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Infringement Notice Review
Corporations and Financial Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: reviewofsanctions@treasury.gov.au

Review of the operation of the infringement notice provisions of the Corporations Act 2001

CSA is the peak professional body delivering accredited education and the most practical and authoritative training and information on governance, as well as thought leadership in the field. We are an independent, widely-respected influencer of governance thinking and behaviour in Australia and represent over 8,000 governance professionals working in public and private companies. Our members are all involved in governance, corporate administration and compliance with the *Corporations Act* (the Act) and we have drawn on their experience in the formulation of our submission on the matters contained in the Consultation Paper.

The infringement notice regime

Part 9.4AA of the *Corporations Act* (the Act) empowers the Australian Securities and Investments Commission (ASIC) to issue infringement notices proposing penalties for contraventions of the continuous disclosure provisions of the Act. The amount of the penalty may be $33,000, $66,000 or $100,000, depending on the market capitalisation of the company in question and whether it has previously failed to give proper disclosure. These figures may be contrasted with the maximum pecuniary penalty that could be imposed by a court under Part 9.4B of the Act ($1 million in the case of a body corporate).

CSA expressed reservations about the infringement notice regime when it was first introduced and so welcomes the review after two years of operation. CSA notes that the regime grants ASIC considerable power and discretion and that a review process ensures that this is exercised responsibly.

CSA continues to have reservations about the infringement notice regime, our reasons for which are provided below. CSA believes that other mechanisms are already open to ASIC, such as enforceable undertakings, to encourage compliance with the disclosure requirements of the Act, which do not involve the need to resort to lengthy and expensive court proceedings and which ensure greater compliance with the continuous disclosure provisions.

If there is a demonstrated need to retain infringement notices as a sanction for continuous disclosure, **CSA recommends** that another review be conducted in two years' time.

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Experiences and perception of the regime

The Consultation Paper, *Review of the operation of the infringement notice provisions of the Corporations Act 2001,* advises that Treasury 'would value comments from the recipients of infringement notices and the wider community about their experience and perception of these provisions'.

A critical feature of an infringement notice, as outlined at the time of its introduction, is that it does not compel the company to pay a penalty. Rather, it presents the company with three options:

- comply with the notice and pay the penalty
- persuade ASIC to withdraw the notice, or
- choose not to comply with the notice.

CSA notes that the stated incentive for the company to pay the penalty is that doing so brings the matter to an end so far as ASIC is concerned. ASIC cannot take civil or criminal proceedings against the company in respect of the breach alleged in the notice. There is no relief, however, for individuals knowingly concerned in the alleged breach, who will probably be directors or senior executives. The infringement notice regime does not apply to them. CSA points out that complying with the notice and paying the penalty does not require a company to revise its compliance programs, put in place educational training and implement a monitoring system to guard against future breaches and notes that this is not necessarily the best method of ensuring greater compliance with the continuous disclosure provisions of the Act.

CSA believes that the company's second option, which is to persuade ASIC to withdraw the notice, may have practical appeal, but that the prospects of success will normally be slim. ASIC's practice is to hold a hearing before issuing an infringement notice and one would expect the company to have put forward its defence at that hearing (see *Continuous Disclosure Obligations: Infringement Notices, an ASIC guide*, May 2004, para 16). Therefore, if an infringement notice is issued, it is extremely unlikely to be withdrawn.

CSA notes that the third option is to choose not to pay the penalty and contest the matter.

CSA surveys of members on the infringement notice regime

In July 2005, CSA conducted a survey of members in relation to continuous disclosure. Members were asked if they believed that the power to issue infringement notices had changed continuous disclosure practices. Twenty six percent of the companies believed that ASIC's power to issue infringement notices had improved their disclosure practices while a majority, 74 per cent, noted that it had not affected their practices.[1]

In April 2007, CSA surveyed members on the operation of the infringement notice regime. Fifty-two per cent of respondents felt that slow turn-around times meant the regime was failing its policy objective of furthering prompt disclosure.[2]

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[1] Chartered Secretaries, Australia, *Survey on Continuous Disclosure in 2005*, at http://www.csaust.com/Content/NavigationMenu/NewsAdvocacy/Surveys/RapidResponseSurvey/Survey18/Survey_18.htm

