

# WHO IS WATCHING THE WATCHDOG?: A CRITICAL APPRAISAL OF ASIC'S ADMINISTRATIVE POWERS

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The Australian Securities and Investments Commission (ASIC) is empowered by the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) to apply administrative sanctions<sup>1</sup> which may significantly impact on companies and individuals. To safeguard the rule of law and to protect the regulated community from a potential exercise of arbitrary power, it will be argued that there must be adequate statutory safeguards to ensure regulators, such as ASIC, are made publicly accountable. Accordingly, careful monitoring is needed to ensure that sufficient legislative protections are available to promote accountability and are not sacrificed for administrative efficiency.

ASIC's power to issue infringement notices under Part 9.4AA of the *Corporations Act 2001* (Cth) and to accept enforceable undertakings under ss 93AA and 93A of the *Australian Securities and Investments Commission Act 2001* (Cth) are the administrative sanctions which are the central focus of this discussion. These administrative sanctions will be critically examined within the context of the availability of internal and external merits review, which will be used as the criteria to evaluate ASIC's accountability. It will be concluded that the present legislative framework relating to these administrative sanctions is inadequate and that legislative reform is needed to make ASIC more accountable and thereby reduce the risk of it acting arbitrarily. For a public regulatory scheme to be effective there needs to be an appropriate balance between the competing public and private interests. The suggested legislative reforms proposed in this paper arguably achieve a fairer balance than the current scheme.

## I. INTRODUCTION

ASIC is the Commonwealth corporate regulator, and derives very wide powers from both the *Corporations Act 2001* (Cth) ('*Corporations Act*') and the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'). ASIC's public interest role includes promoting a stable and secure financial system<sup>2</sup> by ensuring that the regulated community comply with the corporations legislation<sup>3</sup> and thereby protect investors and consumers from corporate misconduct.<sup>4</sup> To facilitate its public function, ASIC has been statutorily empowered to

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1 Administrative sanctions are imposed by ASIC and not by the courts. For the purpose of this paper the administrative sanctions imposed by ASIC will be limited to enforceable undertakings under the *Australian Securities and Investments Commission Act 2001* (Cth) ss 93AA, 93A, and infringement notices under the *Corporations Act 2001* (Cth) Part 9.4AA.

2 *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2)(a)–(b).

3 The *Corporations Act 2001* (Cth) s 9 and the *Australian Securities and Investments Commission Act 2001* (Cth) s 5 define the term 'corporations legislation' to mean both the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth). Accordingly, the term 'corporations legislation' when used in this paper refers to both Acts.

4 *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2)(b).

seek criminal<sup>5</sup> and civil<sup>6</sup> sanctions from the courts against the regulated community for breaches of the corporations legislation or to impose administrative sanctions, such as infringement notices<sup>7</sup> and enforceable undertakings.<sup>8</sup> To further assist it in its role, ASIC has been granted wide powers, which include powers of investigation,<sup>9</sup> information gathering<sup>10</sup> and the power to conduct hearings<sup>11</sup> which must comply with natural justice.<sup>12</sup>

The stated objective of providing ASIC with such wide powers is to enable it to protect the public interest by promoting, securing and maintaining a viable, efficient and transparent financial system that promotes confidence and participation by investors and consumers.<sup>13</sup> This is particularly important given the current global financial crisis and the incidence of a number of major corporate collapses.<sup>14</sup> However, the public also has an interest in a statutory body such as ASIC, which is not an elected or representative entity, being made sufficiently accountable when exercising its statutory powers.<sup>15</sup> Further, the private interests of the regulated community also need to be safeguarded to minimise the risk of the regulator exercising its powers arbitrarily. For a regulatory system to be effective there needs to be a reasonable balance between these competing public and private interests.

As ASIC exercises broad discretionary powers, this may promote a reasonable apprehension within the regulated and wider community that ASIC's determinations lack impartiality and therefore may not readily be accepted. This is especially the case where a regulator, such as ASIC, performs the role of both the investigator/accuser, controls the hearing procedures and then determines the most suitable sanction to apply.<sup>16</sup> It is important within such a context that the regulated community can test ASIC's decisions to apply these administrative sanctions by review, particularly before an independent review body.

Accordingly, this raises the issue for consideration in this paper as to who is watching ASIC to ensure that it exercises its powers appropriately and is made accountable for its actions. In examining this issue, the focus will be on ASIC's power to issue infringement notices and accept enforceable undertakings.

As the corporations legislation has not excluded judicial review in relation to ASIC applying these administrative sanctions, arguably such review is available.<sup>17</sup> Although judicial review may only be available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('AD

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5 For example, the *Australian Securities and Investments Commission Act 2001* (Cth) s 49 gives ASIC the power to commence criminal proceedings for offences relating to noncompliance with its investigative requirements. Also, the *Corporations Act 2001* (Cth) s 1315 grants ASIC standing to commence criminal proceedings for an offence under the *Corporations Act 2001* (Cth). See also *Smolarek v Roper* [2009] WASCA 124 [55]-[56] which examines the operation of *Corporations Act 2001* (Cth) s 1315 in relation to ASIC.

6 For example, the *Corporations Act 2001* (Cth) s1317J(1) gives ASIC standing to seek a declaration or other order under Part 9.4B for breaches of the civil penalty provisions.

7 *Corporations Act 2001* (Cth) Part 9.4AA.

8 *Australian Securities and Investments Commission Act 2001* (Cth) ss 93A, 93AA.

9 *Australian Securities and Investments Commission Act 2001* (Cth) s 13.

10 *Australian Securities and Investments Commission Act 2001* (Cth) Part 3.

11 *Australian Securities and Investments Commission Act 2001* (Cth) s 51.

12 *Australian Securities and Investments Commission Act 2001* (Cth) s59(2)(c).

13 *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2)(a)-(b).

14 For example HIH Insurance, One.Tel and Ansett Airlines.

15 Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) 79.

16 *Kioa v West* (1985) 159 CLR 550; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *Stollery v Greyhound Racing Control* (1972) 128 CLR 509; Rebecca Langley, 'Reconsideration of the Power to Issue Infringement Notices for Breaches of Continuous Disclosure' (2007) 25 *Corporation and Securities Law Journal* 439, 445.

17 *Judiciary Act 1903* (Cth) s 39B; *Commonwealth Constitution* s 75; *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5-6.

(*JR Act*) providing the determination is considered a 'reviewable decision',<sup>18</sup> judicial review by the High Court cannot be excluded.<sup>19</sup> Further, ASIC is statutorily required to comply with natural justice when it conducts any hearings under the corporations legislation.<sup>20</sup> If ASIC fails to comply with natural justice when making its determination to issue an infringement notice or accept an enforceable undertaking, an affected party may be able to seek judicial review on this basis.<sup>21</sup> Accordingly, as judicial review appears to be available for these administrative sanctions,<sup>22</sup> it will not be considered in any detail within this paper.

As internal merits review for these administrative sanctions is limited<sup>23</sup> and external merits review has been expressly excluded,<sup>24</sup> the focus will be on these forms of review in evaluating ASIC's level of accountability. Internal merits review is conducted by the agency itself, while external merits review is performed by an outside tribunal, such as the Administrative Appeals Tribunal (AAT). Internal merits review is considered by the author to be limited for enforceable undertakings and infringement notices, as ASIC's refusal to withdraw an infringement notice or to vary or withdraw an enforceable undertaking cannot be challenged by internal merits review.<sup>25</sup> Further, such determinations are not subject to external merits review by the AAT.<sup>26</sup> It will be argued that as judicial review and merits review perform different functions and achieve different outcomes for those affected by these administrative sanctions, both forms of external review should be available if ASIC is to be made adequately accountable.

