

INFRINGEMENT NOTICES UNDER THE CORPORATIONS ACT 2001 (CTH): HAS THE COMMONWEALTH PARLIAMENT GONE TOO FAR?

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Abstract

This paper aims to critically evaluate the Australian Securities and Investment Commission's statutory power to issue infringement notices under Part 9.4AA of the *Corporations Act 2001* (Cth). It will be argued that this legislative scheme invalidly confers Commonwealth judicial power on an administrative body and therefore should be repealed or substantially amended. Within the context of the constitutional doctrine of the separation of powers, the functional approach, which is currently endorsed by the High Court, as well as an alternative approach that focuses on the *character of the proceedings* rather than the repository of the power, will be applied to support the argument that empowering ASIC to issue infringement notices under the *Corporations Act 2001* (Cth) is constitutionally invalid.

I INTRODUCTION

Currently the power of the Commonwealth executive and the strength of regulators appear to be expanding rapidly.¹ This has been encouraged by legislative action aimed at limiting or ousting independent judicial review of statutory powers exercised by administrative bodies.² Without careful monitoring of these administrative bodies, there is a risk that they may abuse their statutory power, thereby undermining the rule of law. Close scrutiny of statutory powers granted to administrative

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1 *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1, 8 (Kirby J); *Visnic v ASIC* (2007) 234 ALR 413, 423; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 234 ALR 618, 633 (Kirby J); Roger Douglas, *Administrative Law* (5th ed, Sydney: Federation Press, 2006) 696.

2 Douglas, above n 1, 696.

bodies, such as the Australian Security and Investment Commission ('ASIC'), is also essential to safeguard against any further blurring of the constitutional separation of powers. The High Court's role in protecting the separation of powers doctrine was again stressed in *Attorney-General (Cth) v Alinta Ltd.*³ If the rule of law and separation of powers doctrines are to be sustained, administrative bodies, such as ASIC, must be held accountable for their determinations through independent judicial review.

ASIC is a Commonwealth administrative body that administers, investigates and promotes company compliance with the *Corporations Act 2001* (Cth). ASIC can commence legal action and seek appropriate court orders against a disclosing entity that ASIC believes has contravened the *Corporations Act 2001* (Cth).

Part 9.4AA of the *Corporations Act 2001* (Cth), which was introduced in 2004, empowers ASIC to issue infringement notices to disclosing entities for an alleged breach of the continuous disclosure provisions.⁴ The continuous disclosure provisions require disclosing entities to provide information that a 'reasonable person would expect to have a material effect on the price or value' of their securities.⁵ This legislative scheme aims to promote an improved culture of compliance with the continuous disclosure provisions. Also, the scheme allows ASIC to pursue more contraventions than previously, particularly those of a less serious nature.⁶

II WHAT ARE INFRINGEMENT NOTICES?

Part 9.4AA of the *Corporations Act 2001* (Cth) allows ASIC to determine that a disclosing entity has allegedly breached s 674(2) or s 675(2). Where ASIC reasonably believes, after it conducts its investigations, that the disclosing entity may have contravened the continuous disclosure provisions, it may issue an infringement notice.⁷ Before doing so, ASIC must provide the disclosing entity with a statement of its reasons and allow the disclosing entity to respond by making an oral or written

3 (2008) 242 ALR 1, 2.

4 *Corporations Act 2001* (Cth) s 674(2) or s 675(2); Part 9.4AA introduced by *Corporate Law Economic Reform Program ('CLERP') (Audit Reform and Corporate Disclosure) Act 2004* (Cth) Sch 6, cl 9.

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

6 Explanatory Memorandum to the CLERP (Audit Reform and Corporate Disclosure) Bill 2003 (Cth) [4.259]; ASIC, *Regulatory Guide 73 Continuous Disclosure Obligations: Infringement Notices*, (2004) [4] <<http://www.fido.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument>, 4.> at 3 May 2007.

7 *Corporations Act 2001* (Cth) s 1317DAC(1).

submission.⁸ An infringement notice imposes a fine on the disclosing entity for an *alleged* breach of the continuous disclosure provisions and may also require the disclosing entity to provide specific information to the Australian Securities Exchange ('ASX') or ASIC.⁹ The disclosing entity has twenty-eight days to do so.¹⁰ Failure to comply allows ASIC to initiate court proceedings against the entity for an *actual* breach of the continuous disclosure provisions.¹¹ Before infringement notices were introduced into the *Corporations Act 2001* (Cth), ASIC could, and may still, seek court orders against a disclosing entity under the criminal and civil penalty regime for an actual breach of the continuous disclosure provisions.¹²

Infringement notices were seen as providing an 'on the spot fine'. However, this is deceptive, as the process is complex and time consuming.¹³ There are ten stages set out under ss 1317DAA to 1317DAJ of the *Corporations Act 2001* (Cth). In May 2004, ASIC issued a guide to infringement notices, entitled 'Continuous Disclosure Obligations: Infringement Notices', which outlined the procedural steps for issuing an infringement notice.¹⁴ When infringement notices were incorporated into the legislation, there was significant opposition to the imposition of financial penalties.¹⁵ Consequently, the Commonwealth government promised to review the legislative scheme.¹⁶ Accordingly, in March 2007, the Treasury issued a Consultation Paper on infringement notices and their application to the continuous disclosure regime.¹⁷

In response, this article argues that empowering ASIC to issue infringement notices, under Part 9.4AA of the *Corporations Act 2001* (Cth), constitutes an unconstitutional vesting of Commonwealth judicial

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

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

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

11 *Corporations Act 2001* (Cth) s 1317DAG(2).

12 *Corporations Act 2001* (Cth) ss 1317E(1)(ja), 1317G, 1324B, s 1311(3) where the penalties are set out in Sch 3 and also see s 1312.

13 Marina Nehme, Margaret Hyland and Michael Adams, 'Enhancement of Continuous Disclosure' (2007) 21(2) *Australian Journal of Corporate Law* 112, 121.

14 ASIC, *Regulatory Guide 73 Continuous Disclosure Obligations: Infringement Notices*, (2004) <<http://www.fido.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument>, 4.> at 7 November 2008.

15 Explanatory Memorandum to the CLERP (Audit Reform and Corporate Disclosure) Bill 2003 (Cth) [4.264].

16 Robert Baxt, 'The New Fining Power for the Australian Securities and Investments Commission' (2004) 32 *Australian Business Law Review* 61, 61.

