CONTINUOUS DISCLOSURE: HAS REGULATION ENHANCED THE AUSTRALIAN SECURITIES MARKET?

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In order to ensure that the Australian securities market produces the optimal amount of timely information, mandatory continuous disclosure is essential. Whilst the market arguably produces a sufficient amount of information on its own, the evidence on irrationality of investors, the public good characteristics of information and the incentives for managers to withhold 'bad' news all suggest otherwise. It is for these reasons that Australia has adopted a framework of continuous disclosure via the Corporations Act 2001 *(Cth) and the Listing Rules of the Australian Stock Exchange. Historically, the framework of enforcement under the two regimes had fallen short of what is required to ensure that the full range of breaches can be rectified by adequate sanctions. The CLERP 9 reforms have sought to resolve this problem by increasing the range of remedies available under the* Corporations Act 2001 *(Cth). The ASX has also attempted to widen its power and to ensure compliance with its Listing Rules through the 'false markets' requirement, which came into force on 1 January 2003. Unfortunately, the requirement has little, if any, residual operation over and above the rules already in place prior to that date. It is proposed that widening the range of actions available to the ASX would be preferable to the existence of the 'false markets' rule. Additionally, the ASX needs to address the problems associated with the perceptions of a conflict between its commercial and regulatory functions. The best way to eliminate such perceptions would involve the continual external supervision of its activities and the adoption of a policy to provide reasons for its decisions, even though it may not be required to provide these by law. This will guarantee transparency in its operations and will maintain the integrity of the market.*

I INTRODUCTION

The need for the securities market to be fully informed at all times is unquestionable. The heavy reliance placed by entities on funding obtained through listing on stock exchanges makes it essential to maintain the integrity of the market in order to protect this source of funding. The free-flow of information is always necessary to maintain the confidence of market participants and to ensure they do not take their investments elsewhere. It is for these reasons that the Australian legislature has put in place a system of mandated continuous disclosure which aims to ensure that the relevant information is available to market participants to allow them to price stocks correctly.

This article will review the current provisions governing continuous disclosure for listed companies and seek to determine whether they adequately protect the interests of investors without imposing an undue burden on disclosing entities. The current state of the law will be compared to the theoretical foundations of enforcement with a view to determine whether it adequately fits within this theoretical framework. In particular, the suitability of the regulators will be considered with suggestions as to how their role can be improved.

II Is Continuous Disclosure Necessary?

The term 'continuous disclosure' refers to the requirement for companies to continually supply to the market all material information which could affect investors in their decision-making, thus allowing for better-informed choices. Whilst continuous disclosure has many benefits, it also has a number of costs. It has been argued by some commentators[1] that a system of mandatory disclosure is unnecessary and that minimal regulation should be imposed on the securities market, allowing it to determine the optimal amount of information required by investors. This approach to disclosure has its merits, however the analysis below will demonstrate that a mandatory environment of continuous disclosure is necessary for the financial markets. Accordingly, the question to be asked is not whether companies should be required to disclose on a continuous basis but rather how much they should be required to disclose.

A *Market Efficiency*

Underlying all debates on the necessity of continuous disclosure is the Efficient Markets Hypothesis ('EMH'). The central premise of the hypothesis is that market forces incorporate all information into securities prices, so that they 'fully reflect' all available information.[2] Fama has classified the hypothesis as follows:[3]

(1) weak-form efficiency, which implies that all the information contained in the past sequence of prices of a security is fully reflected in the current market price of that security;
(2) semi-strong form efficiency, which implies that all publicly available information is fully reflected in a security's market price; and
(3) strong-form efficiency, which implies that all information, whether public or private, is fully reflected in a security's market price.

Studies of the Australian share market seem to indicate that it is semi-strong form efficient.[4] Accordingly, all public announcements are incorporated into share prices quickly and in an unbiased manner. However, the finding of semi-strong form efficiency does not tell us whether there may be additional, private

1 See, eg, Robert C Clark, *Corporate Law* (1986) 749; Frank H Easterbrook and Daniel Fischel, 'Mandatory Disclosure and the Protection of Investors' (1984) 70 *Virginia Law Review* 669.
2 Graham Peirson et al, *Business Finance* (7th ed, 1998) 663.
3 Eugene F Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25 *Journal of Finance* 383.
4 Gordon Walker, Brent Fisse, Ian Ramsay (eds), *Securities Regulation in Australia and New Zealand* (2nd ed, 1998) 79.

information which is not disclosed by companies but may affect the value of their securities.[5]

B *Behavioural Finance*

Challenging the finding of semi-strong form efficiency and casting doubt on the strength of the EMH is a wide body of empirical research which indicates that the financial markets do not incorporate information in an unbiased manner. This research has uncovered anomalies inconsistent with the EMH, including the underreaction or overreaction of stock prices to price-sensitive information, the January effect for US companies[6] and the fact that stocks of smaller companies tend to outperform those of their larger counterparts.[7]

These anomalies can be explained by behavioural finance which has emerged from cognitive psychology and indicates that people, including share market traders, do not always make rational choices when supplied with a set of information.[8] This lack of rationality indicates that information is not incorporated into share prices efficiently nor in an unbiased manner.

The following behavioural biases have been identified as supporting the anomalies:[9]

- *Loss aversion* – also referred to as the 'endowment effect',[10] this is the tendency of investors to sell their winners too readily and to hold onto their losers for too long. This bias contributes to the volatility of the market, especially at times of increased prices, when people are all too willing to sell.
- *Cognitive conservatism* – the unwillingness of people to change their views, even in the face of overwhelming evidence. This behavioural trait is cited as the reason for under-reaction to new information.

5 For a discussion of how information is incorporated into prices under the different classes of efficiency see Ronald J Gilson and Reinier H Kraakman, 'The Mechanisms of Market Efficiency' (1984) 70 *Virginia Law Review* 549. Gilson and Kraakman argue that the following trading processes incorporate information into securities prices. *Universally Informed Trading*: trading on the basis of all 'old' price information and current news items; incorporates traditional 'weak-form' information into prices. *Professionally Informed Trading*: trading by professional investors resulting in efficient equilibrium of pricing; functions on the premise that rapid price equilibrium does not require widespread dissemination of information but only a minority of knowledgeable traders who control a critical volume of trading activity; explains how semi-strong form efficiency is achieved. *Derivatively Informed Trading*: reliant on information leakage; incorporates inside information into prices and explains how strong-form efficiency is achieved. *Uninformed Trading*: reliant on the premise that uninformed traders have offsetting biases which cancel each other out and leave securities prices to represent a single, best informed aggregate forecast; explains how forecasts and assessments are incorporated into prices as neither of the aforementioned three mechanisms caters for such 'soft' predictive information.

6 The January effect refers to the rise of stock prices in January.

7 See, eg, Lawrence A Cunningham, 'Behavioral Finance and Investor Governance' (Working Paper No 32, Cardozo Law School, 2001); D Langevoort, 'Taming the Animal Spirits of the Stock Market: A Behavioral Approach to Securities Regulation' (Working Paper No 64, University of California, Berkeley, 2002).

8 Cunningham, above n 7, 63.

9 Langevoort, 'Taming the Animal Spirits of the Stock Market', above n 7, 11.

10 Robert B Thompson, 'Securities Regulation in an Electronic Age: The Impact of Cognitive Psychology' (1997) 75 *Washington University Law Quarterly* 779, 781.

- *Representativeness effect* – refers to the mental strategy of viewing events as typical of some specific class when statistically they are not.[11] In the share market this tendency can result in an overreaction to a series of good reports or a string of bad reports. It has an effect opposite to that of cognitive conservatism, however the two can be reconciled on the basis that if information is presented in a particularly salient manner or in a way that is particularly dramatic, an overreaction will take place. Otherwise, investors will under-react.
- *Investor overconfidence* – this is the tendency of investors to place too much weight on their private information or inference and the tendency to take credit for positive results but blame bad luck for bad ones. The overconfidence theory states that investors will overestimate the value of their private information, believing it superior to that possessed by the rest of the market, and therefore overreact to it.

Supporters of the EMH have argued that any systematic irrational tendencies are likely to be countered by the subsequent arbitrage trading which will take place. They argue that informed arbitrage traders will be aware of the presence of any anomalies and will trade to gain from them until all information is correctly incorporated into share prices. Unfortunately, due to the unpredictability of the anomalies, this argument is flawed. If neither the extent nor the duration of the irrational tendencies can be determined, it is very risky to bet that prices will ultimately incorporate all relevant information.[12] Thus, it is unlikely that even the most informed traders would take the chance to trade against the anomalies.

Overall, the psychological biases presented by behavioural theory go a long way towards explaining some of the inefficient behaviour of the stock market. However, they are often conflicting and cannot predict reactions in advance with a high degree of certainty. Furthermore, different empirical studies produce different results, leading to some confusion about the exact extent of the anomalies. Thus, the EMH is still highly influential in determining stock market behaviour and will continue to exist until a more accurate theory of stock market behaviour emerges. The presence of irrational responses, however, provides a strong justification for regulatory intervention in order to ensure that all relevant information is disclosed to investors. Accordingly, the following sections will consider the incentives and disincentives for companies to provide this information to the public in the absence of a regulatory environment.