Before evaluating whether there are currently sufficient safeguards to make ASIC accountable for its determinations to issue infringement notices and enforceable undertakings, a brief description of each of these administrative sanctions will now be provided.

## II. ADMINISTRATIVE SANCTIONS

### *A. Enforceable Undertakings*

ASIC can negotiate and accept an enforceable undertaking under ss 93AA and 93A of the ASIC Act. Section 93AA(1) of the ASIC Act states that ASIC may accept a written undertaking given by a person in connection to a matter in relation to which ASIC has a function or power under

18 *ABT v Bond* (1990) 170 CLR 321, 338 considered a 'reviewable decision' to be an 'ultimate or operative determination'; Langley, above n 16, 464; Australian Law Reform Commission (ALRC), *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002) [21.45], where the ALRC suggested that judicial review may be available for infringement notices under *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 6, even though they may not be considered final and operative decisions.

19 *Plaintiffs 157/2002 v Commonwealth* (2003) 211 CLR 476.

20 *Australian Securities and Investments Commission Act 2001* (Cth) s 59(2)(c).

21 Under *Corporations Act 2001* (Cth) s 1317DAD(1)(b), ASIC is required to conduct a hearing before it issues an infringement notice; enforceable undertakings are 'negotiated settlements', which implies that there is some form of hearing held between the entity and ASIC before ASIC determines whether it will accept such an undertaking. See also Australian Securities and Investments Commission (ASIC), *Regulatory Guide 100: Enforceable Undertakings* (March 2007) [1.7] - [1.8].

22 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5-6.

23 *Corporations Act 2001* (Cth) s 1317DAI(6) and *Australian Securities and Investments Commission Act 2001* (Cth) ss 93AA, 93A make no express provision for internal merits where ASIC refuses to consent to a variation or withdrawal of an enforceable undertaking. See below Part IV Merits Review for a more detailed discussion of internal merits review.

24 *Corporations Act 2001* (Cth) s 1317C(i)-(j); *Australian Securities and Investments Commission Act 2001* (Cth) s 244.

25 *Corporations Act 2001* (Cth) s 1317DAI(6); *Australian Securities and Investments Commission Act 2001* (Cth) ss 93AA, 93A.

26 *Corporations Act 2001* (Cth) s 1317C(i)-(j); *Australian Securities and Investments Commission Act 2001* (Cth) s 244.

the ASIC Act. Section 93A(1) of the ASIC Act is worded similarly but refers to the 'responsible entity of a registered scheme' rather than 'person'. When ASIC suspects that a party has contravened the corporations legislation, either ASIC or the party may propose entering into an undertaking.<sup>27</sup>

Enforceable undertakings are flexible sanctions,<sup>28</sup> reflecting a negotiated compromise between the two parties, where 'the alleged offender will promise to do or refrain from doing certain things.'<sup>29</sup> Once an undertaking has been accepted, the other party cannot withdraw or vary the undertaking without ASIC's consent.<sup>30</sup> If ASIC refuses its consent, there is no formal internal review available of this decision. If, however, ASIC determines that the other person or responsible entity has breached the agreement, then ASIC can seek to have the promise enforced by the court.<sup>31</sup> Arguably, ASIC may form such a belief where the other party has requested the withdrawal or variation of the enforceable undertaking, indicating that perhaps it cannot or will not perform its obligations under the existing undertaking. Consequently, where ASIC refuses a request for a variation or withdrawal of an enforceable undertaking, this may expose the other party to court action instigated by ASIC.

Enforceable undertakings are not often used by ASIC. This is evidenced by the fact that from 1998 until June 2009, ASIC only accepted 297 enforceable undertakings.<sup>32</sup> In 2008, ASIC entered into 13 enforceable undertakings, and from January to June 2009, it has accepted four.<sup>33</sup>

ASIC's regulatory guide indicates the factors that may influence it to accept an enforceable undertaking;<sup>34</sup> for example, whether the conduct was inadvertent and/or the person's willingness to publicly acknowledge ASIC's concerns about its conduct and/or how co-operative they have been with ASIC.<sup>35</sup> Further, the AAT considers an enforceable undertaking an inappropriate sanction where a person has engaged in a 'continuing pattern' of serious breaches of their statutory duties<sup>36</sup> and/or where a person's behaviour is 'reckless', rather than inadvertent.<sup>37</sup> As there are no statutory criteria which ASIC must adhere to when determining whether to accept an enforceable undertaking, this emphasises its wide discretion in this area. If ASIC refuses to enter into an enforceable undertaking, it may decide to take other action against the entity, such as seeking a civil sanction for a contravention of the legislation.<sup>38</sup> Importantly, ASIC's determination to accept or reject an enforceable undertaking cannot be reviewed by the AAT.<sup>39</sup> This raises concerns about ASIC's level of accountability in relation to enforceable undertakings.

### *B. Infringement Notices*

Infringement notices were introduced under Part 9.4AA of the *Corporations Act* to provide ASIC with an alternative tool to encourage compliance with the continuous disclosure requirements, without having to bring court action.<sup>40</sup> At the time, the legislators considered

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27 ASIC, above n 21, [1.5].

28 Ibid [2]; *Australian Securities and Investments Commission Act 2001* (Cth) ss 93AA, 93A.

29 Marina Nehme, 'Enforceable Undertakings in Australia and Beyond' (2005) 18 *Australian Journal of Corporate Law* 1.

30 *Australian Securities and Investments Commission Act 2001* (Cth) ss 93AA(2), 93A(2).

31 *Australian Securities and Investments Commission Act 2001* (Cth) ss 93AA(3)–(4), 93A(3)–(4).

32 ASIC, *Enforceable undertakings register* <<http://www.asic.gov.au/asic/asic.nsf>> at 16 October 2009.

33 Ibid.

34 ASIC, above n 21, [2].

35 Ibid [2.10].

36 *Jungstedt v ASIC* [2003] AATA 159 [337].

37 *Franke v ASIC* [2008] AATA 83 [26].

38 *Australian Securities and Investments Commission Act 2001* (Cth) ss 93AA(3)–(4), 93A(3)–(4).

39 *Australian Securities and Investments Commission Act 2001* (Cth) s 244.

40 ASIC, *Annual Report* (1998-99) 34.

that the proposed legislative scheme appropriately balanced ASIC's public interest role by enhancing its capacity to deal with relatively minor contraventions of the continuous disclosure provisions, while also providing adequate procedural safeguards to protect the private interests of the regulated community.<sup>41</sup> It was also noted that ASIC was already performing a similar role in relation to the suspension or cancellation of financial services licences under the corporations legislation and that the issuing of infringement notices by ASIC would operate in a similar way.<sup>42</sup> However, unlike for banning orders<sup>43</sup> and disqualification orders<sup>44</sup> under the corporations legislation, merits review by the AAT was expressly excluded for infringement notices.<sup>45</sup> The rationale for this exclusion was that ASIC's decision to issue an infringement notice is not considered a final determination because the disclosing entity is not legally obliged to obey the infringement notice.<sup>46</sup>

Infringement notices were also seen as a type of 'on the spot fine', which in fact is not the case, as the process is complex,<sup>47</sup> involving 10 steps which are set out under ss 1317DAA to 1317DAJ of the *Corporations Act*.