17 The Commonwealth Treasury 'Review of the Operation of the Infringement Notice Provisions of the *Corporations Act 2001*' (Consultation Paper, March 2007) <<http://www.treasury.gov.au/contentitem.asp?NavId=013&ContentID=1198>> at 11 December 2008.

power on an administrative body. Consequently, the legislative scheme should be repealed or substantially amended to ensure ASIC only exercises administrative powers. This analysis will be conducted within the context of the constitutional doctrine of the separation of powers. The constitutional validity of ASIC's powers to issue infringement notices will firstly be evaluated by applying the functional approach, which is presently followed by the High Court.¹⁸ Secondly, it will briefly examine ASIC's power to issue infringement notices by applying an alternative approach, which focuses on the *character of the infringement notice proceedings*, to further support the argument that empowering ASIC to issue infringement notices under the *Corporations Act 2001* (Cth) is constitutionally invalid.

The functional approach focuses on the nature of the repository of the power, when deciding whether there has been an unconstitutional conferral of power on that body.¹⁹ In *Visnic v ASIC*,²⁰ Kirby J criticised this approach because it makes it very difficult to successfully challenge the constitutional validity of Commonwealth legislation.²¹ Consequently, this may negatively impact on the maintenance of the constitutional separation of powers. In *Attorney General (Cth) v Alinta Ltd*,²² Kirby J stressed that the High Court must be increasingly vigilant to safeguard the separation of powers, due to the current culture of expanding the powers and strength of the executive and the regulatory state.²³ This concern has been repeatedly expressed by Justice Kirby over the past decade.²⁴ Interestingly, most of the constitutional challenges to the validity of Commonwealth legislation, using the functional approach that is presently followed by the High Court, have failed.²⁵ Accordingly,

18 *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1, 10-11 (Kirby J) citing *Precision Data Holdings Ltd v Wills* (1993) 173 CLR 167, 189; *Visnic v ASIC* (2007) 234 ALR 413, 424; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 234 ALR 618, 627; *Luton v Lessels* (2002) 210 CLR 333, 373; *Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83, 126 (Kirby J); *Brandy v Human Rights and Equal Opportunity Commission* (1994) 183 CLR 245, 267.

19 *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 234 ALR 618, 627.

20 (2007) 234 ALR 413.

21 *Visnic v ASIC* (2007) 234 ALR 413, 424.

22 (2008) 242 ALR 1.

23 *Attorney General (Cth) v Alinta Ltd* (2008) 242 ALR 1, 7.

24 *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 234 ALR 618, 633; *Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83, 125-126.

25 See for example *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1; *Visnic v ASIC* (2007) 234 ALR 413; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 234 ALR 618; *Luton v Lessels* (2002) 210 CLR 333, 361 (Gaudron and Hayne JJ); *Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83, 137.

an alternative approach should be considered, if the separation of powers doctrine and the rule of law are to be sustained. For example, an analysis that focuses on the ‘character of the proceedings’, as endorsed by the United States Supreme Court,²⁶ may be more effective. Therefore, this approach will be briefly discussed when examining the constitutional validity of ASIC’s power to issue infringement notices.

III SEPARATION OF POWERS AND THE FUNCTIONAL APPROACH

The functional approach relies upon the constitutional separation of powers to draw the constitutional line between judicial and administrative powers. The constitutional separation of powers presumes that the Commonwealth legislative power will be exercised by the Commonwealth Parliament, the administrative power by the Commonwealth executive and the judicial power by Commonwealth courts.

Within the context of a challenge to the constitutional validity of a conferral of statutory power to a Commonwealth administrative body, the High Court’s jurisprudence lacks theoretical or conceptual clarity.²⁷ The lack of a coherent doctrine and use of criteria that are difficult to predict was referred to by Kirby J in *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (*‘Albarran’*).²⁸ Earlier, in *Attorney-General of the Commonwealth v Breckler*,²⁹ Kirby J had stated that the functional analysis once again demonstrated that there was no ‘essential or constant characteristic’ for Commonwealth judicial power, distinguishing it from non-judicial functions performed by administrative tribunals.³⁰ It would seem that the court’s approach tends to promote ‘overlap’ rather than a ‘separation’ of powers, as the boundaries are not clearly defined.³¹ This grey area in defining the division between executive and judicial power has been labelled the ‘double aspect’,³² the ‘borderland’,³³ the ‘overlap area’,³⁴ or the

26 *Visnic v ASIC* (2007) 234 ALR 413, 423.

27 G Airo-Farulla and S White ‘Separation of Powers, Traditional Administration and Responsive Regulation’ (2004) 4 *Macquarie Law Journal* 57, 61.

28 (2007) 234 ALR 618, 633.

29 (1999) 197 CLR 83.

30 *Attorney General of the Commonwealth v Breckler* (1999) 197 CLR 83, 113 citing *Brandy v Human Rights and Equal Opportunity Commission* (1994) 183 CLR 245, 267.

31 Airo-Farulla and White, above n 27, 62.

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

33 *Labour Relation Board of Saskatchewan v John East Iron Works Ltd* (1949) AC 134 (Lord Simonds).

34 *Luton v Lessels* (2002) 210 CLR 333, 387 (Callinan J) citing *The Queen v Trade*

‘chameleon’ principle.³⁵ There are a number of ad hoc determinations lacking any consistent rule.³⁶ The chameleon principle of ‘innominate’ functions suggests that the Commonwealth legislation’s assignment of a particular function to a designated body influences the constitutional characterisation of the exercise of that function.³⁷ Some critics consider that if this principle is left unrestrained, it may subvert the constitutional separation of powers by suggesting that Parliament, rather than courts, ‘draw the constitutional line’.³⁸ Justice Kirby disagrees with the critics, stating that the High Court, not Parliament, ultimately determines this question.³⁹ Further, to sustain the rule of law, the courts, and not the executive, must define the legal and constitutional limits of statutory executive power.⁴⁰ Accordingly, legislative privative or ouster clauses that attempt to exclude judicial review of statutory executive decisions arguably undermine the rule of law.⁴¹ These clauses are unconstitutional if they target the High Court’s jurisdiction.⁴² Within public law a minimum level of judicial review of administrative decision-making has been held to be a basic constitutional requirement.⁴³ This makes the executive accountable for its decisions and safeguards against the abuse of power.⁴⁴ Further, judicial review ensures judicial independence in relation to any accountability measures.⁴⁵

Despite criticism of the functional approach, while it is endorsed by the High Court, it must be applied when determining the constitutional validity of ASIC issuing infringement notices. The functional approach adopts a ‘somewhat transcendental analysis’⁴⁶ of the challenged legislative provisions to determine whether an unconstitutional conferral

Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361, 373 (Kitto J), quoting Privy Council in *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134, 148.

35 *Albarran* (2007) 234 ALR 618, 634 (Kirby J); *Visnic v ASIC* (2007) 234 ALR 413, 422 (Kirby J); *Luton v Lessels* (2002) 210 CLR 333, 387 citing *The Queen v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 18 (Aickin J).

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

37 *Albarran* (2007) 234 ALR 618, 634 (Kirby J); *Visnic v ASIC* (2007) 234 ALR 413, 422 (Kirby J).

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

39 *Albarran* (2007) 234 ALR 618, 634.