C *Voluntary Disclosure*

There is a significant amount of voluntary disclosure in the Australian markets, illustrated by the publication on a voluntary basis of quarterly financial reports[13] and the willingness of companies to include non-mandated information in company annual reports. It has been argued that instances of voluntary disclosure illustrate the value of information to investors and the subsequent benefits to

11 Cunningham, above n 7, 15.
12 Langevoort, 'Taming the Animal Spirits of the Stock Market', above n 7, 17.
13 Ibid 58.

companies if they provide this information.[14] Essentially, this argument states that investors will require a lower rate of return from companies which disclose all material information, as disclosure reduces uncertainty about the company's operations and thereby the risk to the investor.[15]

It is expected that most instances of voluntary disclosure would occur when companies are under-valued.[16] In such situations, managers have every incentive to communicate to the market all information which would increase the share price. An increased share price is certainly an incentive for managers. It would allow them to issue shares at a higher price if they seek additional equity capital, it is likely to increase the value of any share-based compensation and it could also increase their job security through a decreased likelihood of a hostile takeover or adverse evaluation by the board of directors.[17]

An alternative justification for voluntary disclosure is that investors may be willing to pay a premium for companies with an increased level of disclosure, where the premium represents the reduced research costs of the investor and recognises the extra value of the information. However, this rationale is undermined by the public good perspective, discussed in detail below, which states that the premium will not equate to the full cost incurred by the company in producing the information and, as such, the information will be under-produced.

Another downside to voluntary disclosure is that managers have an incentive to disclose good news, which could raise the price of the company's shares, but withhold bad news, which could have an adverse impact on price. However, it is also true that investors always assume the worst in the absence of any information to the contrary.[18] Thus it may be more beneficial for companies to disclose bad news rather than allow investors to presume that the situation is in fact worse and to factor this presumption into the company's share price. This is especially true in times of speculation and uncertainty about a company's operations, when disclosing the bad news would in fact limit this uncertainty and may benefit the disclosing entity. Nevertheless, if the market is not aware of the possibility that bad news may exist, managers may have an incentive not to disclose. It is precisely in these situations that the mandatory disclosure rules should operate.

Following this line of argument, Coffee criticises the theory of voluntary disclosure on the basis that it will not eliminate all occasions for opportunistic behaviour by managers.[19] He disapproves of the theory on two main grounds. Firstly, he claims that insider trading by managers is very difficult to detect and

14 Easterbrook and Fischel, above n 1.
15 This argument assumes that investors are risk averse and are willing to accept a lower return for a reduced level of risk.
16 Walker, Fisse and Ramsay, above n 4, 58.
17 Ibid.
18 Easterbrook and Fischel, above n 1, 683.
19 John C Coffee, 'Market Failure and the Economic Case for a Mandatory Disclosure System' (1984) 70 *Virginia Law Review* 717, 738.

is an inviting means for managers to profit.[20] Thus, managers have an incentive to only release information to the market after they have traded on it which means disclosure would not be instantaneous. Secondly, Coffee argues that the advent of the leveraged buyout, a technique for management to purchase the company, has seen managers manipulating the share market by mainly disclosing bad news.[21] Whilst, on the face of it, this may appear to be detrimental for management, it allows them to purchase the company in a buyout at a much reduced price, thereby obtaining a substantial premium on their investment. Following their prominence in the 1980s, the number of leveraged buyouts has decreased substantially over the past decade, reducing the weight of Coffee's second argument. Nevertheless, he raises the valid point that insider trading needs to be prevented and mandatory continuous disclosure is an essential element in its prevention.

A further criticism to the theory of voluntary disclosure is provided by Gulati,[22] who refers to the agency costs of having managers' interests not aligned with the interests of shareholders and cites this as a source of non-disclosure. In particular, Gulati refers to the 'final-period' problem which arises when corporate managers fear that they are about to lose their job and do not believe they can obtain another job as good as the present one.[23] In such circumstances, managers will often retain certain inside information. Because they are in their final period of employment they will be unconcerned with any reputational impacts of their performance or with any discount that the share price of their company may suffer. Accordingly, the market will not force them to disclose the relevant information and this will result in under-disclosure.

1 *Signalling*

There are other ways, apart from formal disclosure, that managers use to keep the market informed as to the internal workings of the company. Through their actions in buying and selling company shares, making dividend announcements and changing the capital structure, managers signal to the market their beliefs as to the prosperity of the company.

Such signalling actions are often undertaken by management because of the risk of personal liability associated with incorrect formal disclosure. Whilst it is essential for all published information to be accurate, any representations with respect to a future matter such as a profit forecast may at times turn out to be incorrect.[24] Accordingly, it is more enticing for management to disclose its intentions about the company's future through various 'signals', rather than by formal disclosure. Furthermore, investors will follow the signals because they

20 Ibid 739.
21 Ibid 741.
22 M Gulati, 'When Corporate Managers Fear a Good Thing is Coming to an End: The Case of Interim Nondisclosure' (1999) 46 *University of California Law Review* 675.
23 Ibid 694.
24 Walker, Fisse and Ramsay, above n 4, 60.

are backed by the actions of management and show what managers are willing to do with their own money.[25]

Signals such as share purchases by managers and announcements of increased dividends send an unambiguous message to the market that managers have made a positive assessment of the company's prospects.[26] Conversely, a sale of shares or reduced dividends would indicate a negative assessment.[27] However, not all signals are unequivocal. A share buy-back could indicate that a company has no profitable use for its funds. Alternatively, it may show that the company is undervalued and a buy-back undertaken at a significant premium to the market price is a means by which management passes this information onto shareholders.[28] Such ambiguity as to the underlying meaning of some signals means that it is unlikely that signalling will supply the market with the requisite degree of information to allow investors to make truly informed decisions. Formal disclosure is necessary to limit any speculation as to the true state of company affairs.

D *Rationale for Mandatory Disclosure*

Proponents of a mandatory disclosure regime argue that such a regime is necessary because market forces are insufficient to produce a socially desirable amount of disclosure.[29] They believe that small and unsophisticated investors, in particular, should be protected by ensuring that all relevant information is disseminated and accessible at the same time to all. Their main arguments are listed below.

1 *Unequal Possession of Information*

In the securities markets, different investors generally possess different levels of information and expertise. It has been argued that investors who lack information and expertise are the ones who need particular protection.[30] This argument is based on reasons of fairness and assumes that additional disclosure is the appropriate form of protection for ill-informed investors.[31] Whilst it is true that a system of mandatory disclosure would increase the information available to unsophisticated investors, it may not in fact improve their decision-making. The reasons for this are two-fold.

Firstly, as long as informed traders engage in a sufficient amount of searching for information and bargains, market prices will reflect all publicly available information.[32] Easterbrook and Fischel argue that the informed traders will always incorporate any available information into the price of securities and that uninformed and unsophisticated traders take a 'free ride' on the information

25 Ibid 62.
26 Ibid 60.
27 Ibid.
28 Ibid 61.
29 Mark Blair, 'Australia's Continuous Disclosure Regime: Proposals for Change' (1992) 2 *Australian Journal of Corporate Law* 54, 61.
30 Easterbrook and Fischel, above n 1, 693.
31 Walker, Fisse and Ramsay, above n 4, 66.
32 Easterbrook and Fischel, above n 1, 694.

incorporated by the market. Easterbrook and Fischel note that informed traders may be ahead of their less informed counterparts and have the advantage of knowledge in some transactions. However they argue that these rewards are not obtained 'at the expense' of the less informed but rather are compensation for the time and research involved in gathering the extra information.[33]

This analysis is likely to hold for insider traders as well. Through their actions in trading, they are in effect incorporating the inside information into security prices. It is unclear whether this is a satisfactory arrangement, as insiders are obtaining a benefit for the exercise of very little effort – and while it is unlikely that a system of mandatory disclosure would eliminate insider trading, it should at least accelerate the incorporation of information into prices, as a wider group of investors will have access to the information. This in turn will substantially minimise the time frame within which insider traders can operate.

The second ground on which the existence of informational inequality is deemed an inadequate justification for mandatory disclosure is the fact that unsophisticated investors are unlikely to consider all the information provided in extended briefings as they will lack the time and expertise to evaluate all the details provided.[34] If lay investors are to be served best, reports should be succinct and simple. Unfortunately, this is of dubious value to the market. In fact, such an approach is likely to take away from more sophisticated investors the opportunity to fully evaluate all available information and will ultimately result in less accurate pricing of securities.[35]

Despite these arguments, fairness requires that equal levels of information are disseminated to all investors in order to maintain confidence in the operation of the market and ensure its integrity.

2 *Reduction of Social Waste*

From a social welfare perspective, trading gains do not increase the amount of wealth in our society. One party's gain is another party's loss. On the other hand, the process of researching and verifying information consumes real resources.[36] Therefore, it is essential that an optimal amount of research be produced in order to allocate resources efficiently. A system of mandatory continuous disclosure would ensure that all the relevant information is supplied to investors and would reduce the duplication of costly research.[37] Whilst it is clear that a system of mandatory disclosure would reduce social waste in this manner, it is not certain whether such a system is required. It is possible that market forces will encourage companies to publish information, in order to raise their value and thereby reduce duplicative research by investors.

33 Ibid.
34 Donald C Langevoort, 'Toward More Effective Risk Disclosure for Technology-Enhanced Investing' (1997) 75 *Washington University Law Quarterly* 753, 759.
35 Walker, Fisse and Ramsay, above n 4, 68.
36 Coffee, above n 19, 733.
37 Ibid.

3 *Allocative Efficiency*

If the securities market is viewed as the principal allocative mechanism for investment capital, the accuracy of securities prices is important to ensure that the money in our society is channelled into the resources which will use it most efficiently.[38] It is essential that society's mechanism for allocating scarce resources does not become distorted, otherwise all members of our society may suffer.[39] Mandatory disclosure can help to ensure the correct pricing of securities which in turn will act as a disciplinary mechanism on managers,[40] reflecting the true value of their company's worth and ensuring that they will only receive funds when profitable investments are available.

4 *Public Good Hypothesis*

A strong argument in favour of mandatory disclosure is based on the economic theory of the public good. According to the theory, a public good is characterised by non-rivalry in consumption – consumption of the good by one person does not diminish its availability to others – and the non-excludability of users – people benefit whether or not they contribute to the costs of acquiring the good.[41] The fact that people can 'free-ride' on others' payments in relation to a public good means that they have an incentive to underpay for its use once someone else has purchased it.[42] This will result in the producers of the good not being paid its full value. As a consequence, the good is likely to be under-produced relative to society's need for it.