When ASIC issues an infringement notice under Part 9.4AA of the *Corporations Act*, it applies the legislative criteria in ss 674(2) or 675(2), which are the continuous disclosure provisions under the Act. Before issuing an infringement notice, ASIC must provide the disclosing entity with a statement of its reasons and allow the disclosing entity to respond by making oral and/or written submissions.<sup>48</sup> After ASIC conducts its own investigations<sup>49</sup> and considers any evidence submitted by the alleged offender,<sup>50</sup> if ASIC reasonably believes that the disclosing entity may have contravened the continuous disclosure provisions, it may issue an infringement notice. Accordingly, it is neither quick and can hardly be described as an 'on the spot fine'. Further, ASIC's determination to issue or withdraw an infringement notice cannot be reviewed by the AAT.<sup>51</sup>

Infringement notices are not limited to fines,<sup>52</sup> which vary in amount depending on the company's size,<sup>53</sup> but may also require the disclosing entity to provide specific information, which ASIC itself determines, to the public, Australian Securities Exchange (ASX)<sup>54</sup> or ASIC<sup>55</sup> to rectify the alleged breach committed by the disclosing entity.<sup>56</sup> Section 1317DAE of the *Corporations Act* prescribes the information that must be contained in an infringement notice, which includes the effect of compliance under s 1317DAF or noncompliance as provided by s 1317DAG. The notice must also state that the disclosing entity can make a written request to

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41 Explanatory Memorandum, Corporate Law and Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (Cth) [5.462].

42 Ibid [5.466].

43 *Corporations Act 2001* (Cth) s 920A.

44 *Corporations Act 2001* (Cth) s 206F.

45 *Corporations Act 2001* (Cth) s 1317C(i)–(j).

46 Explanatory Memorandum, Corporate Law and Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (Cth) [5.462].

47 Marina Nehme, Margaret Hyland and Michael Adams, 'Enhancement of Continuous Disclosure' (2007) 21 *Australian Journal of Corporate Law* 121.

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

49 *Corporations Act 2001* (Cth) ss 1317DAC, 1317DAD.

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

51 *Corporations Act 2001* (Cth) s 1317C(i)–(j).

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

53 *Corporations Act 2001* (Cth) s 1317C(i)–(j).

*Corporations Act 2001* (Cth) s 1317DAE(2)–(7).

54 *Corporations Act 2001* (Cth) s 1317DAE(1)(i).

55 *Corporations Act 2001* (Cth) s 1317DAE(1)(j).

56 *Corporations Act 2001* (Cth) s 1317DAE(1)(e).

ASIC to withdraw the infringement notice.<sup>57</sup> If the disclosing entity accepts the infringement notice, it has 28 days to comply.<sup>58</sup>

Part 9.4AA of the *Corporations Act* sets up a type of statutory undertaking or estoppel where, if the disclosing entity obeys ASIC's determination, then ASIC cannot commence certain court proceedings against it.<sup>59</sup> Unlike enforceable undertakings, infringement notices are not enforced by the court. If the disclosing entity ignores the infringement notice, then ASIC is released from its statutory promise and may commence new and different proceedings against the disclosing entity, requesting the court to make a declaration that the entity has breached the continuous disclosure provisions.<sup>60</sup> This is also the situation where ASIC withdraws an infringement notice. On proof of contravention, the court may grant a pecuniary penalty order<sup>61</sup> or an order to disclose or publish information,<sup>62</sup> but for an actual contravention of the continuous disclosure provisions, not for an alleged breach.

Up until June 2009, ASIC has only issued nine infringement notices,<sup>63</sup> which indicates that ASIC does not readily use this power. ASIC's infrequent use of infringement notices may be partly caused by the current procedural requirements, which result in a fairly lengthy process, 'taking on average over eight months from the date of the alleged breach to the finalisation of the infringement notice process'.<sup>64</sup> Evidently, this was not the intended outcome, as infringement notices were introduced into the *Corporations Act* to provide ASIC with a 'fast and less expensive remedy compared to the existing enforcement mechanisms'.<sup>65</sup>

### C. Recap

For infringement notices, unlike enforceable undertakings, there is no admission of liability, which is emphasised by the legislation<sup>66</sup> and also reinforced in ASIC's media releases and regulatory guidelines.<sup>67</sup> Enforceable undertakings are made publicly available through a register, which may be accessed, for example, through ASIC's website and through media releases made by ASIC.<sup>68</sup> Infringement notices are not recorded in a register, but the contents of such notices are publicly available from ASIC.<sup>69</sup> This provides a certain degree of transparency for these administrative sanctions and some level of accountability by ASIC to the public.

However, it is important to consider the impact that publicity may have on the corporate image of an entity which has been issued with an infringement notice or accepted an enforceable undertaking.

As stated above, ASIC may notify the public that it has accepted an enforceable undertaking through media releases and the public register. Therefore an entity is aware that the contents of the enforceable undertaking will be made publicly available. Accordingly, an entity may consider the possible negative impact on its corporate image that may be generated by such

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57 *Corporations Act 2001* (Cth) s 1317DAE(1).

58 *Corporations Act 2001* (Cth) s 1317DAH(1).

59 *Corporations Act 2001* (Cth) ss 1317DAF(5)–(6).

60 *Corporations Act 2001* (Cth) ss 1317DAG(2).

61 *Corporations Act 2001* (Cth) s 1317G.

62 *Corporations Act 2001* (Cth) s 1324B.

63 ASIC, *Media releases and advisories* <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Media%20centre> at 16 October 2009.

64 Langley, above n 16, 457.

65 ASIC, *Continuous Disclosure Obligations: Infringement Notices: An ASIC Guide* (2004) 4; Rebecca Langley, above n 16, 456.

66 *Corporations Act* (2001) ss 1317DAF(4), 1317DAJ(2)(b); ASIC, above n 21, [3.3].

67 ASIC, *Regulatory Guide 73 — Continuous Disclosure Obligations: Infringement Notices* (May 2004) [25].

68 *Corporations Act 2001* (Cth) s 1274.

69 For example, information can be obtained through ASIC's media releases.

publicity when it enters into an enforceable undertaking or requests ASIC to consent to a variation or withdrawal of the enforceable undertaking.

Although the corporations legislation states that ASIC must not publish any details about a disclosing entity's failure to comply with an infringement notice, it is not an offence if ASIC does so.<sup>70</sup> Further, possibly no action at all is taken against ASIC for ignoring this provision. This is supported by the fact that ASIC stated before the Senate Estimates Committee not only that Telstra had disobeyed an infringement notice but also that ASIC considered that Telstra had actually breached, and not just allegedly breached, the continuous disclosure provisions.<sup>71</sup> No action appears to have been taken against ASIC for its conduct in relation to Telstra.

Further, publicity may have an adverse impact on a disclosing entity's reputation in relation to investors and or consumers. The corporations legislation provides ASIC with a discretionary power to publish details about a disclosing entity's compliance with an infringement notices, provided it includes a statement that compliance is not considered an admission of liability.<sup>72</sup> ASIC's guidelines indicate that it will publish such details, which it does through its media releases.<sup>73</sup> Despite the statement that the acceptance of an infringement notice does not equate to an admission of liability, some stakeholders in the regulated community may still perceive the imposition of this administrative sanction by ASIC as an indication that the 'alleged offender' has in fact done something wrong.<sup>74</sup> Accordingly, this may exert a negative impact on that company's corporate image.<sup>75</sup>

It is a concern that a company's good reputation could be impaired by a media publication stating that the company has complied with an infringement notice.<sup>76</sup> Further, a company may need to consider the damage to its reputation in terms of costs when deciding whether to obey an infringement notice, given the negative publicity that may be generated.<sup>77</sup> Accordingly, this potentially adverse impact on a company's corporate reputation may be one of the reasons why a disclosing entity, who objects to ASIC's decision to issue an infringement notice, requests that the infringement notice be withdrawn, rather than complying with it or ignoring it.