40 D Meyerson, ‘The Rule of Law and the Separation of Powers’ (2004) 4 *Macquarie Law Journal* 1, 2; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 478.

41 Airo-Farulla and White, above n 27, 61.

42 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482.

43 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 511; *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1, 13 (Kirby J).

44 *Church of Scientology v Woodward* (1982) 154 CLR 25, 70.

45 Meyerson, above n 40, 2.

46 *Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83, 114 (Kirby J), who cited *R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 (Windeyer J).

of judicial power was made to a non-judicial body. The functional approach weighs those features common to courts and non-judicial tribunals against features which are characteristic of administrative decision-making.⁴⁷ Some functions may readily be defined as judicial power, others require closer analysis, while others are labelled judicial because ‘their performance has been committed to a court in the strict sense’.⁴⁸ Accordingly, to determine whether the repository of the power is exercising Commonwealth judicial power contrary to the constitutional separation of powers, the High Court must draw the dividing line between administrative and judicial powers. This requires a definition of Commonwealth judicial power.

IV DEFINITION OF COMMONWEALTH JUDICIAL POWER

Section 71 of the Commonwealth Constitution refers to Commonwealth judicial power but fails to define it. Although the Constitution does not expressly state that judicial power cannot be conferred on administrative bodies, this is the accepted inference drawn from the Constitution’s structural division of the legislative, judicial and executive powers. Commonwealth judicial power is limited by the constitutional provision, that there be a ‘matter’.⁴⁹ Accordingly, Commonwealth judicial power excludes purely advisory or hypothetical decision-making.⁵⁰

As there is no express constitutional definition of Commonwealth judicial power, the High Court has attempted to define its meaning. This has proved difficult and a precise definition remains elusive.⁵¹ The High Court’s definition of Commonwealth judicial power becomes particularly important where it is alleged that the Commonwealth legislation contravenes the constitutional doctrine of separation of powers by conferring ‘judicial’ power on an administrative body.⁵² Chief Justice Griffith in *Huddart, Parker & Co. Pty Ltd v Moorehead*,⁵³

47 *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1, 10-11 (Kirby J); *Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83, 125 (Kirby J).

48 *The Queen v Davison* (1954) 9 CLR 353, 388 (Taylor J).

49 *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1, 10 (Kirby J) citing *The State of South Australia v The State of Victoria* (1911) 12 CLR 667, 674-675, 715; *In re The Judiciary Act and In re The Navigation Act 1912-1920* (1921) 29 CLR 257, 264-267.

50 *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1, 9 (Kirby J); *Albarran* (2007) 234 ALR 618, 635 (Kirby J).

51 *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1, 39; *Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83, 113 (Kirby J).

52 *Huddart, Parker & Co. Pty Ltd v Moorehead* (1909) 8 CLR 330, 357; *Visnic v ASIC* (2007) 234 ALR 413; *Luton v Lessels* (2002) 210 CLR 333, 373 (Kirby J).

53 (1909) 8 CLR 330.

provided an accepted starting point for the definition of Commonwealth judicial power, defining it as the power to decide controversies between subjects or between the crown and its subjects.⁵⁴ Commonwealth judicial power begins when a ‘tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action’.⁵⁵

Today, almost one hundred years after Chief Justice Griffith’s definition, there is still no single model or unique subject matter that defines Commonwealth judicial power. Therefore, the characterisation of a power as judicial is derived from examining what the relevant tribunal or agency is authorised to do; whether those affected by its decisions are denied access to the courts for a resolution of related legal controversies and whether its decisions are directly enforceable, as court orders generally are.⁵⁶

Some characteristics have been judicially considered as being indicative of Commonwealth judicial power, although not necessarily exercised exclusively by the courts or representing an exhaustive list.⁵⁷ Consequently, the most significant indicators of judicial power will be examined and applied to infringement notices. This analysis will support the argument that these infringement notices under the *Corporations Act 2001* (Cth) are an unconstitutional conferral by the Commonwealth Parliament of Commonwealth judicial power on ASIC. The six significant indicators of Commonwealth judicial power will be examined below.

A *Final and Binding Order*

Courts have held that the essential features of judicial power are the authority to make a ‘final and binding order’ against parties in dispute and the power to enforce this order.⁵⁸ Where the legislation specifically

54 *Huddart, Parker & Co. Pty Ltd v Moorehead* (1909) 8 CLR 330, 330.

55 *Huddart, Parker & Co. Pty Ltd v Moorehead* (1909) 8 CLR 330, 357.

56 *Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83, 127 (Kirby J).

57 *Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83, 124-125; *Labour Relation Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134 (Lord Simonds).

58 *The Queen v Davison* (1954) 90 CLR 353, 375 where reliance was placed upon Blackstone’s Commentaries, the dicta in *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ) and *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 176 (Isaacs J) to support the concept of ‘enforcement’ as being essential to the exercise of judicial power; *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1, 41-42 where reference was made to Palles CB in *R (Wexford County Council) v Local Government Board for Ireland* [1902] 2 IR 349, 373-374.

states that the tribunal's determinations are 'not binding or conclusive', it is not exercising Commonwealth judicial power.⁵⁹

In Australia, the punishment of criminal offences is accepted as inalienable exercises of judicial power.⁶⁰ This is because existing principles and standards are applied. Further, such determinations are considered to be binding and authoritative because they impose an 'immediately enforceable liability'.⁶¹ Accordingly, if an administrative tribunal made such a determination, this would be considered an unconstitutional exercise of Commonwealth judicial power.⁶² *Brandy v Human Rights and Equal Opportunity Commission* ('*Brandy*')⁶³ held that the Human Rights and Equal Opportunity Commission's ('Commission') determinations became binding and enforceable against the parties, when registered in the Federal Court, thereby taking effect as if they were Federal Court orders.⁶⁴ As no independent judicial review was required to enforce the Commission's determination, the Commission was held to be invalidly exercising Commonwealth judicial power.⁶⁵ Consequently, administrative agencies cannot make determinations that are binding or enforce those determinations against an unwilling party.⁶⁶ The review procedure set out under the Commonwealth legislation in *Brandy*⁶⁷ was a 'rehearing', not a hearing '*de novo*', in the Federal Court.⁶⁸ Although, the Federal Court 'may' review all the issues of fact and law, it was not bound to do so. Further, it was unlikely to do so, without some specified grounds for disturbing the Commission's determination. As the review procedure failed to show that the registration of the Commission's determination was the commencement of 'fresh' proceedings in the Federal Court, the Commission was held to be invalidly exercising Commonwealth judicial power.⁶⁹

59 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 257.

60 *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1, 41 citing *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 444 (Griffith CJ); also see *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 175 (Isaacs J); See above n, 58.

61 *Brandy v Human Rights and Equal Opportunity Commission* (1994) 183 CLR 245, 259.