Information in the securities market is often deemed to display the characteristics of a public good.[43] It is seldom confined to a single user because investors have every incentive to leak information to other users once they have traded on it. The leakage will allow the market to incorporate the full value of the information into the price of the security and give the investor the associated benefit. Whilst the benefit to subsequent recipients of the information is fractionally reduced, this reduction is rarely significant. If the theory is applied to a securities analyst, the public good character of securities information implies that the analyst cannot obtain the full value of their discovery, and this in turn means that they will engage in less research than the market collectively desires.[44]

It is possible, however, for companies to increase the value of information they supply to the market. Through the use of investment banks or independent auditors they can verify the information released to the market.[45] Since these third parties have a reputation to maintain, they would likely employ a high level of scrutiny in assessing the accuracy of information supplied to the market.[46] The

38 Ibid 734.
39 Ibid 736.
40 Walker, Fisse and Ramsay, above n 4, 70.
41 Ibid 74.
42 Coffee, above n 19, 725.
43 Ibid.
44 Ibid 726.
45 Clark, above n 1, 758.
46 Ibid.

value received by the company for the release of this information is likely to be much higher due to its increased reliability. Nevertheless, it is unlikely that companies will receive the full value of information due to its public good characteristics and at least some under-production is likely to occur.

5 *Third Party Effects*

Easterbrook and Fischel cite the notion of third party effects as another reason for the sub-optimal disclosure by companies.[47] This view is linked to the concept that, in their disclosure, companies tend to reveal information about themselves and about the industry they operate in. Information about the industry will also be useful to investors in competitor companies. Thus, investors in rival companies can obtain collateral benefits from disclosure reports. This free riding on industry-specific information by the investors of rival companies will lead to its under-production. Some sort of regulatory framework would need to be imposed in order to ensure a sufficient supply of the information to the market. A system of mandatory continuous disclosure could be one such framework.

E *Technological Impact*

The emergence of the internet as a communication medium has resulted in its increased use in the securities market. It permits those who want to influence investment decisions to produce and disseminate information quickly and at increasingly lower costs.[48] This is likely to result in an explosion in the amount of available information, and if we follow the rationale that more information will result in better decision-making, it is tempting to conclude that less importance should be placed on mandatory disclosure as a protective device.[49] Langevoort believes that we should not be overly enthusiastic about the protective qualities of technology. He believes that with finite time and capacity, people tend to look for simple solutions, often reducing the number of factors considered and failing to utilise all available information in decision-making,[50] which is likely to result in inaccurate decisions.

The question of cost-justification must also be considered. Any extra benefit associated with mandatory disclosure of information must be weighed against the costs of its production. These costs are both direct and indirect.[51] The direct costs are the costs of compiling, disseminating and litigating about information, as well as the costs of the regulator. On the other hand, indirect costs may include companies' non-pursuit of otherwise profitable projects,[52] as where management attention is shifted from profit-making activities.[53] Under a continuous disclosure regime, considerable attention, on a day-to-day basis, may need to be devoted to

47 Easterbrook and Fischel, above n 1, 686.
48 Langevoort, 'Toward More Effective Risk Disclosure', above n 34, 754.
49 Ibid 758.
50 Ibid 759.
51 Easterbrook and Fischel, above n 1, 707.
52 Ibid 708.
53 Blair, above n 29, 66.

what information investors would consider material,[54] and the opportunity cost associated with these activities is likely to be substantial.

A particular example of indirect costs is the problem of confidentiality. A continuous disclosure obligation can too easily compromise legitimate corporate confidentiality interests[55] if it requires all information, whether confidential or not, to be disclosed to the public. The incentives to become a 'market innovator' would be reduced[56] as competitors would pounce upon any confidential information and use it to their advantage. It is therefore essential that any continuous disclosure requirement contains a confidentiality exemption.

F *Implementation of the Regime in Australia*

Until September 1994, continuous disclosure applied in Australia on a contractual basis between the entity and the Australian Stock Exchange under the Listing Rules of the ASX ('Listing Rules'). The amendments to the Corporations Law, which commenced in 1994, provided statutory backing for the disclosure obligations in the Listing Rules and confirmed the requirement that disclosure provisions need to be complied with.[57] Prior to the enactment of the changes, quarterly reporting had been presented as an alternative to continuous disclosure. In October 1990, the ASX called for comments on this issue but rejected the quarterly reporting proposal because of adverse comments by respondents.[58] The opponents of mandatory quarterly reporting stated that (1) it is too costly, (2) it will tend to focus investors upon short term results, (3) it is misleading for companies which trade on a seasonal or cyclical basis.[59]

The cost argument states that quarterly reporting would be time consuming and have significant resource and cost implications, including increased audit costs.[60] This could be countered by the absence of evidence to support these claims, especially considering that continuous disclosure places some heavy cost burdens on entities.[61] Similarly, it is unclear why the short term focus of quarterly reports would not also be a feature of continuous disclosure obligations.[62] The seasonality concerns could be mitigated with the reporting of annualised or comparative figures, and provision for seasonally adjusted data or exemptions to quarterly reporting for companies particularly affected by seasonal factors.[63]

Quarterly reporting does have a further disadvantage when compared to continuous disclosure. As it would principally comprise of accounting statements, it is likely to be backward looking and form a poor basis for

54 Ibid.
55 Langevoort, 'Toward More Effective Risk Disclosure', above n 34, 772.
56 Blair, above n 29, 64.
57 Companies and Securities Advisory Committee ('CASAC'), *Report on Continuous Disclosure* (1996) 8.
58 Blair, above n 29, 66.
59 Ibid 67.
60 CASAC, above n 57, Appendix 3, 11.
61 Blair, above n 29, 67.
62 Ibid.
63 Ibid.

extrapolations.[64] This is mainly the case because accounting data is historical and is not based on current market values. Continuous disclosure is much more likely to reflect the current state. Overall, quarterly reporting does not impose additional obligations to continuous disclosure however it may lack the timeliness of 'real-time' information disclosure. In the current environment, quarterly reporting has little use, since information is already distributed via press releases, interviews and analyst contact.[65] It is for this reason that Australian regulators have not yet moved in line with their US counterparts to require quarterly disclosure.

G *Empirical Evidence*

There is a limited amount of empirical evidence on the effects of mandatory continuous disclosure in Australia, however a useful study is provided by CASAC.[66] The study compared the periods before and after the introduction of the statutory continuous disclosure provisions in September 1994. Its aim was to determine whether the implementation of the provisions had any significant impact on the efficiency of the Australian share market. The study found that continuous disclosure only provided the market with additional price sensitive information for smaller listed disclosing entities; that the bulk of additional information provided to the market by these entities consisted mainly of 'bad' news; and that there was a significant decrease in market and share price volatility, though it was difficult to confidently attribute this to the operation of continuous disclosure. The study emphasised that any conclusions had to be qualified, given the limited period (18 months) between the introduction of the statutory provisions and the study's completion. Nevertheless, it seems that the evidence, albeit inconclusive, supported the implementation of a continuous disclosure regime. Therefore, it is essential that such a regime is operational, but it needs to be implemented carefully in order to avoid placing any undue pressure on companies.

III Current Provisions for Continuous Disclosure

Continuous disclosure by listed companies in Australia is regulated by the *Corporations Act* 2001 (Cth) ('*Corporations Act*') and the listing rules of the relevant financial market. Given that the ASX has responsibility for over 99 per cent of listed disclosing entities,[67] it is the only Australian financial market whose listing rules will be considered in this paper. The provisions of the ASX Listing Rules and the *Corporations Act* dealing with continuous disclosure are considered in turn and compared in order to determine the differences in application of both regimes.

64 Clark, above n 1, 752.
65 Langevoort, 'Toward More Effective Risk Disclosure', above n 34, 766.
66 CASAC, above n 57, 1.
67 Commonwealth Department of the Treasury, *Corporate Disclosure – Strengthening the Financial Reporting Framework* (2002) 132.

A *ASX Listing Rules*

Traditionally, the Listing Rules took the form of a private contract between the ASX and the company whose securities were listed on the exchange.[68] However, as will be seen, some legislative force is given to the ASX, which means that the status of the Listing Rules now 'lies on a blurred line between statutory and contractual obligations imposed by a private body exercising many public functions'.[69]

The main provision dealing with continuous disclosure is Listing Rule 3.1 which provides that '[o]nce an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.' According to Listing Rule 19.12, the company becomes aware of the information when a director or executive officer has, or ought reasonably to have, come into possession of the information in the course of performance of their duties. Once a director or executive officer becomes aware of the information, they must immediately consider whether that information should be given to the ASX. An entity cannot delay giving information to the ASX pending formal sign-off or adoption by the board, for example.[70]

The test of whether information is material is set out by s 677 of the *Corporations Act*. It states that 'a reasonable person would be taken to expect information to have a material effect on the price or value of securities if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe to, or buy or sell, the first mentioned securities.' This test is an objective test, however the individual characteristics of the company at any point in time will influence whether the particular information is expected to be disclosed. As stated by O'Loughlin J in *Flavel v Roget*,[71] 'what one company should advise the Stock Exchange might not have to be advised by a second company' and 'what should be advised by a company at one stage in its career might not have to be advised at another stage of its career because of changed circumstances'.

The provisions of Listing Rule 3.1 and s 677 of the *Corporations Act* refer to a 'reasonable person' which implies that if investors would trade on certain information but this trading is unreasonable, the information need not be disclosed. This indirectly expresses support for the EMH, implying that investors in the Australian markets act reasonably. Given the wide-ranging existence of behavioural factors which influence decision-making, there may be a lot of information which would irrationally influence investors.

