (1999) 197 CLR 83 and *Australian Pipeline Limited v Alinta Limited* [2007] FCAFC 55 [95] [96].

¹¹² *Corporations Act 2001* (Cth), s1317DAE ((1) (f).

¹¹³ *Corporations Act 2001* (Cth), s1317DAE (1) (g).

¹¹⁴ *Corporations Act 2001* (Cth), s 1317DAE (1) (h).

¹¹⁵ *Corporations Act 2001* (Cth), s1317DAE (1) (i) (j).

¹¹⁶ *Corporations Act 2001* (Cth), s1317DAE (1) (l).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

The legislative scheme provides a statutory formula to be applied by ASIC in terms of the calculation of the penalty, which is based on the company's market capitalisation¹¹⁷ and is increased, again by reference to a formula, where the disclosing entity has either previously been convicted of a breach of s 674 (2) or s 675 (2), has had a civil penalty order made against it under Part 9.4B or previously breached an enforceable undertaking given to ASIC in relation to either s674 (2) or 675(2) of the Act.¹¹⁸

The legislative scheme expressly excludes external merits review to the Administrative Review Tribunal for either the issuing or withdrawal of a notice.¹¹⁹

The disclosing entity can comply with the notice, noting that ASIC is then, subject to certain exceptions expressly excluded from commencing proceedings, whether criminal or civil, against the entity on the same matters as those specified in the notice.¹²⁰ Although different personnel may be involved, ASIC both investigates and determines the alleged breach, without having to comply with the standard of proof required by a court. If the disclosing entity fails to pay the fine under the notice, then ASIC can commence court proceedings seeking a declaration of *actual* contravention of the provision allegedly contravened, which is specified in the notice¹²¹ and seek a pecuniary penalty order.¹²² It should be noted that for the court to make such an order it must consider the breach to be 'serious', which distinguishes the decision from that made by ASIC for an *alleged* breach of the Act. Alternatively, ASIC can request orders under s1324B, where the disclosing entity has failed to disclose information specified in the infringement notice. Again such an order is based on a finding of actual contravention of the disclosure provisions.

¹¹⁷ *Corporations Act 2001* (Cth), s1317DAE (6) (7).

¹¹⁸ *Corporations Act 2001* (Cth), s 1317 DAE (2-6).

¹¹⁹ *Corporations Act 2001* (Cth), s1317C (i) (j).

¹²⁰ *Corporations Act 2001* (Cth), s1317DAF (5).

¹²¹ *Corporations Act 2001* (Cth), s 1317 DAG.

¹²² *Corporations Act 2001* (Cth), s1317DAG (2) item 1, column 3 of the Table.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

Although s1317DAG is headed 'Effect of Failure to Comply with Infringement Notice' and appears to engage independent judicial review for its enforcement, in effect all it does, is advise the disclosing entity that ASIC is now free to seek a court declaration that the relevant sections have actually been contravened¹²³ and request orders under s1317G and s1324B. The legislative scheme sets up a type of statutory undertaking or estoppel, whereby if the disclosing entity obeys ASIC's determination, then it will not commence certain legal proceedings against it. However, failure to comply releases ASIC from its statutory promise and allows it to take *alternative* action against the entity by initiating court proceedings against it for *actual* breach of the relevant provisions. This is also the case, where ASIC withdraws an infringement notice. Evidence given by the disclosing entity and used by ASIC in either issuing¹²⁴ or withdrawing a notice¹²⁵ cannot be used against the disclosing entity in any court proceedings ASIC brings against it for a declaration of actual breach of the provisions.

The Legislative scheme under Part 9.4AA does not appear to provide either an 'appeal' or a review of ASIC's determination at all. If ASIC by coercion cannot produce compliance from the disclosing entity with its decision of *alleged* breach, then it can commence new and different proceedings against the disclosing entity for a declaration of *actual* breach, where it now, however, has the onus of proof. This options was always available to ASIC under Part 9.4B of the Act.¹²⁶

The imposition of a fine or request to disclose information are functions, whether punitive or otherwise, closely analogous to those performed by a court. A disclosing entity faced with an adverse determination by ASIC cannot ignore it without fear of

¹²³ *Corporations Act 2001* (Cth), s1317E.

¹²⁴ *Corporations Act 2001* (Cth), s1317DAD (4).