Given the role of publicity in relation to these administrative sanctions, this may provide another reason as to why merits review should be available in relation to ASIC making its determination to impose these administrative sanctions.

The statutory exclusion of external merits review of ASIC's decisions regarding infringement notices<sup>78</sup> and enforceable undertakings,<sup>79</sup> and the provision of only a minimum level of internal merits review, arguably allows ASIC to exercise wide discretionary powers with limited accountability.

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

71 Australian Institute of Company Directors, *Law Reporter — Infringement Notices — It's Time to Scrap Them* (2006) <<http://www.companydirectors.com.au/Media/Company+Director/2006/April/law+reporter+infringement+notices>> at 16 October 2009.

72 *Corporations Act 2001* (Cth) ss 1317DAJ(1), 1317DAJ(2)(c).

73 ASIC, above n 67, [40].

74 Note, an infringement notice is for an 'alleged' breach and therefore ASIC may have insufficient evidence to prove to a court that the disclosing entity has actually breached the provisions. Despite claiming that Telstra had in fact breached the continuous disclosure provisions, ASIC did not take any civil action against them.

75 Rebecca Langley, above n 16, 460.

76 Ibid.

77 Ibid 447.

78 *Corporations Act 2001* (Cth) 1317C(i)–(j).

79 *Australian Securities and Investments Commission Act 2001* (Cth) s 244(2).



The availability of merits review has been selected by this author as the primary criteria to evaluate ASIC's accountability when it imposes these administrative sanctions.<sup>80</sup> This raises the question as to why is it considered important that ASIC be made accountable for these decisions. This issue will now be considered.

### III. WHY SHOULD ASIC BE HELD ACCOUNTABLE?

There is generally wide acceptance for the concept of public accountability by regulators such as ASIC.<sup>81</sup> Robert Baldwin and Martin Cave identified 'accountability' and 'transparency' as two of five criteria that could be used for evaluating the effectiveness and/or legitimacy of a regulatory scheme in the public domain.<sup>82</sup> The Australian Law Reform Commission (ALRC) appears to have endorsed this view, as it readily accepted that public regulators should be made accountable and that for 'accountability' to be meaningful, the decision making process must be transparent and the public must understand the basis for the regulator's decision and, most importantly, how these decisions can be reviewed.<sup>83</sup> Accountability concerns the 'general transparency of the activities of the regulators' and not simply the review of individual cases.<sup>84</sup> Accordingly, these criteria of 'transparency', 'reasons for the decision' and particularly 'accountability', as measured by the availability of review, will be considered in evaluating the effectiveness of the currently regulatory scheme which allows ASIC to issue infringement notices and accept enforceable undertakings.

Arguably, better administration and 'more rigorous and lawful decision making' may result when regulators such as ASIC realise that their decisions are reviewable.<sup>85</sup> Review promotes accountability by 'allowing decisions made by one decision maker to be tested by another'.<sup>86</sup> For example, it allows regulators to be guided by tribunal and court decisions, as they provide 'norms and procedures'.<sup>87</sup> This is evidenced in ASIC's published regulatory guidelines, which often refer to court decisions to support and guide its enforcement activities.<sup>88</sup> Further, external review allows regulators to claim 'legitimacy' for their decisions, as being 'properly accountable

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80 Infringement notices under the *Corporations Act 2001* (Cth) Part 9.4AA and enforceable undertakings under the *Australian Securities and Investments Commission Act 2001* (Cth) ss 93A, 93AA.

81 ALRC, above n 18, [20.1]; Administrative Review Council, *The Contracting Out of Government Services*, Issues Paper (1997) [2.13]; Peter Bayne, 'Administrative Law and the New Managerialism in Public Administration' (1988) 62 *Australian Law Journal* 1040.

82 Baldwin and Cave, above n 15, 77.

83 ALRC, above n 18, [20.1]; Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (1998).

84 ALRC, above n 18, [20.2]; Mark Aronson, Bruce Dwyer and Matthew Groves, *Judicial Review of Administrative Action* (3<sup>rd</sup> ed, 2004) 1.

85 ALRC, above n 18, [20.8].

86 Ibid.

87 Ibid [20.52].

88 See, eg, ASIC, *Regulatory Guide 57: Notification of Rights of Review* (2003) [57.6] which states that as the AAT follows the High Court's decision in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 when interpreting the word 'decision' under the *Administrative Appeals Act 1975* (Cth), then, accordingly, so will ASIC; ASIC, *Policy Statement 103: Confidentiality and Release of Information*, Australian Securities & Investments Commission, [PS 103.1] <[www.cpd.com.au/asic/ps/ps103.pdf](http://www.cpd.com.au/asic/ps/ps103.pdf)> at 23 October 2001, states that 'in this policy statement ASIC indicates the practices it will adopt in relation to the disclosure of information obtained by the exercise of its compulsory powers. The practices are adopted in the light of the High Court's decision in *Johns v Australian Securities Commission* (1993) 178 CLR 408'.



to, and controlled by, other public institutions', making the process more transparent and independent.<sup>89</sup>

Further, regulators often claim that the public should support their actions because they are accountable to, and controlled by, a democratically representative body, such as Parliament, and that such 'oversight' legitimises the exercise of their powers.<sup>90</sup>

However, controversy may arise where the regulator is made accountable to a body which is not democratically elected and is then criticised as being 'unrepresentative'.<sup>91</sup> For example, courts may be questioned as to their 'competence' to conduct reviews in 'specialist areas'.<sup>92</sup> However, where regulators claim that they are the only body with the requisite 'expertise' to make certain determinations and to conduct any required review, this may generate public concern and 'mistrust'.<sup>93</sup> It cannot be assumed, nor is it generally accepted, that 'experts' will always act impartially. Often their decisions are political because 'competing interests are affected by regulation' and these 'tensions are resolved in a particular manner'.<sup>94</sup> Accordingly, this stresses the importance of independent external review where administrative sanctions are applied by public regulators, such as ASIC. Further, the concept of 'accountability' often raises other related issues, such as the 'appropriate' degree of accountability, questions about the suitable reallocation of resources and the 'accepted trade-off between accountability and the pursuit of regulatory objectives'.<sup>95</sup> These issues are important when evaluating the effectiveness of the current regulatory scheme, given the competing public and private interests within this context.

The regulated and wider community may reasonably apprehend that ASIC's determinations are not independent and impartial, and have a shared interest in requiring adequate legislative protective measures to make ASIC publicly accountable and thereby promote greater confidence in its determinations.<sup>96</sup> These protective measures include both merits review and judicial review.

Merits review can be conducted internally by the agency itself and/or by an external body, such as the AAT under s 25 of the *Administrative Appeals Tribunal Act 1975* (Cth). As Commonwealth tribunals exercise administrative power, they can review the 'merits' of a case, which allows 'all aspects of a challenged decision, including the finding of facts and the exercise of any discretion by the original decision maker' to be reviewed.<sup>97</sup> The AAT, for example, may consider new evidence which was not available to the original decision maker when determining the 'best' or 'preferable' decision on the facts.<sup>98</sup> Not only can the AAT affirm or vary the original decision, but it may also make a new decision to replace it.<sup>99</sup>

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89 Sir Anthony Mason, 'Administrative Review : The Experience of the First 12 Years' (1989) 18 *Federal Law Review* 122.131; Robin Creyke and John McMillan, *Control of Government Action: Text, Cases & Commentary* (2005), 13; ALRC, above n 18, [20.8].