62 *Brandy v Human Rights and Equal Opportunity Commission* (1994) 183 CLR 245, 259.

63 (1994) 183 CLR 245.

64 *Brandy* (1994) 183 CLR 245, 245.

65 *Brandy* (1994) 183 CLR 245, 264.

66 Suri Ratnapala, 'Harry Brandy's Case and its Implications for Tax Administration in Australia' (1995) 18(2) *University of Queensland Law Journal* 233, 234.

67 (1994) 183 CLR 245.

68 *Brandy* (1994) 183 CLR 245, 254.

69 *Brandy* (1994) 183 CLR 245, 263-264.

With infringement notices, there is no requirement for ASIC to register its determination to issue the infringement notice with the court. Further, the court is provided with no opportunity to oversee ASIC's determination at all. If the disclosing entity accepts ASIC's determination, then the disclosing entity must pay the fine or disclose the specified information, as determined by ASIC and set out in the infringement notice. If the disclosing entity ignores the infringement notice, then ASIC may initiate court proceedings against the disclosing entity for an actual contravention of the continuous disclosure provisions but not for failure to comply with the notice. Therefore, there is no *de novo* hearing of ASIC's initial determination. Accordingly, where ASIC issues an infringement notice, there is no independent judicial oversight for the enforcement of this determination. Consequently, the decision to issue an infringement notice is an unconstitutional vesting of Commonwealth judicial power in an administrative body. Further, perhaps the test in *Brandy* is inadequate.⁷⁰ Accordingly, if the constitutional separation of powers is to be maintained, then an alternative focus of looking at the character of the proceedings should be examined, within this context of constitutional challenges to Commonwealth legislation that confers statutory powers on Commonwealth administrative bodies, such as ASIC.⁷¹

Often administrative determinations are complied with. If independent judicial review is available for disputed decisions, the tribunal's determinations generally will not be characterised as an invalid exercise of Commonwealth judicial power.⁷²

When ASIC issues an infringement notice under Part 9.4AA of the *Corporations Act 2001* (Cth), it applies the legislative criteria in s 674(2) or s 675(2), which define wrongful conduct by disclosing entities.⁷³ The infringement notice may impose a fine⁷⁴ and also require the disclosing entity to provide specific information to ASX⁷⁵ or ASIC,⁷⁶ to rectify the 'wrongful' past conduct *allegedly* committed by the disclosing entity.⁷⁷

70 (1994) 183 CLR 245.

71 This is discussed later in the paper under the heading 'VI Alternate Analysis: Character of the Proceedings'.

72 *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1, 12-13 (Kirby J); *Luton v Lessels* (2002) 210 CLR 333, 374-375; *Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83, 124; *Brandy* (1994) 183 CLR 245, 268-269.

73 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 175 (Isaacs J) for statement about 'punishment for crime or trial of actions for breach of contract or for wrongs'.

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

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

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

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

If the infringement notice is accepted by the disclosing entity, the penalties are an immediate liability, allowing the disclosing entity 28 days to comply.⁷⁸ Generally, disclosing entities obey the infringement notice.⁷⁹ Perhaps it is easier than the risk that ASIC may take court action against them for an actual breach of the continuous disclosure provisions.

Section 1317DAG of the *Corporations Act 2001* (Cth) states what ASIC may do if the disclosing entity ignores the infringement notice. This section permits ASIC to seek various court orders, *not* to enforce the infringement notice which is based on an *alleged* breach of the Act, but to seek a court declaration that the disclosing entity has *actually* contravened the continuous disclosure provisions. On proof of contravention, the court may grant a pecuniary penalty order,⁸⁰ or an order to disclose or publish information,⁸¹ again for an *actual* contravention. Further, the onus and standard of proof used by the court and ASIC is different when reaching their determinations. In court proceedings, ASIC must prove on the balance of probabilities that the disclosing entity has breached the continuous disclosure provisions. With an infringement notice, ASIC may issue a notice, where it reasonably believes that a disclosing entity has breached the continuous disclosure provisions. Such a belief is based on ASIC's investigations and any evidence provided by the disclosing entity to ASIC to persuade ASIC to change its position.⁸² If the disclosing entity elects not to be heard, ASIC may still issue a notice. Where the disclosing entity is heard, it must prove to ASIC that it has not breached the relevant provisions. The standard of proof, the conduct of the investigation and hearing are all determined by ASIC. Further, ASIC's determination to issue or withdraw an infringement notice cannot be reviewed by the Administrative Appeals Tribunal ('AAT').⁸³ Where ASIC withdraws an infringement notice, s 1317DAI(6)(d) and s 1317DAI(6)(e) of the *Corporations Act 2001* (Cth) allow ASIC to commence legal proceedings against the disclosing entity, again for *actual* contravention of the continuous disclosure provisions. The criteria applied by the court under s 674(2) or s 675(2) are the same as those used by ASIC in reaching its determination of an *alleged* breach of the provisions.⁸⁴

The legislative scheme repeatedly uses the word *alleged* to suggest that

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

79 Nehme, Hyland and Adams, above n 13, 123.

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

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

82 *Corporations Act 2001* (Cth) ss 1317DAC(1), 1317DAD(1).

83 *Corporations Act 2001* (Cth) s 1317C(i), (j).

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

ASIC is only recommending to the disclosing entity what it *should do*, not what it *must do*. The inference being that ASIC's determinations are therefore not binding and conclusive. A disclosing entity can comply with ASIC's determination or risk ASIC initiating new and different court proceedings against it for *actual breach*. As such court proceedings are not to enforce or review ASIC's determination to issue an infringement notice; there is no independent judicial oversight of ASIC's determination. Further, the penalties imposed by the infringement notice are an immediate liability.

B Adjudicate

NSW v Commonwealth ('*Wheat case*') held that 'adjudication' is not an exclusive power of Commonwealth courts.⁸⁵ Even where the tribunal 'adjudicates' and makes binding and effective decisions similar to a court, this does not make it a court.⁸⁶ The judicial process adjudicates on claims that legal rights have been breached. This generally requires the application of law to past events or conduct.⁸⁷

Before ASIC issues an infringement notice, the disclosing entity must be given a statement of ASIC's reasons.⁸⁸ The disclosing entity may attend a private hearing conducted by ASIC.⁸⁹ ASIC's guidelines state that the delegate who carried out the initial investigation does not conduct the hearing or review the submissions.⁹⁰ The Act is silent as to internal review mechanisms, apart from allowing the disclosing entity to make a written representation to ASIC under s 1317DAI(1) of the *Corporations Act 2001* (Cth) to withdraw the infringement notice. Even where the disclosing

85 (1915) 20 CLR 54, 87.

86 *NSW v Commonwealth* (1915) 20 CLR 54, 87 (Isaacs J); *The Queen v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 371-372 (McTiernan J) citing dicta from Isaacs J in *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 176 and the judgment *In re The Judiciary Act and In re The Navigation Act 1912-1920* (1921) 29 CLR 257, 265; also see *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1, 11.