¹²⁵ *Corporations Act 2001* (Cth), s1317DAI (2).

¹²⁶ *Corporations Act 2001*(Cth), s 1317E (1) (ja).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

further action being taken by ASIC against it. In the event that ASIC elects to initiate court action against the disclosing entity, then providing ASIC can prove the disclosing entity in fact breached the relevant provisions, then the sanctions available are set out under s1317DAG of the Act. This indicates judicial power.¹²⁷

(vi) Determination of Guilt and Punishment

In *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board*¹²⁸, one issue raised was whether the Companies Auditors and Liquidators Board ('Board') was unconstitutionally exercising judicial power, as it could penalise or punish a person, which was submitted as being the exclusive commonwealth judicial power.¹²⁹ The appellants' argued that the Board's determination of wrong-doing was of a public nature and the sanction imposed was intended to indicate both the wrong-doing itself and also deter others from acting in a similar way.¹³⁰

The Commonwealth in *Albarran* accepted that under commonwealth law, 'the adjudication of criminal guilt' and 'the imposition of fines' are part of a non-exhaustive list of functions 'reserved exclusively to Ch III courts.'¹³¹ In *Albarran* Justice Kirby held that as the Board did not adjudicate or determine guilt, or impose a punishment for such, then it was not exercising judicial power. This was further supported by the fact that the Court held that the Board did not enforce existing legal rights and duties and that its decisions were subject to review.¹³² A disciplinary scheme designed to uphold standards

¹²⁷ *Neil Wilkinson, Tony Tuohey & Marita Wall v Clerical Administrative & Related Employees Superannuation Pty Ltd & Ors* [1998] 51 FCA at 18.

¹²⁸ (2007) 234 ALR 618.

¹²⁹ *Ibid* 621 where Tamberlin J in *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* (2006) 59 ACSR 698 was applied.

¹³⁰ *Albarran* (2007) 234 ALR 618, 637, 641 (Kirby J).

¹³¹ *Ibid* 639.

¹³² *Ibid* 640, 641.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

of integrity and competence in the liquidation of companies was held to be appropriate for an administrative body.¹³³ In *Visnic v ASIC*¹³⁴ it was also stated that as there was no determination of guilt with respect to any offence provision, the discipline provided under the Act was administrative in character.¹³⁵

Sections 674 (2) and 675 (2) are both criminal and civil provisions. ASIC can seek a court declaration¹³⁶ that the continuous disclosing provisions have been breached and request a pecuniary penalty order.¹³⁷ The Court in determining whether to grant such an order must be satisfied that the contravention materially prejudices the interests of the corporation, the scheme or its members or materially prejudices its ability to pay its creditors and is 'serious'.¹³⁸ The criminal sanctions for breach of either section are 200 penalty units and/or 5 years imprisonment. For both sections an infringement notice may be issued for an alleged breach.

ASIC's function under the infringement notice provisions is to determine whether there is an alleged breach of the continuous disclosure provisions and then issue the disclosing entity with a sanction or punishment for its alleged breach of the relevant provision.

Infringement notices involve the 'imposition of fines', which arguably are among some of the functions exclusively reserved to Ch III Courts.¹³⁹ The *Corporations Act 2001* (Cth) imposes criminal and civil sanctions on disclosing entities for their 'unlawful' conduct as defined in sections 674 (2) or 675 (2) and seeks to deter such conduct by

¹³³ *Ibid* 641.

¹³⁴ *Visnic* (2007) 234 ALR 413.

¹³⁵ *Ibid*.

¹³⁶ *Corporations Act 2001* (Cth), s1317E.

¹³⁷ *Corporations Act 2001* (Cth), s1317G.

¹³⁸ *Corporations Act 2001* (Cth), s 1317G.