90 Baldwin and Cave, above n 15, 79.

91 Ibid.

92 Ibid.

93 Ibid 80.

94 Ibid.

95 Ibid 79.

96 Ibid 80.

97 *Commonwealth v Ford* (1986) 9 ALD 433,437; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 419.

98 *Wharton v ASIC* [2002] AATA 443 [39]; *PTLZ v ASIC* [2008] AATA 106 [58]; *Re Greenham and Minister for Capital Territory* [1979] 2 ALD 137, 141; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 419.

99 *Administrative Appeals Tribunal Act 1975* (Cth) s 43; See also *ASIC v Donald* [2002] FCA 1174 [33], which upheld the AAT's power to decide that an enforceable undertaking under the *Australian Securities and Investments Commission Act 2001* (Cth) s 93AA should be accepted by ASIC, when it was asked to review ASIC's decision to impose a banning order, even though an enforceable undertaking is not a 'reviewable decision'.

Providing there are no ouster provisions attempting to exclude judicial review, administrative decisions may be judicially reviewed by the courts under the *AD (JR) Act* or an appeal from certain decisions of the AAT under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth). Judicial review may also be available under s 39B of the *Judiciary Act 1903* (Cth) or pursuant to s 75 of the *Commonwealth Constitution*.<sup>100</sup> Commonwealth courts, when performing judicial review, exercise judicial power, and cannot consider the merits of a case — only whether the decision was lawfully made.<sup>101</sup> Where the court decides that the decision maker has acted unlawfully, the decision may be set aside and remitted back to that person to remake the decision, this time in accordance with the law.<sup>102</sup>

Judicial review is essential to ensure that a regulator acts lawfully within the legal limits of its powers. This type of review supports the rule of law by ensuring that no-one, including a statutory body such as ASIC, acts unlawfully. As previously discussed, judicial review is available for both infringement notices and enforceable undertakings, and therefore this form of review will not be considered.<sup>103</sup> However, as outlined above, because judicial review and merits review perform different functions and achieve different outcomes, both forms of external review should be available when ASIC imposes these administrative sanctions. The availability of merits review will now be addressed.

#### IV. MERITS REVIEW

As noted before, the criteria selected to evaluate ASIC's accountability is primarily the availability of internal and external merits review. Each form of merits review will now be discussed with the focus being on the legislative provisions for infringement notices and enforceable undertakings. Further, the justifications for limiting or excluding merits review will also be addressed.

##### *A. Internal Review*

Generally, internal merits review is conducted within the agency by a different and more senior person than the original decision maker.<sup>104</sup> The outcome of such a review may be that a new decision is made or the original decision is affirmed or varied in some way.<sup>105</sup> In terms of managerial efficiency, often regulators prefer internal review to external review as it is faster and more cost effective.<sup>106</sup> Internal review may be a formal or semi-formal process,<sup>107</sup> is typically merits review, and may be single or two tiered.<sup>108</sup> The ALRC recommended that, generally, unless internal review is clearly inappropriate, there should be at least one level of internal review of a decision to impose an administrative sanction.<sup>109</sup>

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100 Note that the High Court held, in *Plaintiff's 157/2002 v Commonwealth* (2003) 211 CLR 476,538, that the High Court's jurisdiction under the *Commonwealth Constitution* s 75 to conduct judicial review cannot be excluded by an ouster or privative clause. Such a clause would be held to be constitutionally invalid.

101 *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1, 6; *Abebe v Commonwealth* (1999) 197 CLR 510, 579; Roger Douglas, *Douglas and Jones's Administrative Law* (6<sup>th</sup> ed, 2009) 56.

102 Douglas, above n 101, 771.

103 *Australian Securities and Investments Commission v Donald* (2003) 136 FCR 7; *Daws v Australian Securities and Investments Commission* [2006] AATA 321; *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5–6.

104 Administrative Review Council (ARC), *Internal Review of Agency Decision Making*, Report No 44 (2000) [1.4]; ALRC, above n 18, [20.11].

105 Creyke and McMillan, above n 89, 229; ALRC, above n 18, [20.11].

106 ALRC, above n 18, [20.12].

107 *Ibid* [20.11].

108 *Ibid*.

109 ALRC, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper 65 (2002) Proposal 10–4; ALRC, above n 18, [20.58].

### *1. Factors that May Justify Limiting or Excluding Internal Review*

There is some support for the view that internal review may not be suitable for all administrative decisions or for all regulators.<sup>110</sup> Whether internal review is deemed necessary often depends on the type of sanction imposed and the nature of the regulated community.<sup>111</sup> Where sanctions are automatically imposed by the legislation or arise in 'high volume areas', the ALRC accepts that internal review may not always be appropriate.<sup>112</sup> However, from June 2008 to June 2009, ASIC only issued one infringement notice and accepted 11 enforceable undertakings.<sup>113</sup> Accordingly, these sanctions are not frequently applied by ASIC. Further, when ASIC imposes these sanctions, ASIC exercises fairly wide discretionary power in determining whether or not to apply the sanction. Consequently, these administrative sanctions are not automatically imposed by virtue of an alleged breach of the legislation.

However, there may be other reasons used to justify the exclusion or limitation of internal merits review. For example, internal review may be considered a waste of resources, where the determinations involve 'serious decisions' which generally are made by senior officers of the agency. Further, if before the sanction was imposed the person affected was significantly involved in the process and was permitted 'multiple opportunities to make submissions and appear before the decision maker at a hearing',<sup>114</sup> this may also justify excluding or limiting internal review.

These reasons may have been considered when limiting internal review for infringement notices and enforceable undertakings, as they involve fairly 'serious' decisions for which the person affected has been afforded an opportunity to make oral and written submissions to ASIC before it imposes the sanction. Although the hearing rule may have been complied with in terms of procedural fairness,<sup>115</sup> the major concern is that ASIC's determinations are not sufficiently impartial or neutral, given ASIC is both the accuser and investigator, controls the hearing procedure, and also makes the determination.<sup>116</sup> As previously noted, ASIC is required by the corporations legislation to comply with natural justice when it conducts any hearings.<sup>117</sup> Accordingly, any failure to do so may be challenged by judicial review.<sup>118</sup> Although judicial review may be available in relation to ASIC applying these administrative sanctions, the concern is that ASIC's decision cannot be challenged by external merits review and only limited formal internal review is available. This is unsatisfactory, given ASIC's dual role as both investigator and decision maker,<sup>119</sup> making merits review, particularly external merits review, an effective method of ensuring that ASIC is made adequately accountable.

Further, under the corporations legislation ASIC is not required to provide reasons for refusing to consent to a variation or withdrawal of an enforceable undertaking or for withdrawing or refusing to withdraw an infringement notice. At common law, it is accepted that there is no right

110 ALRC, *Securing Compliance*, above n 109; ALRC, above n 18, [21.15].

111 ALRC, above n 18, [21.25].

112 ASIC, *Submission CAP 15* (10 September 2002); ALRC, above n 18, [21.16].

113 ASIC, above n 32; ASIC, above n 63.

114 ALRC, above n 18, [21.24]; Australian Taxation Office, *Submission CAP 16* (17 September 2002) [1.48].

115 *Minister for Immigration and Multicultural and Indigenous Affairs v WAFJ* [2004] FCAFC 5, 68; *Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 35 ALD 225.

116 *Webb v R* (1994) 181 CLR 41; Baldwin and Cave, above n 15, 80.

117 *Corporations Act 2001* (Cth) 1317C(i)–(j).

*Australian Securities and Investments Commission Act 2001* (Cth) s 59(2)(c).