Langevoort argues that materiality should be measured by its actual impact, not 'an idealised theory of reasonableness', and if the information would in fact be

68 David Brewster, 'Judicial Enforcement of the Listing Rules of the Australian Stock Exchange' (1991) 9 *Company and Securities Law Journal* 313, 317.
69 Ibid.
70 Australian Stock Exchange, *Guidance Note 8; Continuous Disclosure: Listing Rule 3.1* (2003) 4.
71 (1990) 1 ACSR 595, 602-3.

relied on by a sufficient number of investors to move the market price, it should be considered material regardless of how reasonable the reliance is.[72] If the test of materiality was to be amended in this manner, additional information would no doubt need to be disclosed by companies. Langevoort justifies his views on that basis that non-disclosure of this additional information would amount to manipulation of the market.[73] On the other hand, an amended test may cause uncertainty as to what should be disclosed and impose undue pressure on management. Whilst a test of what is common, as opposed to what is reasonable, may not always be preferred, we must be aware that the current test does not capture all information that may influence the market.

The foreword to the ASX Listing Rules states that the ASX has 'absolute discretion in administering the Listing Rules and in doing so looks to companies to comply with the spirit as well as the letter of those Listing Rules'. As such, the ASX appears to be the sole judge of whether a breach of the Listing Rules has occurred.[74] Traditionally, the exchange's only real sanctions for non-compliance under the Listing Rules were to delist an entity or to suspend trading in its securities.[75] This is affirmed by Listing Rules 17.3 and 17.12 which state that the ASX may suspend an entity's securities from trading or remove them from the official list if the entity is unable or unwilling to comply with, or breaks, a listing rule. A stock exchange may also seek to enforce its Listing Rules by less formal means such as moral suasion or public and private inquiries of its listed entities,[76] however the need for such enforcement has become less necessary over time, with the statutory recognition of continuous disclosure requirements.

B *Corporations Act*

Section 674 of the *Corporations Act* provides an additional obligation in relation to continuous disclosure for both listed and unlisted disclosing entities. This article will focus on listed entities only. Section 674(2) states that if a listed entity has information that the Listing Rules require to be disclosed, and that information is not already generally available, then the entity must notify the market operator of that information in accordance with the relevant listing rules. Pursuant to s 677, the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') applies to breaches of s 674(2). Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility – and since the offence is not declared to be one of strict liability, the element of mens rea must also be satisfied.[77] The penalty is a fine of up to 200 penalty units, and s 11.2 of the *Criminal Code* states that directors, officers and advisers may also be criminally liable if they aid, abet, counsel or procure the disclosing entity's contravention.

72 Langevoort, 'Taming the Animal Spirits of the Stock Market', above n 7, 28-9.
73 Ibid 66.
74 The issue of whether decisions of the ASX are judicially reviewable is discussed in Part V.
75 Brewster, above n 68, 315.
76 Ibid.
77 H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (11th ed, 2003) 507.

Section 674(2) is also a civil penalty provision under Part 9.4B of the *Corporations Act*. A breach of s 674(2) could lead to a pecuniary penalty of up to A$1 000 000 (s 1317G) or a compensation to another person under s 1317HA. The civil remedies are available in cases where the breach has been merely negligent and does not satisfy the standard of criminal responsibility under the *Criminal Code*,[78] as well as being available where intentional breaches have occurred. Under s 1325, a wide variety of orders may be made against any persons involved in a contravention of s 674(2). ASIC may make an application for such orders on behalf of one or more persons identified as having suffered or being likely to suffer loss or damage by the contravening conduct.

C *Overlap between the Two Regimes*

The *Corporations Act* provides an additional obligation to the Listing Rules, and widens the range of available remedies. However, there is a major difference between the two regimes. Whereas the ASX expressly states that the fact that information is generally available is not an excuse for failing to disclose it under Listing Rule 3.1,[79] s 674(2)(c)(i) of the *Corporations Act* states that generally available information is exempt from the disclosure requirements. Therefore, some breaches of the Listing Rules, namely occasions where the information is generally available before the breach occurs, will not result in a corresponding breach of the *Corporations Act* provisions.

Section 676 of the *Corporations Act* sets out the definition of when information is generally available. Section 676(2) provides that information is generally available if it consists of a readily observable matter or if it has been made known in a manner likely to bring it to the attention of those who commonly invest in securities of the relevant kind, and a reasonable period has elapsed. Furthermore, s 676(3) states that information is also generally available if it consists of deductions, conclusions or inferences made from readily observable matter or information which has been released, even if a reasonable period has not yet elapsed.

The question of when information is generally available was considered by the New South Wales Court of Criminal Appeal in *R v Firns*.[80] In issue was whether a judgment delivered by the Papua New Guinea Supreme Court consisted a readily observable matter within Australia. The Court held that the phrase 'readily observable matter' was not limited to matters readily observable within Australia and as such the information was deemed to be generally available. Following the decision, CASAC recommended that the requirement of a reasonable dissemination period be extended to the first limb[81] of s 676(2) in some circumstances.[82] Furthermore, it was recommended that the test be clarified to eliminate any uncertainty as to its application. No amendments to the *Corporations Act* have yet been made.

78 Ibid 508.
79 ASX, above n 70, 5.
80 (2001) 51 NSWLR 548.
81 Currently, the requirement only applies to the second limb.
82 CASAC, *Insider Trading Discussion Paper* (2001) 40.

Overall, the distinction between the coverage of the Listing Rules and the *Corporations Act* provisions is important to note, mainly because of the different remedies provided by each regime. As such, some breaches will only allow for the more limited range of remedies under the Listing Rules and may not provide for any compensation to individual investors.

IV CARVE OUTS TO DISCLOSURE

The continuous disclosure requirements imposed by the ASX, as defined by Listing Rule 3.1, are not absolute and do allow for an exception. The exception is commonly referred to as the 'carve-out' to disclosure and operates if the facts of the case satisfy the requirements of Listing Rules 3.1A and 3.1B. This section of the article will describe the operation of the exception and consider the practicality of the 'false markets' rule, as brought in by the amendments to the Listing Rules on 1 January 2003.

A *The Exception*

The existence of an exception to the continuous disclosure requirements of the Listing Rules has been favoured ever since the requirements came into operation. The exception is primarily aimed at protecting 'intellectual property which, if disclosed, could provide commercial competitors with information that would significantly benefit them to the detriment of the disclosing entity'.[83] The aims of the exception have largely remained unchanged. The ASX currently states that '[t]he intention of the exception is to protect the legitimate commercial interests of listed entities in those circumstances where the market integrity is not adversely affected'.[84] With the aim of the exception in mind, the ASX has devised three requirements, *all* of which must be satisfied, before information is considered exempt from disclosure. The first requirement, as set out by Listing Rule 3.1A.1, states that a reasonable person would not expect the information to be disclosed. The requirement indicates that if a reasonable person expects the information to be disclosed, then it would no longer be exempt from disclosure. This is justified by the ASX on the basis that if a reasonable person would expect the information to be disclosed, then the result would not be unreasonably prejudicial to the entity.[85]

Listing Rule 3.1A.2 provides that for the exception to operate, the information must be confidential and the ASX must not have formed the view that the information has ceased to be confidential. 'Confidential' means confidential as a matter of fact, therefore any release of information from any source, however inadvertent, will mean that the requirement is no longer satisfied. Whereas the ASX recognises that a release of the information to advisers or other service providers does not result in a loss of confidentiality, it has stated that it will take

[83] CASAC, *Report on an Enhanced Statutory Disclosure System* (1991) 22.
[84] ASX, above n 70, 6.
[85] Ibid.

all the circumstances of each case into account in deciding whether or not confidentiality has been lost.[86]

Finally, under Listing Rule 3.1A.3, for the exception to apply, the information must fall within one of the following categories: it would be a breach of law to disclose the information; the information concerns an incomplete proposal or negotiation; the information comprises matters of supposition or is insufficiently definite to warrant disclosure; the information is generated for the internal management purposes of the entity; the information is a trade secret.

B *False Market Rule*

The exception requirements are qualified by Listing Rule 3.1B which provides that if there is or is likely to be a false market in an entity's securities, the entity must give ASX the information that it asks for to correct or prevent the false market. The rule operates even if an exception applies. A false market in an entity's securities may arise where there is a reasonably specific rumour or media comment in relation to the entity that has not been confirmed or clarified by an announcement by the entity to the market and the rumour is having or is likely to have an impact on the price of the entity's securities. In such situations, the entity must make an announcement to the market in order to dispel or clarify the rumour.

The ASX has recognised that an entity cannot be expected to respond to all comments made in the media or all market speculation. Nevertheless, it requires that whatever the information, and however much it might otherwise have been reasonable not to disclose it, it should be released to the market once it becomes known to any part of the market.[87] There is a clear overlap between the confidentiality requirement in 3.1A.1 and the false market rule. In fact, it appears that where information has lost its confidentiality, the false market rule has little operation, since the information will not satisfy the 3.1A exception requirements. This indicates that the false market rule only has a residual operation in situations where confidentiality is maintained, and yet the existence of media speculation forces a comment from the company. In these situations of maintained confidentiality, the rumour cannot have come from the company and is likely to be externally generated. In many cases it may be no more than baseless speculation.

It is for these reasons that the majority of chief executives have not met the rule with approval. David Murray, chief executive of the Commonwealth Bank, has been a particularly vocal opponent of the requirement, claiming it gives rise to market manipulation.[88] His concerns are similar to those of Rob Elliott, the national policy manager for the Institute of Company Directors, who has stated that 'there is a very big possibility of the media being used as pawns by competitors to find out information about other competitors or to have deals

[86] Ibid 7.
[87] Ibid 10.
[88] Damon Kitney and Fiona Buffini, 'CEOs Warn: ASX Crackdown Threatens Deals', *The Australian Financial Review* (Sydney), 24 February 2003, 1.

disclosed before it's in their interest for the company or its shareholders; the whole deal can fall over'.[89] Thus, it seems the main concern with the rule is that it encourages market rumours. In effect, parties who would benefit from the premature publication of information about a proposed transaction are encouraged to generate rumours in relation to that transaction, which then require a response.[90]

The ASX has defended the rule, claiming that if details of confidential deals are in fact in the public domain, then confidentiality has already been lost and that it is only fair that all investors should be informed to the same extent.[91] This reasoning is accurate to the extent that only confidential information should be exempted from disclosure, but its accuracy does not support the existence of the false market rule. As stated above, if information is not confidential it does not fall within the disclosure exceptions. As such, it would need to be disclosed regardless of whether the false market rule is in place or not. This appears to make the rule unnecessary.