[2] Chartered Secretaries, Australia, *Review of the operation of the infringement notice regime for continuous disclosure,* at http://www.csaust.com/Content/NavigationMenu/NewsAdvocacy/Surveys/RapidResponseSurvey/Survey25/Survey_25.htm

CSA members felt that the regime's very premise was misconceived, that is, 'on-the-spot' fines work well for straightforward offences, but are unsuitable for complex issues like continuous disclosure, which involve finely-balanced questions of judgment. The infringement notice regime attempts to impose, with the benefit of hindsight, a 'black and white' penalty on continuous disclosure value judgments made by companies where the subject matter is rarely black and white. CSA also notes that directors have a duty to make disclosures that are timely and complete, and that the tension in satisfying those two requirements can make the value judgment particularly difficult.

Members were also concerned that the regime is not subject to full external scrutiny or third-party review. They noted that it will always be easier for a regulator to decide, after the event, and with no stake involved, at which exact point in time a board decision had become final and should have been communicated, than it would be for a board trying to balance a number of competing interests and issues to the best of its ability. The mismatch extends to the assessment of all the facts to determine whether or not a breach has occurred, which will, of necessity, be an extensive and time-consuming process and which does not fit the concept of 'swift justice'. An original intent of the regime was to exercise 'swift justice', yet in each instance it has taken 6–12 months to issue the notice after the breach of disclosure. This raises the question of whether the policy objective of timeliness is being achieved.

Has this additional tool resulted in greater compliance with the continuous disclosure provisions?

CSA does not believe that this additional tool results in greater compliance with the continuous disclosure provisions. The infringement notice regime is too blunt an instrument and treats continuous disclosure as though no element of judgment is required.

Prior to the introduction of the regime, ASIC had argued that it was required due to the number of breaches of continuous disclosure that were occurring. Despite this, CSA notes that only six infringement notices have been complied with. This raises the question of whether there is a demonstrated need for such a regime. Furthermore, while there have been few infringement notices complied with, they have been issued for relatively trivial breaches in most instances, which also raises the question of whether the policy objective is being achieved.

CSA is aware that the regulator can only act when it knows that there has been a breach of continuous disclosure. On this basis, the regulator will always lag behind the event. Given this reality, it is difficult to argue that the infringement notice regime is achieving its policy objective of ensuring entities put in place better systems or frameworks to deal with continuous disclosure and the prompt disclosure of relevant information.

Should the infringement notice provisions be amended to improve the usefulness, or the fairness, of the mechanism?

CSA suggests that enforceable undertakings could more fruitfully ensure that a compliance program is implemented. This is a remedy that directly requires an improvement in a company's internal controls, which achieves the policy objective of the implementation of better systems or frameworks to deal with continuous disclosure.

An enforceable undertaking attempts to prevent the breach from reoccurring in the future by requiring companies to revise their compliance programs, put in place educational training and implement a monitoring system to guard against future breaches. This preventive element is not part of the infringement notice.

CSA notes that a second Consultation Paper issued by Treasury, *Sanctions in Corporate Law*, which is also open for comment at present, notes that 'Notices/letters of warning/fines' sit in the

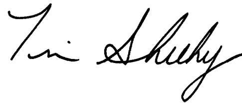
middle of the enforcement pyramid that clarifies the options open to the regulator to secure compliance with directors' duties. Persuasion and education; negotiation and settlement; and investigations, inspections and examinations occupy the lower levels of the pyramid and are intended to be used for lesser breaches of the law. CSA notes that the infringement notice regime was implemented to give ASIC an additional remedy to address less serious breaches of the continuous disclosure obligations, yet the regime uses options to secure compliance intended for more serious breaches of the law.

Conclusion and recommendation

CSA has given careful consideration to the issues raised by the Consultation Paper on the operation of the infringement notice regime. CSA believes that the infringement notice regime has serious flaws and that it has not been demonstrated that it has resulted in greater compliance with the continuous disclosure provisions.

On this basis, **CSA recommends** that the regime not be maintained.

Yours sincerely



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