87 *Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd* (1998) 79 FCR 469, 501 (Sundberg J); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188; *The Queen v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 396 (Windeyer J) cited in support Holmes J in *Prentis v Atlantic Coast Line Co*, 211 US 210 (1908), 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'.

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

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

90 ASIC, *Regulatory Guide 73 Continuous Disclosure Obligations: Infringement Notices* (2004) [16] <<http://www.fido.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument>, 4.> at 7 November 2008; ASIC, *Regulatory Guide 8 Hearings Practice Manual* (2002) [3.10] <[http://www.fido.gov.au/asic/pdfib.nsf/LookupBy-FileName/hearings_manual.pdf/\\$file/hearings-manual.pdf](http://www.fido.gov.au/asic/pdfib.nsf/LookupBy-FileName/hearings_manual.pdf/$file/hearings-manual.pdf)> at 7 November 2008.

entity makes no representations, ASIC may withdraw the notice.⁹¹ The disclosing entity cannot appeal to ASIC or the AAT against this decision.⁹²

As another delegate of ASIC hears and finds facts suggesting that the disclosing entity may have breached the continuous disclosure provisions, this suggests that the proceedings are adversarial.⁹³ ASIC's guidelines, however, describe these hearings as non-adversarial.⁹⁴ However, as ASIC provides the disclosing entity with an outline of the case against it⁹⁵ and may conduct a hearing, where the disclosing entity can be legally represented,⁹⁶ this indicates an adversarial process. Further, ASIC adjudicates, in a way similar to the judicial process, by applying the legislative criteria in the continuous disclosure provisions to the past conduct of the disclosing entity, before issuing an infringement notice to that entity.

C *Ascertainable Criteria*

For a tribunal's determinations to be deemed to be the exercise of judicial power, it must apply 'ascertainable criterion', rather than 'its own idiosyncratic conceptions and modes of thought'.⁹⁷ Such criteria should be 'an objective test or standard supplied by the legislature'.⁹⁸

Where a tribunal determines that a practice is contrary to public interest, it may make appropriate orders to restrain specified future conduct with 'certain descriptions'.⁹⁹ This is considered an administrative function. If however, a tribunal restrains conduct in breach of ascertained obligations and tries to ensure conformity with

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

92 *Corporations Act 2001* (Cth) s 1317C(j).

93 ASIC, *Regulatory Guide 73 Continuous Disclosure Obligations: Infringement Notices* (2004) [19] <<http://www.fido.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument>, 4.> at 7 November 2008.

94 ASIC, *Regulatory Guide 73 Continuous Disclosure Obligations: Infringement Notices*, (2004) [19] <<http://www.fido.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument>, 4.> at 3 May 2007.

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

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

97 *Queen v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 376 (Kitto J).

98 *Queen v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 377 (Kitto J); *Brandy* (1994) 183 CLR 245, 268 (Gaudron, Dawson, McHugh & Deane JJ) citing with approval Justice Kitto in *R v Gallagher; Ex Parte Aberdare Collieries Pty Ltd* [1963] ALR 641, 644; *Australian Pipelines Limited v Alinta* (2007) 159 FCR 301, 323 citing *Precision Data Holdings Ltd v Willis* (1991) 173 CLR 167, 189-191.

99 *Queen v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 378 (Kitto J).

them,¹⁰⁰ this is indicative of judicial power. Determinations based on policy or matters not specified in the legislation, or which create new rights and obligations based on policy, are not characteristic of judicial power.¹⁰¹ Accordingly, ASIC's determination to issue an infringement notice ought to be classified as an exercise of Commonwealth judicial power. ASIC applies objective legislative criteria, not policy, to restrain and ensure disclosing entities conform to the continuous disclosure provisions of the *Corporations Act 2001* (Cth).

Commonwealth courts (when developing precedent) often create norms to resolve a particular dispute or class of disputes,¹⁰² and frequently apply discretionary power and criteria such as 'fair and reasonable'.¹⁰³ Criteria such as 'fair and reasonable', although general terms, are judicially construed as objective standards, not based on policy. Courts often apply such criteria.¹⁰⁴

Sections 674(2) or 675(2) of the *Corporations Act 2001* (Cth) require the disclosing entity to provide information that a 'reasonable' person would expect to have a 'material' effect on the value of their securities. These 'objective' criteria are used by the court in determining whether an actual breach of the continuous disclosure provisions has occurred.¹⁰⁵ Unlike *Visnic v ASIC*,¹⁰⁶ ASIC applies the same legislative criteria as the court,¹⁰⁷ when determining that the disclosing entity has allegedly breached the continuous disclosure provisions. If the word *alleged* was removed from the legislative scheme, it would almost be impossible to conclude that ASIC was not exercising Commonwealth judicial power.

D Declaration of Future or Existing Rights

Judicial power has been defined as not involving the creation of future rights but rather 'an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to

100 *Queen v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 378 (Kitto J).

101 *Visnic v ASIC* (2007) 234 ALR 413, 416-417 relied on dicta in *Precision Data Holdings Ltd v Willis* (1971) 173 CLR 167, 191; *Queen v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 408 (Windeyer J).

102 *Visnic v ASIC* (2007) 234 ALR 413, 420.

103 *Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83, 126; *Precision Data Holdings Ltd v Willis* (1991) 173 CLR 167, 191.

104 *Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83, 126.

105 *Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83, 126; *Corporations Act 2001* (Cth) s 1317E.

106 (2007) 234 ALR 413, 420 (Kirby J) where ASIC, unlike the court, was required to consider whether the disqualification was in the 'public interest'.

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

the facts as determined'.¹⁰⁸ Often tribunals also do this. Perhaps this only demonstrates the tribunal's compliance with the law, and not necessarily that it is exercising Commonwealth judicial power.¹⁰⁹

In *Luton v Lessels* ('*Luton*') Gleeson CJ stated that applying legal criteria to facts is 'characteristic',¹¹⁰ although not necessarily distinctive of judicial power.¹¹¹ On the other hand, the creation of new rights and future obligations is indicative of administrative power.¹¹² In *Luton* it was held that the Registrar's determinations created future rights that courts enforced,¹¹³ and therefore, such determinations were not final and conclusive.¹¹⁴ Accordingly, there was no unconstitutional conferral of judicial power to an administrative body.¹¹⁵ Infringement notices do not relate to future rights, but involve the application of statutory legislative criteria to the past conduct of the disclosing entity.