The false market rule undoubtedly has been implemented by the ASX to strengthen the continuous disclosure provisions in place before 1 January 2003. Prior to its existence, major listed companies had used the technical reading of the continuous disclosure provisions to avoid disclosing to the market information that is clearly price sensitive and of potential significance to investors.[92] Its implementation seems to be consistent with the ASX belief that a successful continuous disclosure system requires the creation of a 'culture of disclosure', as distinct from a 'culture of compliance' and in actively promoting such a culture, it seeks to pre-empt the need for enforcement.[93] The rule assists the ASX in creating such a culture by allowing it to query non-disclosure, however it may present some difficulties for listed entities.

The rule may at times jeopardise a company's commercial activities, particularly in relation to proposed transactions. In November 2002, Anglo American walked away from a possible merger with MIM Holdings after a leak to a newspaper and an ASX query.[94] Whereas this information was clearly no longer confidential, an externally generated rumour could easily achieve a similar result. Because of the possible negative implications for companies, the Australian Institute of Company Directors has called for media organisations to face sanctions for reporting false, market moving rumours.[95] This suggestion has been fervently contested by newspaper publishers, however it does have merit and some degree of media accountability is necessary if the false market rule is to operate.

89 Ibid.

90 Fiona Buffini, 'ASX Defends Its Disclosure Amendments', *The Australian Financial Review* (Sydney), 3 April 2003, 14.

91 Ibid.

92 Malcolm Rodgers, 'Regulating in a Global Economy: A View from ASIC' (2002) *Australian Mining and Petroleum Law Association Yearbook* 338, 339.

93 Gabia Roberts, 'The Alphabet Soup of Corporate Governance Reforms: Who is Proposing What?' (2002) 54 *Keeping Good Companies* 668, 669.

94 Stephen Bartholomeuz, 'MIM's Directors Have Been Made an Offer They Can't Readily Refuse' *The Age* (Melbourne), 9 April 2003, B3.

95 Kitney and Buffini, above n 88, 1.

Pursuant to the rule coming into force, it is necessary for companies to review their internal compliance measures in an effort to minimise the likelihood of inadequate disclosure in the future.[96] It is now more necessary than ever to re-structure internal flows of information in order to ensure than inadvertent disclosure does not occur.

The rule has also created some uncertainty as to what is meant by a 'reasonably specific rumour'.[97] The phrase leaves a wide scope of interpretation for the ASX and may have a different operation in different situations. Thus, if the rule is to operate, the ASX needs to be restrained in applying its new powers. A company should only be required to respond to media reports that are serious, appear well-sourced and substantiated, and where the matter is truly material to shareholders.[98]

These factors need to be considered in light of the reasons for the creation of the exceptions to the continuous disclosure requirements. Their stated objectives are to *protect the legitimate commercial interests of listed entities.* There is a clear possibility that the rule may impose undue costs and hardships on listed entities and thereby jeopardise their commercial interests. This will ultimately be passed on to investors as a reduction of their returns.

The analysis above indicates that the rule has little, if any, residual operation and in light of these perceived disadvantages it seems quite unnecessary. A better solution would be for the ASX to increase the range of penalties available at its disposal. Currently, it has the option of either de-listing or suspending the securities of an entity which has breached the continuous disclosure rules. In most instances such a penalty would be unduly harsh and disproportionate to the breach. As Part V below will demonstrate, an effective system of enforcement has at its disposal a range of remedies, appropriate for breaches of differing severity. Accordingly, increasing the range of remedies available to the ASX and allowing it to deal with minor breaches of the rules would be more appropriate than creating provisions with little residual operation.

V ENFORCEMENT

The question of exactly how the enforcement of the various continuous disclosure provisions should be structured is not an easy one to answer. The existence of two regimes has meant that there are two regulatory bodies, namely the ASX and ASIC, which ensure that the respective provisions are complied with. There are doubts as to whether this co-regulatory framework is optimal and over time the legislature has continued to implement changes in order to ensure that the rules are enforced in the best possible manner. The latest round of these changes stems from the proposals raised in the Corporate Law Economic Reform Program

96 Roberts, above n 93, 671.
97 Tony Boyd, 'ASX Muddle Over When a Rumour Is Not a Rumour' *The Australian Financial Review* (Sydney), 29 January 2003, 44.
98 Kitney and Buffini, above n 88, 1.

(CLERP) 9 discussion paper,[99] released in September 2002 and the subsequent *CLERP (Audit Reform and Corporate Disclosure) Act 2004* (Cth) ('*CLERP 9*'), assented to on 30 June 2004.

The *CLERP 9* amendments have sought to increase the financial penalties available for breaches of the continuous disclosure requirements and to ensure that persons harmed by non-disclosure are compensated appropriately. Furthermore, they have provided for an increased power to be given to ASIC to issue infringement notices in the hope that it will strengthen the enforcement framework. A general overview of possible enforcement methods, including theoretical foundations, is described below. This is followed by an outline of the main provisions of *CLERP 9* in relation to continuous disclosure, which also seeks to evaluate their appropriateness in light of the theories of enforcement. Finally, the suitability of the ASX as a regulator will be assessed in the context of the co-regulatory system of enforcement.

A *Theories of Enforcement*

The enforcement stage of regulation can be described as the bringing to bear of existing rules on persons or institutions sought to be controlled by those rules.[100] It is vital to the success of regulation as even the most fail-proof set of regulations can be undermined by ineffective enforcement. Whereas a range of informal enforcement techniques are available to a regulating authority, an important distinction can be drawn between 'compliance' approaches to enforcement, which emphasise the use of measures falling short of prosecution in ensuring the rules are not breached, and 'deterrence' approaches, which involve the imposition of penalties in order to deter future contravention.[101]

1 *Compliance*

Compliance-based approaches seek to educate and coerce potential offenders into complying with the law. They are generally regarded as more flexible than deterrence based approaches, allowing for a compliance system to adapt to the situation, and more efficient, as they tend to prevent costly prosecutions.[102] Furthermore, they reduce any harm to society by ensuring that breaches never occur.

Corporations will generally ensure compliance with existing laws and regulations via the implementation of a compliance system. A compliance system can be defined as an internal management system designed to prevent, detect and correct breaches.[103]

99 Department of the Treasury, above n 67.
100 Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice* (1999) 96.
101 Ibid 97.
102 Ibid 98.
103 Christine Parker and Olivia Conolly, 'Is There a Duty to Implement a Corporate Compliance System in Australian Law?' (2002) 30 *Australian Business Law Review* 273.

In a discussion of whether the continuous disclosure regime mandates the establishment of compliance systems, Ford, Austin and Ramsay point towards the obligations of listed companies under both s 674(2) of the *Corporations Act* and the Listing Rules.[104] They argue that that there is an implied duty under the Listing Rules, reinforced by s 674(2), to establish a compliance system and ensure that proper consideration is given to whether information which comes into the hands of executives should be disclosed, and to ensure that they have taken all reasonable steps to acquire disclosable information.

ASIC also has the power to mandate a compliance system under s 93AA of the *ASIC Act 1989* (Cth). The section states that ASIC may accept a written undertaking given by an entity in relation to a matter over which ASIC has a function. Under this power, ASIC may require implementation of a compliance system as part of an enforceable undertaking in settlement of potential enforcement action.[105] It is likely that if ASIC requires a company to implement a compliance system, this system will need to comply with AS3806-1998, the Australian Standard on Compliance Systems. However, as pointed out by Mansfield J in *ACCC v Rural Press*,[106] AS3806 has no statutory recognition and should only be used as a 'guide' to be adapted to each company's operations.

Despite the availability of undertakings as an enforcement measure, care should be taken by ASIC not to use them too extensively. McConvill believes that undertakings are particularly costly and time consuming and do not guarantee a satisfactory outcome.[107] Furthermore, he argues that the adverse publicity attached to an undertaking is undesirable and may compromise a company's reputation in the market.[108] He bases this contention on the fact that enforceable undertakings are often publicised however presents no evidence that they have ever harmed a company's operations. Therefore, it seems that despite their disadvantages, they are a useful enforcement tool in securing compliance.

2 *Deterrence*

The deterrence approach to enforcement aims to use penalties and prosecutions to deter breaches of the rules. It is argued to be highly effective in changing corporate cultures so as to produce improved standards of behaviour.[109] On the downside, it can be costly and can cause resentment, hostility and lack of co-operation.[110] Another undesired side effect of a deterrence-based strategy of enforcement is the possibility that firms may be driven out of business. This would cause unemployment and consequently alienate the public.[111] Therefore,

104 Ford, Austin and Ramsay, above n 77, 509.
105 Parker and Conolly, above n 103, 281.
106 (2001) ATPR 41-833.
107 James McConvill, 'Australian Securities and Investment Commission's Proposed Power to Issue Infringement Notices: Another Slap in the Face to s 1324 of the *Corporations Act* or an Undermining of Corporate Civil Liberties?' (2003) 31 *Australian Business Law Review* 36, 46.
108 Ibid.
109 Baldwin and Cave, above n 100, 98.
110 Ibid.
111 Ibid.

deterrence-based approaches should be used sparingly and only to prevent the most serious contraventions.

The consequences for a breach of the continuous disclosure provisions of the *Corporations Act* are a clear example of penalties designed to deter potential offenders. If s 674(2) is contravened, an offending company will expose itself to a civil penalty or criminal liability. The power of the ASX under the Listing Rules to delist a company or suspend trading in its securities is also aimed at preventing contraventions. Together, the *Corporations Act* and the Listing Rules present a powerful deterrent for any would-be offenders.