118 *Plaintiff's 157/2002 v Commonwealth* (2003) 211 CLR 476. *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(a); *Australian Constitution* s 75; *Winter v ASC* (1995) 56 FCR 107 [42]–[43], where it was held that there was no demonstration of a reasonable apprehension of bias and that the tentative view expressed did not support a finding that the decision maker did not have an 'open mind' when making the final determination.

119 Langley, above n 16, 464.

to reasons for administrative decisions.<sup>120</sup> A person has a statutory right to reasons if they are able to seek merits review before the AAT<sup>121</sup> or is entitled to judicial review under the *AD (JR) Act*<sup>122</sup> or where such a right is expressly provided by the legislation authorising the making of the determination.<sup>123</sup> Accordingly, as the corporations legislation is silent on this issue, and review by the AAT has been excluded, this raises significant concerns about ASIC's accountability. This could be corrected by enacting legislative reform making the provision of reasons a statutory requirement under the corporations legislation and/or by providing for merits review by the AAT.<sup>124</sup> Where reasons are provided for decisions, the process is generally perceived as more transparent.<sup>125</sup> Accordingly, such determinations may be more readily accepted by the person affected by the decision, as they understand the basis for the decision and may not necessarily wish to pursue review.<sup>126</sup> Therefore, providing a statutory right to reasons under the corporations legislation, and not only where a person seeks external review, may be effective in terms of costs, time and in promoting efficiency.

## 2. The Availability of Internal Merits Review for Infringement Notices

Indirectly, a disclosing entity may seek formal internal review of ASIC's decision to issue an infringement notice under the *Corporations Act* by making a written submission to ASIC to 'withdraw the infringement notice'.<sup>127</sup> However, if ASIC refuses, the disclosing entity has no further recourse in terms of merits review. Further, ASIC's regulatory guidelines do not state that a different or more senior person than the original decision maker will consider the submission for withdrawal.<sup>128</sup> Additionally, ASIC itself may withdraw an infringement notice, providing s 1317DAF(3) is not satisfied.<sup>129</sup> Again, there does not appear to be any formal internal merits review of this determination. It should be noted that if ASIC withdraws an infringement notice, this allows ASIC to commence civil or criminal penalty proceedings against the disclosing entity, which were barred while the infringement notice was in place.<sup>130</sup> Although the legislation does not require ASIC to provide reasons for its refusal to withdraw the notice, ASIC's guidelines state that a person may request ASIC to provide reasons and ASIC will do so within 28 days.<sup>131</sup>

A disclosing entity may object to ASIC issuing an infringement notice because it believes that ASIC has made an incorrect decision based on the merits of the case. This may be the reason it requests ASIC to withdraw the notice. Where a disclosing entity objects to ASIC's decision to issue an infringement notice, it could ignore it, request its withdrawal or comply, despite its objection.<sup>132</sup>

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120 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656; *Masu Financial Management Pty Ltd v FICS* [2004] NSWSC 829 [17].

121 *Administrative Appeals Tribunal Act 1975* (Cth) s 28.

122 *157/2002 v Commonwealth* (2003) 211 CLR 476.

*Administrative Decision (Judicial Review) Act 1977* (Cth) s 13.

123 See, eg, *Corporations Act 2001* (Cth) s 920F(1)–(2), which requires ASIC to provide reasons for making or varying a banning order.

124 *Administrative Appeals Tribunal Act 1975* (Cth) s 28.

125 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 459 (Kirby J); Paul Craig, 'The Common Law, Reasons and Administrative Justice' (1994) 53 *Cambridge Law Journal* 282, 283.

126 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 459 (Kirby J); ALRC, above n 18, [20.1].

127 *Corporations Act 2001* (Cth) s 1317DAI(1).

128 ASIC, above n 67, [32]; *Corporations Act 2001* (Cth) s 1317DAI(6)(d)–(e).

129 *Corporations Act 2001* (Cth) s 1317DAI(3).

130 *Corporations Act 2001* (Cth) s 1317DAI(6)(d)–(e).

131 ASIC, *Regulatory Guide 8: Hearings Practice Manual* (May 1999)[3.16].

132 See Langley, above n 16, where she examines seven companies which complied with infringement notices, and states, at 455, that five of these companies considered that at the time of the alleged breach, the information was either unavailable or too uncertain to warrant disclosure.

Alternatively, a disclosing entity may object to ASIC withdrawing an infringement notice because it may prefer to comply with the infringement notice rather than risk ASIC pursuing civil or criminal sanctions against it for the matters raised in the notice. Accordingly, such an entity may wish to have ASIC's decision to withdraw the infringement notice reviewed, to allow it an opportunity to persuade the person conducting the review that the infringement notice should not be withdrawn.

Vesting all the power in ASIC's hands to both impose and withdraw an infringement notice, with limited internal merits review, no external merits review and no statutory right to reasons under the *Corporations Act*, further strengthens ASIC's power, while simultaneously weakening its accountability to the regulated community.

### *3. The Availability of Internal Merits Review for Enforceable Undertakings*

Under ss 93AA(2) and 93A(2) of the ASIC Act, a person can only withdraw or vary an undertaking with ASIC's consent. Indirectly, this operates as a form of internal review of the initial undertaking. However, the corporations legislation and ASIC's regulatory guide provides no indication as to how such a review will be conducted.<sup>133</sup> Again, this provides ASIC with very wide discretionary power. Additionally, there does not appear to be any formal internal review available, where ASIC refuses its consent. Further, there are no specified times frames within the legislation or ASIC's regulatory guide stating how long it will take ASIC to provide or refuse its consent, nor is there any indication that a different person to the original delegate will consider this request for variation or cancellation.<sup>134</sup>

As ASIC is the corporate regulator and is vested with wide enforcement powers, arguably the negotiations between itself and the other party are not conducted from an equal bargaining position. If ASIC refuses to vary such an undertaking, there may be reasons based on the 'merits' of the case for requesting such a change. Allowing the party an opportunity to challenge ASIC's refusal to withdraw or vary the undertaking on its merits, before a person who was not the original delegate of ASIC, would make ASIC more accountable for its decisions and provide a greater level of protection to this party, without requiring court action to enforce or vary the undertaking. The negotiated settlement between ASIC and the other party ought to be distinguished from other commercial undertakings, as here the negotiations are conducted with the corporate regulator, who has very wide powers of enforcement and compliance at its disposal, placing it in a very different position to other negotiated settlements in the commercial area.

If ASIC considers that the person or responsible entity has breached the undertaking, ASIC can seek a court order that may either enforce the undertaking made with ASIC or the court may make any other order it considers appropriate.<sup>135</sup> Evidently, the court does not simply 'rubber stamp' the undertaking negotiated between ASIC and the other party but exercises its own discretion when making its orders in response to ASIC's request to enforce the undertaking.<sup>136</sup> This provides some protection to the other party as the court reviews the undertaking before making its orders. A person's request that ASIC consent to a variation or withdrawal of the enforceable undertaking could signal to ASIC that the person cannot, or is unwilling to, obey the undertaking. Accordingly, if ASIC refuses its consent, it may consider the person's request for variation or cancellation of the undertaking as support for its determination that the person has breached the undertaking, and may then seek a court order to enforce the undertaking. An entity wishing to avoid court proceedings may simply want some form of merits review to challenge ASIC's decision not to vary or withdraw the undertaking. As it is not entitled to this under the current legislative regime, it may be reluctant to request a variation or cancellation because this may provide an incentive for ASIC to commence legal action against the entity. Arguably, the

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<sup>133</sup> ASIC, above n 21, [3.11 to 3.17].