¹³⁹ *Albarran* (2007) 234 ALR 618, 639 (Kirby J).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

‘punishing’ those found in breach. By allowing ASIC to impose fines and orders to produce information, which are similar to an injunction, was seen to offer advantages of cost saving, speed and flexibility that would be lost if the power under the Act was reserved to the courts.¹⁴⁰ The Australian Law Reform Commission (ALRC) observed that issuing infringement notices provided regulators with an advantage of allowing the unlawful conduct to be ‘noticed’ and penalised, without having to prove the elements of the offence to the relevant standard.¹⁴¹ In addition, the ALRC considered that disclosing entities may see infringement notices as an advantage in terms of making the problem ‘go away’.¹⁴² Lastly, the courts themselves may see infringement notices as an advantage, as they may result in diverting a significant number of cases away from the court system.¹⁴³

The issuing of infringement notices can be distinguished from *Albarran*’s case where the decision resulting in the public sanction was made by an independent Panel,¹⁴⁴ chaired by a person with similar legal qualifications as a judge. However, ASIC, as the corporate ‘watchdog’, cannot exhibit the appearance of similar institutional independence and impartiality. Also, unlike *Visnic*, when ASIC makes a determination to issue an infringement notice for an alleged breach of the continuous disclosure provisions, it uses the same legislative criteria as the courts use when they make a determination of actual breach. Both bodies aim to punish those who fail to comply. In effect ASIC is exercising almost the same power as the courts, although unlike the court, it does not make a declaration of actual contravention. It can impose a penalty, which is less than that imposed by a court and it cannot impose a prison term. ASIC’s determination, however, is made without meeting the stricter requirements of proof and evidentiary rules that the

¹⁴⁰ Explanatory Memorandum, CLERP 9 Bill, [4.255].

¹⁴¹ ALRC, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, Report No. 95, (2002), [2.67].

¹⁴² *Ibid.*

¹⁴³ Fox R, ‘Infringement Notices: Time for Reform’ (1995) 50 *Trends and Issues in Criminal Justice* 1, 4.

¹⁴⁴ Companies Auditors and Liquidators Disciplinary Board (the ‘Board’).

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

judicial process requires and lacks impartiality, as ASIC is both the investigator and the decision maker. Although it is noted that different personnel may be involved in this process, nevertheless to an outsider, they are still representatives of the same administrative body.

Infringement notices allow ASIC to punish a disclosing entity by allowing it to impose a fine, which ASIC may make publicly known, if the disclosing entity obeys the notice.¹⁴⁵ It should be noted that the legislative scheme expressly states that no inference of admission of liability is to be drawn from a disclosing body complying with an infringement notice. However, ASIC publicly sanctions a disclosing entity for its 'unlawful' conduct, presumably both to punish the entity and to deter others. If it were not for the word 'alleged', which is used repeatedly in Part 9.4AA, it would appear that ASIC may be exercising commonwealth judicial power.

(vii) Conclusion

The application of the functional approach, which is presently endorsed by the High Court, to the legislative scheme for infringement notices under the *Corporations Act 2001*(Cth), raises real concerns that there has been an unconstitutional conferral of commonwealth judicial power on ASIC. By examining some of the criteria that may be indicative of commonwealth judicial power and applying it to ASIC's determination to issue an infringement notice, arguably it can be seen that ASIC is invalidly exercising judicial rather than administrative powers when issuing such notices. In summary, the determination by ASIC to *issue* an infringement notice is both final and conclusive and gives effect to an immediate liability. There is no independent judicial oversight of its determination to issue or withdraw an infringement notice. The legislative scheme suggests that there is an adjudication relating to existing rights and obligations.¹⁴⁶ Such a determination is reached by the application of ascertainable and objective criteria to the

¹⁴⁵ *Corporations Act 2001* (Cth), s 1317 DAJ.

¹⁴⁶ distinguish from *Albarran* (2007) 234 ALR 618, 640,641.

**Australasian Law Teachers Association - ALTA
2007 Refereed Conference Papers**

facts as found, when reaching its determination of alleged breach of the disclosure provisions. In addition, the determination to issue an infringement notice is arguably to publicly penalise disclosing entities that allegedly have breached the disclosure provisions under the Act by the imposition of fines and orders to publish material. By such a public sanction, ASIC seeks to deter others from committing similar unlawful conduct. Consequently, all the indicators are that by adopting such a functional analysis, ASIC is unconstitutionally exercising commonwealth judicial power.

To safeguard against any further blurring of the doctrine of separation of powers and potential abuse of power, then either the provisions relating to infringement notices should be repealed or at the very least substantially amended to ensure that ASIC is confined to exercising an administrative and not a judicial function. It is important that the determinations of regulators, such as ASIC, be subject to independent review to ensure that they remain accountable and to safeguard against a potential abuse of power. By doing so, the rule of law will be sustained and people's rights will be protected.