3 *Pyramidal Enforcement*

A suitable *combination* of compliance and deterrence approaches to enforcement can be achieved by implementing a strategy of pyramidal enforcement. Such a strategy involves a pyramid of remedies available to the regulator, with the least intrusive, compliance-based remedies at the bottom and the most severe criminal penalties at the top. According to this strategy, most of the regulatory action takes place at the base of the pyramid through attempts to induce compliance by persuasion.[112] As the frequency and gravity of offences increase, the sanctions move further up the pyramid. Non-compliance at any level can result in an escalation to a higher level of adverse consequences.[113]

For such a strategy to be effective, it is necessary to have a wide range of available sanctions. An availability of particularly severe criminal penalties or a threat of corporate liquidation can act as a useful deterrent, even if rarely used,[114] but they would not be sufficient on their own as they may be so drastic that it is politically unacceptable to use them for all but the most serious offences. Severe sanctions need to be supported by a wider range of less severe remedies such as warnings, negotiation and settlement, enforceable undertakings and adverse publicity orders. This will ensure that an appropriate action is available for every type of breach and an escalation is always available to the next level. Thus, the steeper the enforcement pyramid, the greater the pressure that can be exerted to motivate compliance at the base of the pyramid.[115]

The current framework under the *Corporations Act* and the Listing Rules requires additional building blocks for a pyramid to be projected. Whereas severe penalties such as criminal liability and de-listing are readily available, the system is lacking in opportunities for parties to negotiate and settle in order to ensure that costly litigation is avoided and the law is complied with. For the pyramidal structure of enforcement to work, the legislature needs to ensure that the base of the pyramid is widened. This will facilitate the education of the market and ultimately reduce breaches of the regulations.

[112] Gordon Walker and Brent Fisse, *Securities Regulation in Australia and New Zealand* (1994) 579.
[113] Ibid.
[114] Ibid 572.
[115] Ibid 582.

B *CLERP 9 PROVISIONS*

In September 2002, the Federal Government released a discussion paper proposing, amongst other issues, changes to the current continuous disclosure regime. This was followed by the release of the CLERP (Audit Reform and Corporate Disclosure) Bill 2003 in October 2003, which incorporated the proposals into draft legislation and the subsequent enactment of the *CLERP 9* Act.

1 *Dissemination of Information*

The 2002 discussion paper identified that the current procedures for dissemination of price sensitive information, via which the general public receives the information on a twenty minute delayed basis, disadvantage small investors in comparison with market participants and institutional investors.[116] These latter entities often have access to information on an instantaneous basis through commercial information vendors, which gives them an advantage in decision-making. The paper proposed that all investors should have equal access to the materially price sensitive information disclosed by listed entities. It proposed that, as an alternative, listed entities could be required to establish websites and post materially sensitive information at the same time that this information is first released or they could provide facilities for investors to be electronically alerted through real time electronic messaging systems such as e-mail or SMS. It is envisaged that such procedures would reduce the disparity between the information available to investors in the market. Furthermore, it would ensure that the required amount of information is disseminated on a timely basis.

2 *Penalties*

The discussion paper went on to propose that the range of penalties and remedies available for breaches of the continuous disclosure regime be substantially widened. The paper justified this by the need for flexibility of penalties and the importance that the penalty should be tailored to reflect the different circumstances of particular contraventions.[117]

Prior to *CLERP 9*, financial penalties of up to $200 000 could be imposed on a disclosing entity. The *CLERP 9* amendments increased the maximum financial penalty that may be imposed in relation to a contravention of the continuous disclosure provisions by a body corporate from $200 000 to $1 million.[118] The paper also noted that the provisions generally impose penalties on the disclosing entities rather than individuals. Accordingly, the provisions of *CLERP 9* now allow civil penalties to be imposed on individuals involved in the contravention as well as against the entity itself.[119] It is argued that such a move is necessary to prevent those individuals from being 'shielded from responsibility'. It will also allow the penalties to reach their rightful target, rather than impose a burden on an entity,

[116] Department of the Treasury, above n 67, 140.
[117] Ibid 143.
[118] Ibid 144.
[119] *Corporations Act* ss 674(2A), 675(2A).

which is ultimately likely to fall disproportionately on persons such as shareholders rather than on the individuals whose conduct led to the contravention.

Following on from the need for penalties to be directed towards those responsible for the contravention, the *CLERP 9* amendments also aim to provide the most appropriate remedy for those who have suffered loss or damage as a result of a contravention. There was some uncertainty in the pre-*CLERP 9* provisions as to whether a person could apply to recover loss or damages as a result of a contravention of the continuous disclosure regime if ASIC had not sought a declaration of contravention under s 1317J of the *Corporations Act*. To remedy the situation, *CLERP 9* provides that a person may seek compensation regardless of whether ASIC has sought a declaration of contravention. Furthermore, to ensure that any losses are recovered, the *CLERP 9* provisions allow persons to recover damages from either the relevant entity or any other person involved in a contravention.[120]

In formulating the measure of damages in these situations, the legislature needs to be aware of the behavioural factors which influence stock markets. If the EMH was assumed to hold then damages could simply be measured by movement in the share prices once the information is published. However, given that some irrational factors influence investor behaviour, an approach similar to that taken by the *Private Securities Litigation Reform Act*[121] in the US might be preferable. The approach allows for a 'bounce back' period after the information is released to ensure that no over or under-reaction to the information affects the proper measure of damages.[122]

The 2002 discussion paper identified the different processes through which penalties may be imposed on entities and individuals, distinguishing between formal court proceedings and administrative processes. The paper argued that under the pre-*CLERP 9* regulatory framework, only a limited range of penalties could be imposed through administrative processes by market operators or ASIC. It claimed that in many circumstances, administrative penalties are preferable to instituting formal court proceedings, mainly because of the significantly lower costs involved.

Accordingly, the paper made its most controversial proposal in relation to continuous disclosure, recommending that ASIC should be able to impose financial penalties through a process that could potentially involve both administrative and judicial proceedings.[123] Despite the Corporate Reporting and Public Accountability Forum 2002 expressing a number of reservations about the proposed new power to be given to ASIC,[124] the power was included as part of the *CLERP 9* provisions. The process, widely referred to as the 'infringement notice mechanism', is summarised below.

120 *Corporations Act* s 1317HA.
121 *Private Securities Litigation Reform Act* 15 USC § 78a (1995).
122 Thompson, above n 10, 783.
123 Department of the Treasury, above n 67, 147.
124 Mark Abernethy, 'Heads of Agreement' (2002) 73 *CA.Charter* 37, 39.

To begin the infringement notice process, ASIC would hold a hearing to determine whether it is of the opinion that the continuous disclosure provisions of the *Corporations Act* have been breached by an entity. The entity would be invited to make submissions to this hearing. If ASIC forms the opinion that a contravention has occurred, it would issue an infringement notice, setting out a fixed penalty, which would be substantially less than the maximum penalty available for the breach. The mechanism is not intended to be punitive but rather intends to provide a procedure through which an entity that, in ASIC's opinion, has contravened the continuous disclosure provisions may forestall an application to the courts by complying with the infringement notice. Correspondingly, a payment of the penalty under the infringement notice will be a bar to further civil or criminal proceedings instituted by ASIC in relation to the contravention and is not to be taken as an admission of liability by the entity.

If the infringement notice is not paid by the entity, ASIC may commence court proceedings and support its application to the courts by evidence used in the initial hearing. However, the court would be able to consider all matters afresh and form its own view as to whether a contravention has occurred. In these subsequent proceedings, the relevant burden of proof would need to be satisfied, otherwise the court would quash the financial penalty set out in the infringement notice. Notably, if a court finds a contravention has occurred, it would be permitted to impose a financial penalty not lower than the penalty set out in the ASIC infringement notice. Overall, the role of the process is to supplement existing criminal and civil court procedures and thereby fill a regulatory gap existing in the current enforcement framework.

Combined, the *CLERP 9* amendments clearly aim to take a tougher stance on any breaches of the continuous disclosure rules, while simultaneously ensuring that the appropriate remedies are available to those harmed. Whilst aiming to ensure stricter compliance with the rules is an admirable goal, the amendments have not been without their critics. The following sections will evaluate how the provisions fit within the theoretical framework of enforcement.

3 *CLERP 9 Provisions and Enforcement*

The changes instituted by *CLERP 9* are clearly aimed at discouraging any infractions of the continuous disclosure provisions. However, they have also allowed for lesser penalties to act as building blocks in an enforcement pyramid. The sections below discuss the expected efficacy of the proposals in relation to deterring breaches as well as their viability as compared to the existing provisions.

(a) Fines

The provisions which increase the maximum civil penalty, impose penalties on individuals and allow those harmed to recover damages from persons responsible for their loss, all seek to impose a greater burden on potential offenders via a pecuniary penalty. Such monetary fines are normally imposed on companies,

even in relation to criminal offences, since imprisoning firms is not feasible.[125] However, the imposition of fines is not always the best deterrent. Companies may treat fines as a normal business expense and may be able to pass the costs of fines through to consumers or even employees.[126] The provisions do indeed allow investors to claim against the company more easily if they have incurred losses, however shareholders are only one sub-set of innocent parties who could be harmed by a breach.

In most cases criminal prosecution carries with it the stigma of adverse publicity. This of itself could be detrimental to the company's operations and the detriment may again be passed on to shareholders. Thus, an appropriate regulatory framework needs to be set up where all innocent parties are adequately protected.