<sup>134</sup> Ibid .

<sup>135</sup> *Australian Securities and Investments Commission Act 2001* (Cth) ss 93AA(4), 93A(4).

<sup>136</sup> *Australian Securities and Investments Commission Act 2001* (Cth) ss 93AA(3)–(4), 93A(3)–(4).

current procedures leave the affected party with insufficient safeguards to challenge ASIC's decisions on their merits and potentially expose such a party to an arbitrary use of power.

#### 4. Recap

Formal internal review is somewhat limited in relation to infringement notices and enforceable undertakings. As these sanctions are not frequently applied by ASIC and involve the exercise of discretionary power by ASIC, this lends support to making internal merits review available. However, as these decisions are quite 'serious' and are made by fairly senior staff of ASIC, and the parties have been afforded the opportunity to state their case to ASIC before the sanction was imposed, these factors may partly justify limiting, although not excluding, internal merits review.

However, 'internal review can never be a substitute for external review'<sup>137</sup> as it lacks the independence and credibility of external review. Generally, the public has little confidence in a system which is not independent of the decision maker. True accountability therefore necessitates 'independent, external avenues of review'.<sup>138</sup> Accordingly, both internal and external review is needed. If cost and efficiency require a choice between internal and external review, then external review should take precedence.<sup>139</sup> There may be some justification for limiting internal review in order to protect the public's interest in ASIC being able to apply these sanctions relatively quickly in order to promote and protect the transparency and efficient operation of the financial market. However, an appropriate balance needs to be effected between the competing interests and, as these administrative sanctions are not frequently applied, to allow merits review would not overly increase the cost or inefficiency of the system. Further, merits review, as compared to ASIC initiating court proceedings against an entity that ignores an administrative sanction, should provide advantages in terms of costs and time.

To further evaluate ASIC's accountability, the availability of external merits review for infringement notices and enforceable undertakings will now be examined.

#### B. External Review

External review is conducted by either the courts or tribunals, depending on whether judicial review or merits review is being sought. The advantage of external review is that it is independent of the original decision maker.

External merits review may be conducted by the AAT, which can affirm, vary or make a new decision<sup>140</sup> on a wide range of administrative decisions, providing the conferring legislation allows it to do so.<sup>141</sup> Judicial review is generally available, unless expressly excluded by legislation, while external merits review is only available if expressly provided for in the legislation

Where administrative sanctions are imposed, external review may be the first or only avenue of review. Legislation may also exclude or limit either one or both forms of external review. However, the High Court has held that any attempt to oust the jurisdiction of the High Court itself would be unconstitutional.<sup>142</sup> For infringement notices and enforceable undertakings, external

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137 John Uhr, 'Accountability without Independent External Review' (1997) 84 *Canberra Bulletin of Public Administration* 57, 58; ALRC, above n 18, [20.16].

138 ALRC, above n 18, [20.17].

139 Robin Creyke, 'Sunset for Administrative Law Industry? Reflection on Developments under a Coalition Government' (1998) 87 *Canberra Bulletin of Public Administration* 39, 48.

140 *Administrative Appeals Act 1975* (Cth) s 43.

141 *Administrative Appeals Act 1975* (Cth) s 25.

142 *Plaintiffs 157/2002 v Commonwealth* (2003) 211 CLR 476.

merits review is unavailable, although judicial review may be sought under the common law or under the *AD(JR) Act*,<sup>143</sup> providing they are considered to be 'reviewable decisions'.<sup>144</sup>

### *1. Factors that May Justify Limiting or Excluding External Merits Review*

The ALRC accepted that external review may be inappropriate for some decisions; for instance decisions to commence legal proceedings to seek a civil or criminal penalty or 'legislation like decisions of broad application (which are subject to the accountability safeguards that apply to legislative decisions), or decisions that automatically flow from the happening of a set of circumstances (which leave no room for merits review to operate).'<sup>145</sup> Accordingly, external merits review may not be appropriate where administrative decisions do not involve the exercise of any discretion by the decision maker, but simply involve the application of a sanction prescribed by the legislation for a particular fact situation which is also defined by the legislation. For instance, external merits review is unavailable where a person is automatically disqualified from managing a corporation under s 206B of the *Corporations Act* on proof of a conviction for a defined criminal offence. However, both infringement notices and enforceable undertakings involve the application of discretionary power by ASIC. For example, with infringement notices, before ASIC issues the notice it must consider any guidelines provided by the ASX or 'any other relevant matter',<sup>146</sup> which allows it discretionary power. In relation to enforceable undertakings, as they are negotiated settlements between ASIC and the other party, evidently ASIC exercises discretionary power in determining what it considers important in reaching such a compromise. Such an exercise of discretionary power by ASIC, when it imposes these administrative sanctions, further supports the argument that greater statutory protections are needed to make ASIC accountable for these decisions by providing increased access to internal review and making external merits review available.

Apart from the types of decisions outlined above, the ALRC recommended that where regulators impose administrative sanctions, generally both external merits and judicial review should be available.<sup>147</sup> However, ASIC strongly opposed this, claiming it was 'contrary to established law and practice in that 'only final and operative penalty decisions' should be 'subject to external merits or judicial review.'<sup>148</sup> ASIC claimed that to recommend otherwise would indicate that the ALRC was suggesting a reform of the standing rules. The ALRC response at the time was that this was not its intention.<sup>149</sup>

Accordingly, the ALRC considered that merits review may also be unsuitable where a decision is 'preliminary or procedural' as, generally, it would not have substantive consequences. Review would only serve to 'frustrate the making of substantive decisions.'<sup>150</sup> A further rationalisation for excluding external merits review is that as the entity was not obliged to obey the administrative sanction, it was therefore considered as having consented to ASIC applying the sanction. Accordingly, the relevant determination is not ASIC's decision to apply the sanction but rather ASIC's determination as to whether or not it will initiate court proceedings if the entity disobeys the sanction.<sup>151</sup> The decision to commence legal proceedings is generally accepted as a non-reviewable decision.<sup>152</sup> Arguably this reasoning was used to support the exclusion of external

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143 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 6.

144 *ABT v Bond* (1990) 170 CLR 321,338 considered a 'reviewable decision' to be the 'ultimate or operative determination'.

145 ALRC, above n 18, [21.48].

146 *Corporations Act 2001* (Cth) s 1317DAC(4).

147 ALRC, above n 18, [21.46].

148 *Ibid* [21.44]; ASIC, above n 112, 37; *ABT v Bond* (1990) 170 CLR 321.

149 ALRC, above n 18, [21.44].

150 *Ibid* [21.9].

151 Explanatory Memorandum, Corporate Law and Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (Cth) [5.466]

152 ALRC, above n 18, [21.48].



merits review for enforceable undertakings and infringement notices. However, this allows ASIC to engage in this administrative activity with limited accountability.

It is not really an answer to the problem, to state that judicial review may be available under the *AD (JR) Act*,<sup>153</sup> s 79B of the *Judiciary Act 1903* (Cth) or s 75 of the *Commonwealth Constitution*. A person's complaint may not be that ASIC has acted 'unlawfully', warranting judicial review, but rather that ASIC's decision was not the 'best or preferable decision'. Further, the rules of evidence, standard of proof and formality of the procedures vary greatly between merits review by administrative tribunals and judicial review by the courts. In addition, the financial costs of seeking judicial review may be outside the reach of most small companies, making such review 'illusory'.<sup>154</sup> As previously discussed, the outcomes for the two types of review also differ in that judicial review requires the matter to be remitted to ASIC to remake the decision in accordance with the law, while merits review allows the tribunal to make a new decision to replace ASIC's decision.<sup>155</sup>

If a disclosing entity ignores an infringement notice, then unlike for enforceable undertakings, ASIC does not request a court order to enforce the infringement notice. Instead, ASIC may initiate new proceedings to seek either a criminal or civil penalty order for an actual breach of the continuous disclosure provisions.<sup>156</sup> Therefore, unlike enforceable undertakings, infringement notices issued by ASIC in this sense are not 'preliminary determinations' and should be subject to external merits review.