Decisions based on subjective evaluations are also often characteristic of administrative decision-making,¹¹⁶ whereas determinations that apply legislative provisions to past conduct, in a similar way to courts, are indicative of a judicial function.¹¹⁷ Accordingly, this supports the view that infringement notices are an exercise of the judicial function. Traditionally, an injunction to restrain an unlawful practice is characterised as a judicial function, particularly where personal or property damage result.¹¹⁸ An infringement notice operates like an injunction. It orders the disclosing entity to cease their alleged unlawful conduct, which may negatively impact on investor confidence and the transparency of the investment market.

108 *Queen v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J); *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1, 9.

109 *Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83, 128 (Kirby J).
110 (2002) 210 CLR 333.

111 *Luton* (2002) 210 CLR 333, 345.

112 *Luton* (2002) 210 CLR 333, 346.

113 (2002) 210 CLR 333.

114 *Luton* (2002) 210 CLR 333, 360.

115 *Luton* (2002) 210 CLR 333, 360 (Gaudron & Hayne JJ); Also see *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1, 2.

116 *Australian Pipeline Limited v Alinta Limited* (2007) 159 FCR 301, 326 (Finklestein J), who followed *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, which substantially followed the *Queen v Trade Practice Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, particularly Kitto J at 373-378.

117 *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617, 631, which was cited in *Australian Pipeline Limited v Alinta Limited* (2007) 159 FCR 301, 379 (Gyles J).

118 *Australian Pipeline Limited v Alinta Limited* (2007) 159 FCR 301, 380 (Gyles J) cited Barwick CJ and McTiernan J in *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617, 631.

Before ASIC issues an infringement notice, it must make findings of fact about the disclosing entity's past conduct to establish 'reasonable' grounds for issuing the notice. These grounds are based on ASIC's own investigations,¹¹⁹ appropriate consultation with the ASX and a hearing involving the disclosing entity.¹²⁰ The hearing or procedure conducted under s 1317DAD of the *Corporations Act 2001* (Cth) relates to a 'matter', which is the 'prevention, redress or punishment of some act inhibited by law'.¹²¹ Subject to limited exceptions, evidence provided by the disclosing entity, although relevant to ASIC's determination to issue an infringement notice, cannot be used against the entity in other proceedings.¹²²

In determining whether to issue an infringement notice, ASIC applies the legislative criteria set out in the continuous disclosure provisions to the disclosing entity's past conduct.¹²³ Where ASIC decides there has been an alleged breach, it may issue an infringement notice, which imposes penalties on the disclosing entity.¹²⁴ These penalties aim to restrain and deter disclosing entities from engaging in an alleged unlawful practice. This suggests that ASIC is invalidly exercising Commonwealth judicial power. In this context, a further concern is that ASIC acts as the investigator, judge and jury, which undermines the rule of law.¹²⁵

E *Enforcement and Independent Judicial Oversight*

The High Court has repeatedly held that where the enforcement of a tribunal's determination depends upon an independent exercise of judicial power to give it effect, then there is no invalid conferral of judicial power.¹²⁶ This focus on judicial oversight, rather than a strict adherence to the separation of powers, promotes administrative flexibility and accountability to the courts.¹²⁷

119 *Corporations Act 2001* (Cth) s 1317DAC and s 1317DAD.

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

121 *In re The Judiciary Act and In re The Navigation Act 1912-1920* (1921) 29 CLR 257, 266.

122 *Corporations Act 2001* (Cth) s 1317DAD(4).

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

124 *Corporations Act 2001* (Cth) s 1317DAE(1)(g); *Corporations Act 2001* (Cth) s 1317DAE(1)(i); *Corporations Act 2001* (Cth) s 1317DAE(1)(j).

125 *Visnic v ASIC* (2007) 234 ALR 413, 421-422.

126 *Luton* (2002) 210 CLR 333, 346 (Gleeson CJ); *Brandy* (1994) 183 CLR 245, 268 (Deane, Dawson, Gaudron and McHugh JJ), who cited with approval *Waterside Workers Federation of Australia v J W Alexander Ltd* (1918) 25 CLR, 451 (Barton J); *Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83, 111 and *Australian Pipeline Limited v Alinta Limited* (2007) 159 FCR 301, 323; Also see Airo-Farulla and White, above n 27, 69.

127 Airo-Farulla and White, above n 27, 58.

If a tribunal can enforce its own determinations, this often helps to characterise the power as being judicial.¹²⁸ Although, not essential, where such a power is ‘conferred as part of the whole, the judicial power is undeniably complete’.¹²⁹ *Brandy*¹³⁰ held that a tribunal’s inability to enforce its own orders is a strong indicator against characterising its powers as judicial.¹³¹

On the other hand, a determination that legislative provisions have been contravened clearly indicates Commonwealth judicial power, as Commonwealth courts have the jurisdiction and authority to do this.¹³² Where statutory administrative bodies can award damages, as well as declaratory or injunctive relief, whether punitive or otherwise, this is again closely analogous to what courts do.¹³³ Accordingly, this supports the characterisation of ASIC’s power to issue infringement notices as the exercise of Commonwealth judicial power.

An infringement notice imposes a penalty on the entity for an alleged breach of the relevant disclosure provision. Section 1317DAE of the *Corporations Act 2001* (Cth) states that the notice must, among other things, stipulate the maximum amount the court can impose for a proven breach of the relevant provisions under Part 9.4B,¹³⁴ indicate the amount of the penalty to be imposed by ASIC,¹³⁵ direct the penalty to be paid to ASIC on behalf of the Commonwealth,¹³⁶ specify any information it must provide to the ASX for an alleged breach of s 674(2),¹³⁷ stipulate the information it must lodge with ASIC for an alleged breach of s 675(2), state the effect of compliance under s 1317DAF or non compliance as provided by s 1317DAG, and the requisite time frames as set out in s 1317DAH.¹³⁸ ASIC must also advise the disclosing entity that it can make a written request to ASIC to withdraw the infringement notice.¹³⁹

128 *Brandy* (1994) 183 CLR 245, 257 (Mason CJ, Brennan and Toohey JJ).

129 *Waterside Workers Federation of Australia v Alexander* (1918) 25 CLR 434, 451; Concept of enforcement supported by Isaacs J in *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 176, 200 and Latham CJ in *Rola Co (Australia) Pty Ltd v Commonwealth* (1944) 69 CLR 185, 198-199.

130 (1994) 183 CLR 245.

131 *Brandy* (1994) 183 CLR 245, 259.

132 *Victoria Chamber of Manufacturers v the Commonwealth (Industrial Lighting Regulations)* (1943) 67 CLR 413, 422 (Starke J), which was cited in *Brandy* (1994) 183 CLR 245, 269.

133 *Brandy* (1994) 183 CLR 245, 269.

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

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

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

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

138 *Corporations Act 2001* (Cth) s 1317DAE(k).

139 *Corporations Act 2001* (Cth) s 1317DAE(l).