One alternative to the imposition of a large monetary fine is the equity fine. Equity fines require the convicted corporation to issue a given number of shares to the victim.[127] They have the advantage of reducing the negative effects of fines on workers and consumers and of giving shareholders the opportunity to discipline managers and ensure that further breaches do not occur.[128] Other alternatives to monetary fines include punitive injunctions and adverse publicity orders. Accordingly, whilst pecuniary fines do provide a powerful deterrent to potential offenders, they are not always the best solution and other methods of penalising corporations may need to be devised in order to ensure the optimal operation of the regime.

(b) Infringement Notices

The provisions which allow ASIC to issue infringement notices for contraventions of the continuous disclosure regime have come under scrutiny[129] for various reasons. Much of the negative feedback is associated with the nature of infringement notices. They are a coercive penalty which offers alleged offenders an opportunity to 'make the problem go away' by paying the penalty as set out in the notice, instead of exposing themselves to a court of law and a subsequent conviction.[130]

There are some advantages presented by infringement notices, justifying their use. Infringement notices have been described as 'instant justice'[131] and their primary purpose is to deal with contraventions of the law without involving the courts, thereby increasing the speed and reducing the costs of dealing with certain offences.[132] They are also said to provide a less harsh and discriminatory way of

125 Baldwin and Cave, above n 100, 112.
126 Ibid 113.
127 Ibid.
128 Ibid.
129 See, eg, McConvill, above n 107; Abernethy, above n 124.
130 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No 65 (2002) 396.
131 Mirko Bagaric, 'Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt With on the Spot' (1998) 24 *Monash University Law Review* 231.
132 Australian Law Reform Commission, above n 130, 397-8.

dealing with minor offences and are advantageous for the offender as they do not involve the stigma of a conviction.[133]

Infringement notices have generally been employed in situations where a quick and easy penalty is most appropriate, such as minor traffic offences. This was the view held by the Hon Daryl Williams who has stated that '[a]dministrative penalties, especially on the spot fines provide a quick and efficient resolution of minor transgressions of the law'.[134] However, he also distinguished those penalties from civil penalties, which 'have evolved largely to provide a financial deterrent to corporate misconduct'.[135] Thus, the suitability of infringement notices as a penalty for breaches by corporations may be questioned.

Further disadvantages of infringement notices include the lack of court scrutiny and the risk that innocent people may pay the associated fine in order to save themselves the expense of being involved in a costly court process.[136] The Australian Law Reform Commission has stated that infringement notice schemes may be seen as an attempt to convince people to voluntarily forego the procedural protection of the criminal process in the interests of allowing the state to collect fines more efficiently.[137]

Given that ASIC does allow for a hearing, where the alleged offender can present their side of the case, not all of the factors listed above apply to the *CLERP 9* amendments. However, they are useful in allowing us to understand why the public may view the infringement notices as something sinister, whether that view is justified or not.

An additional problem is presented for infringement notices in the federal sphere. The High Court held in *R v Kirby; Ex parte Boilermakers' Society of Australia*[138] that

> when an exercise of legislative powers is directed to the judicial power of the Commonwealth it must operate through or in conformity with Chapter III [of the *Constitution*]. For that reason it is beyond the competence of the Parliament to invest with any part of the judicial power any body or person except a court created pursuant to s 71 and constituted in accordance with s 72 or a court brought into existence by a State.[139]

This indicates that use of federal judicial power by a body which is not a Chapter III court is unconstitutional. Non-judicial bodies, such as ASIC, can only perform administrative tasks. They may simply put into effect a process of issuing penalty notices that is triggered automatically by a particular set of

[133] Ibid 398.
[134] The Hon D Williams AM QC MP, 'Official Opening and Keynote Address' (Paper presented at Penalties; Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001) 5.
[135] Ibid.
[136] Australian Law Reform Commission, above n 130, 398-9.
[137] Ibid 400.
[138] (1956) 94 CLR 254.
[139] Ibid 270.

facts.[140] Thus, the validity of the infringement notices, as enacted by *CLERP 9*, will rest on whether ASIC is seen as exercising judicial power. Given the wording of *CLERP 9*, which states that ASIC may issue an infringement notice if it has 'reasonable grounds' to suspect a contravention and it must have regard to '*any* other relevant matter',[141] there appears to be a substantial level of discretion given to ASIC.

McConvill[142] believes that an enactment allowing for infringement notices to be issued by ASIC will undoubtedly be unconstitutional. He believes there is both a general and a specific reason as to why the enactment would not be constitutionally valid.[143] The general reason is that, under an infringement notice procedure, the relevant regulator will have to engage in an exercise of fact-finding, value judgment and decision making to determine whether the imposition of an infringement notice is justifiable according to the particular circumstances.[144] McConvill deems this to be the exercise of judicial power with the outcome directly impacting on the rights and obligations of persons. The specific reason is that, according to *CLERP 9*, once an infringement notice has been issued by ASIC, in subsequent court proceedings the court will not be able to impose a penalty of an amount less than that which was provided for in the notice. McConvill argues that this amounts to the court putting a 'rubber stamp' on any decision to give it judicial force.[145]

Another concern with the process was recognised by *CLERP 9* itself. It relates to the ASIC's dual role of investigating alleged contraventions and then holding a hearing to determine whether it should form an opinion that a contravention has occurred and that an infringement notice should be issued.[146] This presents a clear opportunity for bias, which is justified by the paper on the basis that ASIC already has a similar dual role under the *Corporations Act*.[147] However, as McConvill states,[148] the fact that the power already exists elsewhere does not reduce the presence of an inherent conflict of interest.

Whilst it is essential for any enactment to be constitutionally valid, administrative tribunals often undertake similar processes which are clearly non-judicial. The fact that other powers already exercised by ASIC have not been challenged in a constitutional court is an indication of their validity and indicative of the fact that they are unlikely to be challenged in the future. Furthermore, ASIC has an advantage over any other body in dealing with infringements of securities regulation. Its experience in matters of corporate law means it is in the best position to evaluate the available evidence and to reach an accurate conclusion,

140 Australian Law Reform Commission, above n 130, 412.
141 *Corporations Act*, s 1317DAC.
142 McConvill, above n 107.
143 Ibid 40.
144 Ibid 41.
145 Ibid.
146 Department of the Treasury, above n 67, 149.
147 The role refers to ASIC decisions to suspend or cancel a licence granted under the *Corporations Act*.
148 McConvill, above n 107, 42.

despite any perceptions of bias. The potential for infringement notices to reverse the onus of proof has been cited as an additional disadvantage[149] of the proposals. Their implementation has the potential to entrench this reversed onus into the *Corporations Act* where no such intention on the part of the government is evident.[150]

Indeed, there may be some problems with the issue of infringement notices by ASIC, however it appears that these problems are associated with the general negative perceptions of 'on the spot' penalties, rather than the reality of the proposals. If ASIC and the government can educate investors and inform them of the benefits of utilising infringement notices in a system of pyramidal enforcement, it is likely that their acceptance will become more widespread.

(c) Corporate Fault and Liability

For many years it has been difficult to attribute fault to individuals in relation to breaches of the continuous disclosure provisions and the company instead has borne the burden of paying the imposed penalties. The provisions which allow for penalties to be sought against any person, other than the disclosing entity, is a welcome change and is likely to reduce the burden on listed entities and shift it onto those individuals responsible for the breaches. Whilst it can be argued that managers may become over-cautious because of these additional obligations, this is a small price to pay for the provision of a powerful deterrent which goes to the true source of the breach.

On the whole, the enforcement mechanisms enacted by *CLERP 9* do appear to strengthen the continuous disclosure framework, especially in creating suitable remedies for minor contraventions. The enactment may be challenged on grounds of being constitutionally invalid, however such a challenge is unlikely to succeed.

C *ASX as a Regulator*

As discussed above, the ASX and ASIC share the regulation of the continuous disclosure rules, being responsible for the administration of the Listing Rules and the *Corporations Act* respectively. As an independent Commonwealth government body, ASIC's credibility as a regulator is rarely doubted. Unfortunately, the same cannot be said about the ASX. The following sections consider some of the doubts raised as to the ASX's ability to regulate the market and seek to evaluate whether a change of system is warranted.

1 *Advantages and Disadvantages of the Current Framework*

Prior to 1998, the ASX was a mutual enterprise, owned collectively by its members and run on their behalf under its own constitution and operating rules. The exchange demutualised and listed its shares in October 1998. It was this demutualisation which has cast some doubts on the regulatory ability of the now listed ASX.

[149] Australian Law Reform Commission, above n 130, 399.
[150] McConvill, above n 107, 42.

Irrespective of these doubts, there are advantages of having the ASX in the position of a regulator. A number of these were listed by the Senate Economics References Committee in its February 2002 report, *Inquiry into the Framework for Market Supervision of Australia's Stock Exchanges*.[151] The main expressions of support for the ASX as a regulator referred to its proximity to the market and its ability to respond quickly to developments in the market itself.[152] Further, the exchange's familiarity with the market and its ability to adapt elements of supervisory arrangements to reflect the needs of the market was a clear advantage of having it in the position of a regulator.[153]

Perhaps the most powerful argument in support of the ASX relates to its commercial need to maintain the integrity of the market. Since the Australian capital markets account for a mere 1.43 per cent[154] of the global market, international companies in particular have a choice of whether to list on the ASX, since they could easily obtain funding elsewhere. The integrity of the market is seen as an important factor in the determination of where to list. Therefore, in order to attract international capital, the ASX has a very compelling incentive to maintain market integrity. This may reasonably be expected to exert a counter to commercial pressures that might otherwise provide inducements to compromise integrity.[155]

Opposing this commercial incentive to maintain integrity are a number of equally influential incentives to compromise integrity in the name of inflated profits. The first of these relates to the conflict between the commercial and supervisory responsibilities of the ASX. This issue has manifested itself not so much in terms of the amount of resources that the ASX devotes to supervisory responsibilities, but rather the ASX's maximisation of revenue through the imposition of fees and charges for information formerly provided free.[156] Since the availability of information is essential to market integrity, investors rely on a range of information produced by the ASX, such as market indices, which they regard as a 'public good' and as constituting a necessary part of the exchange's operations.[157] The recent sale of the ASX's index business to Standard & Poors outraged investors and now requires them to pay for a service they previously received free of charge. In response, the ASX has stated that since demutualisation it has substantially reduced the cost of access to real time market data and continuous disclosure information.[158] Indeed, with improvements in technology and the increasing use of the internet in the dissemination of information, costs to investors have been reduced. However, this does not mean that the ASX is not simultaneously pursuing commercial objectives at the expense of investors. It is

[151] Senate Economics References Committee, Parliament of the Commonwealth of Australia, *Inquiry into the Framework for the Market Supervision of Australia's Stock Exchanges* (2002) 3.
[152] Ibid 9.
[153] Ibid.
[154] Ibid 15.
[155] Ibid 10.
[156] Ibid 19.
[157] Ibid.
[158] Ibid 21.

doubtful that all the technology-driven savings are passed on to investors and the ASX must be careful not to pursue its commercial objectives at the expense of its regulatory commitments.