However, the contrary view is that as the disclosing entity can simply ignore the notice, compliance with the notice is consensual and thereby external merits review is not required.<sup>157</sup> Although it is true that the disclosing entity may refuse to obey the notice, it then runs the risk that ASIC may commence civil or criminal proceedings against it for the matters raised in the infringement notice. Indirectly, therefore, ASIC has a tool to coerce the disclosing entity into complying with its determination. Accordingly, such a determination should be subject to external merits review as infringement notices may have substantive consequences for the disclosing entity, both where it obeys the notice and where it ignores it. This is supported by the Administrative Review Council (ARC), which considered external review appropriate for recommendations or preliminary decisions that have a 'substantive or operative effect'.<sup>158</sup> The ARC considered that such an effect depended on whether the final decision maker reviews all the facts and circumstances when making their decision or simply rubber stamps the recommendation.<sup>159</sup> As previously stated for infringement notices, it is ASIC and not the courts which makes the determination to issue and enforce the notice.

However, with enforceable undertakings, the actual enforcement of the undertaking is conducted by the courts and not ASIC.<sup>160</sup> If ASIC considers that the person has breached the enforceable undertaking, it can request a court order, which may include an order to enforce the undertaking itself or any order the court considers appropriate. Where enforceable undertakings

153 Subject to the issue as to whether it would be considered a 'reviewable' decision to come within the *Administrative Decisions Judicial Review Act 1977* (Cth) ss 5–6.

154 Langley, above n 16, 464.

155 See, eg, *Murdaca v Accounts Control Management Services Pty Ltd* [2007] FCA 577, in which the Federal court upheld an appeal by ASIC against a decision of the AAT concerning a disqualification order. The matter was remitted back to the AAT to make a new decision in accordance with the law; Also see *Daws v Australian Securities and Investments Commission* [2006] AATA 321.

156 *Corporations Act 2001* (Cth) ss 674–5. A breach of either section may constitute an offence under s1311(1) or a civil penalty under s 1317E.

157 Explanatory Memorandum, Corporate Law and Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (Cth) [5.466].

158 ARC, *What Decisions Should Be Subject to Merits Review?* (1999) [8]; ALRC, above n 18, [21.9].

159 *Ibid* [4.48].

160 *Australian Securities and Investments Commission Act 2001* (Cth) s 93AA(4).

are negotiated, accepted and complied with by the entity, arguably they have a substantive and operative effect. Accordingly, external merits review ought to be available. If the entity complies with the undertaking, although there is limited internal review, external merits review is unavailable to challenge the initial negotiated agreement. Perhaps some would argue that the entity was not forced to enter into the negotiated settlement, but elected to do so. However, where a person is negotiating with the corporate regulator, who is also empowered to seek civil, criminal and administrative sanctions against you, this raises the question as to whether there is a level playing field. What protections are afforded to the entity, if it disagrees with ASIC? Greater procedural protections for the regulated community are needed to make ASIC more accountable for its determinations to accept enforceable undertakings.

The classification of infringement notices and enforceable undertakings as 'preliminary' and 'consensual' determinations was used to justify excluding external merits review and thereby reduce ASIC's level of accountability. Although the ALRC did not recommend amending the tests for 'standing' and 'jurisdiction' for external merits review of such decisions, it noted that judicial review may apply to the 'conduct or other activities' of a regulator, even where there was not a 'final and operative penalty decision'.<sup>161</sup>

## V. PROPOSED REFORM

Despite the ALRC's reluctance to advocate changing the standing rules, perhaps this is what is required. A suggestion would be to frame the rules in a similar way to those used under the *AD (JR) Act*, by allowing the AAT jurisdiction to consider the merits of the regulator's 'administrative conduct', even where its determinations are not deemed final. Further, the AAT's jurisdiction to review ASIC's determinations to issue infringement notices or accept enforceable undertakings should be expressly provided for under the corporations legislation. It should be noted that currently, under the corporations legislation, external merits review is available when ASIC applies other administrative sanctions, such as banning orders and disqualification orders.<sup>162</sup> Defining infringement notices and enforceable undertakings as 'reviewable decisions' by express provisions within the corporations legislation would clarify the situation and reduce the time spent by courts and tribunals in determining issues of jurisdiction and the meaning of terms, such as 'reviewable decision'.<sup>163</sup> Further, allowing access to the AAT, which is an existing tribunal that already provides merits review for other administrative sanctions imposed by ASIC, would be an easier and more cost-effective solution than setting up a new, specialist independent review tribunal.<sup>164</sup>

## VI. CONCLUSION

Where legislators exclude one form of review, whether it be internal review, external merits review or judicial review, some justification is needed for weakening the level of accountability by the regulator. Although administrative speed, efficiency and cost may be considered as some justification for limiting or excluding internal review, these same arguments should not be used to rationalise excluding external merits review. Arguably, this should be particularly the case where a regulator such as ASIC wields significant power and can apply administrative sanctions which may substantially affect those upon whom they are imposed. Accordingly, the exclusion of external merits review and the limitation of internal review for such administrative sanctions only serves to weaken ASIC's accountability to the public.

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<sup>161</sup> ALRC, above n 18, [21.45].

<sup>162</sup> See, eg, banning orders and disqualification orders under *Corporations Act 2001* (Cth) ss 920A, 206F.

<sup>163</sup> See *ABT v Bond* (1990) 170 CLR 321.

<sup>164</sup> See Langley, above n 16, 465, where she suggests the setting up of an independent review body similar to the Takeovers Panel.

As ASIC does not frequently issue infringement notices or accept enforceable undertakings, administrative efficiency and costs should not be the primary consideration when deciding whether or not to exclude merits review for these administrative sanctions. The paramount concern should always be the public's interest in regulators acting fairly, consistently and transparently, and being made accountable for their decisions by providing 'systems of review'.<sup>165</sup> For the regulated and wider community to accept ASIC's determinations, ASIC must be made accountable. This requires the availability of both judicial review and external merits review.

It would seem that the legislative framework relating to merits review of ASIC's determinations, particularly for infringement notices and enforceable undertakings, is inadequate. To promote greater accountability by ASIC for these administrative sanctions, it is suggested that the present legislative safeguards need to be strengthened. External merits review should be made available for both infringement notices and enforceable undertakings. It is therefore recommended that the current standing rules and jurisdiction of the AAT should be amended to allow merits review of ASIC's administrative conduct, in a similar way to judicial review under the *AD (JR) Act*.<sup>166</sup> Further, the corporations legislation should be amended to expressly provide that infringement notices and enforceable undertakings are 'reviewable decisions'. Doing so would overcome the justification that external merits review is excluded because the decisions are considered to be recommendations or preliminary determinations, without any substantive effect. Further, a statutory right to reasons ought to be provided, preferably under the corporations legislation and/or by making external merits review to the AAT available.<sup>167</sup> Such legislative reform is necessary to strengthen ASIC's accountability and to enhance public confidence in its determinations, knowing that the corporate regulator itself is also being watched.

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165 ALRC, above n 18, [20.60].

166 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 6.

167 *Administrative Appeals Tribunal Act 1975* (Cth) s 28.