The legislative scheme provides a statutory formula to be applied by ASIC to calculate the penalty, which is based on the company's market capitalisation.¹⁴⁰ The penalty is increased, again by reference to a formula, where the disclosing entity has 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 s 674(2) or s 675(2) of the *Corporations Act 2001* (Cth).¹⁴¹

If the disclosing entity obeys the notice, then, subject to certain exceptions, ASIC cannot commence criminal or civil court proceedings against the entity on the same matters specified in the notice.¹⁴² If the disclosing entity fails to pay the fine under the notice, ASIC may initiate court proceedings seeking a declaration of *actual* contravention of the provision allegedly contravened and specified in the notice.¹⁴³ ASIC may seek a pecuniary penalty order,¹⁴⁴ which the court may make if it considers the breach is 'serious'. This further distinguishes the court's decision from ASIC's decision for an alleged breach of the Act. Alternatively, ASIC can request a court order under s 1324B for the disclosing entity to disclose information or publish advertisements, if it did not disclose information specified in the infringement notice. Again, the court order is based on an actual contravention of the continuous disclosure provisions.

Section 1317DAG of the *Corporations Act 2001* (Cth) is headed 'Effect of Failure to Comply with Infringement Notice' and appears to engage independent judicial review for its enforcement. However, this provision only advises the disclosing entity that ASIC can now commence court proceedings to seek a declaration that the relevant sections have been contravened¹⁴⁵ and request orders under s 1317G and s 1324B of the *Corporations Act 2001* (Cth). The legislative scheme establishes a type of statutory undertaking or estoppel, where if the disclosing entity obeys ASIC's determination, then ASIC cannot commence certain court proceedings against the disclosing entity. However, failure to comply releases ASIC from its statutory undertaking and allows ASIC to initiate court proceedings against the disclosing entity for actual breach of the relevant provisions. This is also the situation where ASIC withdraws an infringement notice.

¹⁴⁰ *Corporations Act 2001* (Cth) s 1317DAE(6), (7).

¹⁴¹ *Corporations Act 2001* (Cth) ss 1317DAE(2)-(6).

¹⁴² *Corporations Act 2001* (Cth) ss 1317DAF(5)-(6).

¹⁴³ *Corporations Act 2001* (Cth) s 1317DAG.

¹⁴⁴ *Corporations Act 2001* (Cth) s 1317DAG(2) item 1, column 3 of the Table.

¹⁴⁵ *Corporations Act 2001* (Cth) s 1317E.

In substance there is no appeal or review of ASIC's determination to issue an infringement notice. If the infringement notice fails to produce compliance from the disclosing entity with its decision of *alleged* breach, then ASIC can commence new and different proceedings against the disclosing entity for a declaration of *actual* breach. However, in such proceedings ASIC now has the onus of proof, using the civil standard.

Imposition of fines and/or requests to disclose information,¹⁴⁶ are functions, whether punitive or otherwise, closely analogous to those performed by courts. Infringement notices do both of these things. Further, a disclosing entity cannot ignore an infringement notice without the fear that ASIC may initiate court proceedings, as a consequence of them disobeying the notice.¹⁴⁷ This indicates judicial power.¹⁴⁸

F *Determination of Guilt and Punishment*

In *Albarran*¹⁴⁹ the issue was whether the Board was exercising judicial power, as it could penalise or punish a person. It was submitted that this was exclusively Commonwealth judicial power.¹⁵⁰ The appellants argued that the Board's determination of wrong-doing was made publicly and resulted in the imposition of a sanction to punish the wrongdoer and to deter others.¹⁵¹

The Commonwealth in *Albarran*,¹⁵² accepted that the adjudication of criminal guilt and the imposition of fines was the exclusive power of Commonwealth courts under the Constitution.¹⁵³ However, the High Court in *Albarran*,¹⁵⁴ held that the Board was not adjudicating, determining guilt or imposing a punishment but was merely a 'step in the process'. Accordingly, the Board was not exercising Commonwealth judicial power.¹⁵⁵ Further, the Court found that the Board did not declare existing legal rights and duties and could not enforce its own decisions.¹⁵⁶ The Court held that a disciplinary scheme, designed to uphold standards of integrity and competence in the liquidation of

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

147 *Attorney-General of the Commonwealth v Breckler* (1999) 197 CLR 83, 131 (Kirby J) who stated that 'A trustee faced with an adverse determination of the Tribunal could not ignore it without fear of sanction'.

148 *Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd* (1998) 79 FCR 469 (Heerey J).

149 (2007) 234 ALR 618.

150 *Albarran* (2007) 234 ALR 618, 621 (Kirby J).

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

152 (2007) 234 ALR 618.

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

154 (2007) 234 ALR 618.

155 This was also held to be the case in *Visnic v ASIC* (2007) 234 ALR 413.

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

companies, is appropriate for an administrative body and was not an unconstitutional exercise of Commonwealth judicial power.¹⁵⁷

The issuing of infringement notices can be distinguished from *Albarran*,¹⁵⁸ where the decision resulting in the public sanction was made by an independent Panel, chaired by a person with similar legal qualifications as a judge.¹⁵⁹ ASIC, as the corporate ‘watchdog’, cannot exhibit a similar appearance of institutional independence and impartiality. Both bodies aim to punish those who fail to comply. ASIC can impose a fine, which must be less than the one imposed by a court for an actual breach. ASIC’s determination, however, is made without meeting the stricter requirements of proof and evidentiary rules that a court uses. Further ASIC’s determinations lack impartiality, as ASIC is the investigator and the decision maker. Infringement notices allow ASIC to impose sanctions on disclosing entities for an alleged breach, which serves to punish and deter others. When ASIC issues an infringement notice for an alleged breach of the continuous disclosure provisions, this may indicate that ASIC has insufficient evidence and/or resources to prove to the court that the disclosing entity has actually contravened the continuous disclosure provisions. For example, ASIC indicated in Senate Estimates Committee hearings on 16 February 2006 that Telstra Ltd (‘Telstra’) had ignored an infringement notice. Interestingly, although ASIC represented that Telstra had breached the continuous disclosure provisions, ASIC did not take any further action against Telstra. ASIC’s representatives stated to the Senate Estimates Committee hearings that as Telstra’s ‘breach’ was not ‘serious’, it did not justify ASIC spending their limited litigation funds to pursue court action.¹⁶⁰ Until March 2007 ASIC has issued only seven infringement notices, which were all complied with.¹⁶¹ This information is available because under the legislative scheme, ASIC has a discretionary power to publish certain details about a disclosing entity’s compliance with an infringement notice.¹⁶² ASIC’s guidelines state that it *will* advertise these details.¹⁶³ ASIC cannot advertise that a company ignored the notice, although there are no sanctions for ASIC doing so.¹⁶⁴ This was evidenced in Telstra’s case. Publicity of company compliance with an infringement notice serves to deter other companies. Further, it

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

158 (2007) 234 ALR 618.