It has also been argued that the ASX may be reluctant to regulate listed companies to the fullest because of the costs of doing so.[159] This argument is supported by Listing Rule 18.5 which states that the ASX has the right to take no action in response to a breach of a listing rule. The evidence examined by the Senate Economics Reference Committee indicated otherwise and maintained that the ASX does have a strong vested interest in maintaining integrity. Thus, it is unlikely that the ASX would be willing to compromise the standard of companies listed on the market.

A further challenge to the ASX's regulatory abilities is posed by the expansion of its operations beyond its core listing and trading services into other areas such as registry and information services. This has resulted in the ASX being in direct competition with some of the companies listed on it. Furthermore, a conflict exists in respect of the exchange supervising itself as a self-listed entity. These situations cause the perception that a conflict of interest may arise and, even if no actual conflict occurs, the perception itself can compromise the integrity of the exchange.

These arguments were seized upon by Computershare Ltd, in its proposal to break up the ASX's vertically integrated operation.[160] The Senate Economics References Committee rejected these proposals, perhaps because they seem to have mainly been motivated by self interest.[161] Instead, it was supportive of the creation of the ASX Supervisory Review Pty Ltd ('ASXSR'), a subsidiary company to the ASX, which was to provide a further level of assurance that the ASX is directing appropriate resources to supervisory functions and maintaining standards.[162] The ASXSR claims to provide an additional layer of transparency to the prevailing standards of market operating integrity.[163] Unfortunately, it is difficult to see how a subsidiary company can provide the requisite level of transparency, especially given that not many investors in the market have heard of its existence.[164] The very fact that the ASXSR is a subsidiary of the ASX gives rise to the perception of a possible conflict of interest in its operations. Given that it was put in place exactly for the reason of eliminating these perceptions, its very nature makes it unsuitable for the task.

Some external supervision of ASX's regulatory functions is provided by ASIC. Since March 2002, ASIC has been required to annually assess market licensees

[159] Ibid 23.
[160] Ibid 26.
[161] The ASX's expansion into registry and information services has meant that it is now a direct competitor of Computershare Ltd. Computershare's proposals to break up the operations of the ASX and to prohibit cross-subsidisation from monopoly areas to contestable areas would clearly diminish the ability of the ASX to compete.
[162] Senate Economics References Committee, above n 151, 29.
[163] Australian Stock Exchange Supervisory Review, *Annual Report to the Board of the Australian Stock Exchange* (2002) 5.
[164] Jan Eakin, 'ASX Makes a Fist of Self-Regulation' *The Age* (Melbourne), 22 October 2002, B5.

such as the ASX in order to ensure that they have adequate arrangements to supervise the market and to handle conflicts.[165] In its 2003 assessment,[166] ASIC concluded that the arrangements of the ASX were in fact adequate. This indicates that currently there are no major abuses of ASX's regulatory functions. However, in order to dispel any perceptions that conflicts may occur, ASIC's supervisory jurisdiction needs to be communicated more strongly to the market, to ensure market participants' confidence in the functions of the ASX. Additionally, it is arguable that an annual assessment may not be sufficient to ensure the timely remedy of any deficient regulatory processes within the ASX. If ASIC, or another external supervisor, was to have a more hands-on role in ASX supervision the market would certainly increase its confidence in the ASX as a regulator.

2 *Insufficiency of Redress against ASX Decisions*

The contractual basis from which the ASX derives its powers has proved the source of much uncertainty and disquiet in relation to its suspension and delisting decisions. The discretion of the ASX is illustrated by the decision of Street J in *Kwikasair Industries v Sydney Stock Exchange*,[167] which held that stock exchange board members should be 'free to exercise honestly their powers of entry on or removal from the official list unencumbered by any prospect of their having to face a litigious investigation of the correctness of their decisions'. This rationale is used to justify the fact that the ASX will often fail to give reasons for its decision.[168] Following the High Court decision in *Public Service Board (NSW) v Osmond*,[169] the ASX is under no common law duty to provide reasons, even though the decision to de-list a company may be so serious that the rules of natural justice would require reasons to be given. Unfortunately the issue is far from certain, which is clearly inconsistent with the need for transparency in ASX operations.

It is also doubtful whether ASX delisting and suspension decisions are reviewable under either the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*AD(JR) Act*') or the common law.[170] In *Chapmans v Australian Stock Exchange* ('*Chapmans*'),[171] Beaumont J held that a decision to suspend trading in a company's securities is not a decision to which the *AD(JR) Act* applies. In reaching this decision, Beaumont J held that a delisting decision was not made 'under an enactment' but rather made pursuant to a contractual agreement. Given the current backing to the Listing Rules provided by s 674(2), this proposition is

165 *Corporations Act*, s 794C.
166 Australian Securities and Investments Commission, *Annual assessment (s794C) report – Australian Stock Exchange Limited* (2003).
167 (Unreported, Supreme Court of New South Wales, Street J, 15 May 1968) 15.
168 Gonzalo Puig, 'The Insufficiency of Legal Redress against the Decisions of the Australian Stock Exchange' (2000) 18 *Corporate and Securities Law Journal* 516, 517.
169 (1986) 159 CLR 656.
170 Puig, above n 168, 518.
171 (1994) 14 ACSR 726, 734.

doubtful. Nevertheless, the *Chapmans* decision provides the current law[172] and with it much uncertainty.

Under the common law, there may be legal redress against ASX decisions under the inherent supervisory jurisdiction of the courts to review the decisions of public bodies.[173] In the English case of *R v Panel on Takeovers and Mergers: Ex Parte Datafin plc* ('*Datafin*'),[174] decisions by the London City Panel on Takeovers, a market body like the ASX, were held to be reviewable. Donaldson MR identified the two elements required to enliven the court's jurisdiction, as 'a public element ... and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction'.[175]

Given that the regulatory activities of the ASX are supported by statute and the decision to permit a self-regulatory system is a government decision,[176] the ASX is clearly exercising public powers which do not stem entirely from its members' consent. Following the *Datafin* principle, its decisions should be reviewable. However, no Australian court has yet ruled on the issue of whether the common law provides legal redress against ASX decisions. Likewise, until the position established in relation to the *AD(JR) Act* by Beaumont J in *Chapmans* is clarified, listed companies are unlikely to be assured of the availability of redress against ASX decisions. This compromises the role of the ASX as a regulator and does not allow for independent review of its decisions, which is especially important in cases of perceived conflict.

3 *Double Jeopardy*

The existence of two regulators in the sphere of continuous disclosure means that there is always the possibility for a listed company to incur the wrath of both the ASX and ASIC. Because of this possibility, it is essential that the enforcement activities of both regulators are well coordinated. The ASX should not use its power to delist a company or suspend trading in its securities if the entity has already been appropriately penalised by ASIC, and vice-versa.

Furthermore, both regulators should ensure that there is no duplication of regulatory activities under both the *Corporations Act* and the Listing Rules. Any such duplication could result in unnecessary effort and use of resources, increased uncertainty and costs of compliance for regulated entities, as well as the imposition of an unfair burden. As long as cooperation between the two regulators is maintained, it is likely that these disadvantages will be avoided and the system will continue to function smoothly.

[172] Puig, above n 168, 518.
[173] Ibid.
[174] [1987] 1 All ER 564.
[175] Ibid 577.
[176] Ashley Black, 'Judicial Review of Discretionary Decisions of Australian Stock Exchange Limited' (1989) 5 *Australian Bar Review* 91, 100.

VI Conclusion

The tendency of investors to act irrationally and the incentives for management to 'hide' certain information clearly require a system of mandated continuous disclosure. The current framework moves towards ensuring that a sufficient level of disclosure is present in the market, however it suffers from a lack of available remedies at the enforcement level. The *CLERP 9* provisions have aimed to ensure that this gap in the regulatory process is filled. They have allowed for a greater range of penalties which can ensure compliance with the continuous disclosure provisions. Notwithstanding the presence of unfounded doubts as to their constitutionality, they are likely to only enhance the current framework.

The recent amendments to the Listing Rules, on the other hand, are somewhat more problematic. Whilst they clearly aim to encourage a 'system of disclosure' they have little residual operation and have the potential to impose undue burdens on listed companies. A more appropriate change would see a widening of the range of remedies available to the ASX, beyond the traditional de-listing and suspension power, to allow the regulator to mandate compliance with the Listing Rules by way of lighter penalties. This power needs to be expressly given to the ASX rather than being concealed behind new rules with little substantive operation. This will indeed ensure that a 'system of disclosure' is created.

A further problem for the ASX is posed by the perceptions that it is in a position of conflict in operating an exchange it is itself listed on. In order to ensure that its operations are truly transparent, it is insufficient to appoint a subsidiary company to perform this function. The powers given to ASIC to annually review ASX operations go quite a way towards ensuring the integrity of ASX regulation, however in order to ensure that any perceptions of a conflict are eliminated and investor confidence is maintained, continual review by an external supervisor may be necessary.