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

160 Baxt, above n 16, 86.

161 Nehme, Hyland and Adams, above n 13, 123.

162 *Corporations Act 2001* (Cth) s 1317DAJ.

163 ASIC, *Regulatory Guide 73 Continuous Disclosure Obligations: Infringement Notices*, (2004) [40] <<http://www.fido.gov.au/asic/asic.nsf/byheadline/Regulatory+guides?openDocument>> at 7 November 2008.

164 *Corporations Act 2001* (Cth) s 1317C(i), (j).

indicates the type of conduct ASIC considers unacceptable and the way the legislative scheme will be interpreted by ASIC. In this sense a type of precedent is created.

V THE OUTCOME

Applying the functional approach to Part 9.4AA of the *Corporations Act 2001* (Cth) supports the argument that this legislative scheme is an unconstitutional conferral of Commonwealth judicial power on ASIC. Infringement notices satisfy the criteria identified by the court as indicative, although not definitive, of Commonwealth judicial power. There is no judicial oversight of ASIC's determination to issue an infringement notice based on an *alleged* contravention of the continuous disclosure provisions and ASIC does not require the courts to enforce its determinations.

Where an infringement notice is accepted by a disclosing entity, it gives rise to an immediate enforceable liability. This distinguishes infringement notices from *Brandy*.¹⁶⁵ The legislative scheme is indicative of an adjudicative judicial process, where ASIC applies an objective pre-existing legislative standard, rather than policy. It makes a decision by the application of the law to past conduct with respect to existing duties and liabilities. ASIC can impose a punishment, although the provisions specifically state that no inference of admission of liability is to be drawn from a disclosing body complying with an infringement notice.¹⁶⁶

Further, ASIC applies a public sanction or punishment aimed at punishing the disclosing entity for its unlawful practice. ASIC publishes compliance with the infringement notice, partly to deter other disclosing entities from engaging in similar conduct.

VI ALTERNATIVE ANALYSIS: CHARACTER OF THE PROCEEDINGS

An alternative analysis to the High Court's functional approach, of focusing on the character of the proceedings, provides further support to the argument that the power exercised by ASIC under Part 9.4AA of the *Corporations Act 2001* (Cth) is an invalid exercise of Commonwealth judicial power.¹⁶⁷

165 (1994) 183 CLR 245.

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

167 See *Visnic v ASIC* (2007) 234 ALR 413, 423 (Kirby J), who referred to a number of US Supreme Court decisions, which have endorsed this approach.

Judicial proceedings are generally perceived as being conducted impartially, fairly and without executive interference. This supports the rule of law and safeguards against abuse of judicial power.¹⁶⁸

With infringement notices, the nature of the proceedings is such that the community would expect these determinations to be made by an independent body, not an administrative body, which also administers and regulates the legislation. Impartiality cannot be achieved under the current legislative scheme, because ASIC initiates the enquiry, investigates the matters and makes a determination, for which there is no merits review by the AAT.

In *Luton*,¹⁶⁹ Callinan J stated that administrators should act fairly, but as they do not 'adjudicate between the State and citizen, or between vested, personal, or corporate interests', they are unlikely to be susceptible to one side or the other.¹⁷⁰ Consequently, administrators do not require judicial tenure and independence, which is required in court proceedings.¹⁷¹ With infringement notices, independence and judicial tenure is needed because it is the outcome of adjudication between ASIC and corporate entities in an area which attempts to protect the community's interest by promoting a transparent securities market. Callinan J outlined an alternative test raising eleven questions considered important in determining whether there had been an invalid conferral of Commonwealth judicial power on the regulator. For example, whether the decision serves as a precedent, whether the decision is made by reference to a formula or by a standard set of criteria, whether the decision is appealable, whether the decision affects future rights, whether it is enforceable and whether the process is one traditionally undertaken by courts.¹⁷² These considerations go to the character of the proceedings and may be useful in deciding whether the issuing of infringement notices should be left to the courts and not the regulator.

The character of the proceedings for infringement notices do not simply require the application of a formula to facts as found. Rather, the process requires the interpretation and application of law to such facts, to reach its decision which imposes a public sanction. Such proceedings constitutionally must be reserved to the courts. ASIC's interpretation and application of the law generates a type of precedent, which may be applied in similar cases with respect to the legislative rights and liabilities of disclosing entities under the *Corporations Act 2001* (Cth). This may

168 *Re Wakim; ex parte McNally* (1999) 198 CLR 511, 559.

169 (2002) 210 CLR 333.

170 *Luton* (2002) 210 CLR 333, 388 (Callinan J).

171 *Luton* (2002) 210 CLR 333, 388 (Callinan J).

172 *Luton* (2002) 210 CLR 333, 388 (Callinan J).

arise because ASIC publishes details about a company's compliance with an infringement notice. This indicates to other companies how the provisions will be interpreted and applied by ASIC in future and similar cases.

ASIC's policy of publishing details of compliance suggests that the character of the proceedings are to deter, punish and sanction unlawful conduct, determined after a hearing in reference to ascertained and objective legislative criteria. Traditionally, such proceedings have been conducted by courts and this should continue.¹⁷³

Proceedings that raise important questions of law, and impose sanctions for unlawful conduct, require legal skill and impartiality.¹⁷⁴ Infringement notices are such proceedings. ASIC lacks the requisite skills and impartiality to conduct such a scheme. The legislative scheme under Part 9.4AA of the *Corporations Act 2001* (Cth) could be characterised as the type of proceedings the community would expect to be conducted by the courts and not the corporate regulator.

VII CONCLUSION

A functional approach and a focus on the character of the proceedings supports the argument that infringement notices under Part 9.4AA of the *Corporations Act 2001* (Cth) are an unconstitutional conferral of Commonwealth judicial power on ASIC.

Part 9.4AA of the *Corporations Act 2001* (Cth) was introduced to provide ASIC with an additional method to ensure disclosing entities comply with the continuous disclosure provisions. However, the legislative scheme raises real concerns about its constitutional validity and poses a threat to the constitutional separation of powers doctrine. The Commonwealth legislative scheme authorises ASIC to make determinations for *alleged* breaches of the provisions implying that it is targeting less serious breaches, where ASIC may have insufficient evidence to support a case for actual breach. This has been demonstrated by reference to the Telstra case. ASIC can issue such notices without judicial oversight of its determinations. With infringement notices, the Commonwealth Parliament has gone too far. Accordingly, Part 9.4AA of the *Corporations Act 2001* (Cth) should therefore be repealed or substantially amended to ensure that ASIC does not unconstitutionally exercise Commonwealth judicial power.

173 *The Queen v Davison* (1954) 90 CLR 353, 357 (Kitto J).

174 *The Queen v Davison* (1954) 90 CLR 353, 382 (Kitto J) where reference was made to the different skills and professional habits at the time the Constitution was framed, as necessary for the exercise of the different powers.

