MONASH University

Corporate Law and Accountability Research Group

June 2007

Working Paper No. 7

The Use of Civil Sanctions for Breaches of Corporate Law (Submission to the Department of Treasury's Review of Sanctions in Corporate Law)

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A SUBMISSION TO THE DEPARTMENT OF TREASURY'S REVIEW OF SANCTIONS IN CORPORATE LAW

By

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This submission addresses the following consultation issue;

Should greater use be made of civil sanctions for breaches of Corporate Law?

I. SUMMARY

The civil sanctions that are the subject of the Department of Treasury's review are contained in the civil penalty regime in Part 9.4B *Corporations Act 2001* (Cth). This submission contains an evaluation of the Australian Securities and Investments Commission's ('ASIC') use of the civil penalty regime between 1993, when the regime was introduced, and 2006. Based on this evaluation it is recommended that greater use be made of the civil penalty regime for breaches of Corporate Law. While greater use should be made of the civil penalty regime it must be recognized that these enforcement provisions will not be suitable for all breaches of the Corporations Law.

The examination of ASIC's use of the civil penalty regime between 1993 and 2006 has produced the following findings:

- ASIC has achieved a high level of success with the civil penalty applications it has issued.
- While the civil penalty regime was used infrequently between 1993 and 1999 greater use has been made of the regime since 2000.
- Most civil penalty applications issued by ASIC have alleged contraventions of the directors' duties, insolvent trading and market misconduct provisions.
- Very few civil penalty applications issued by ASIC have alleged contraventions of the share capital provisions and the provisions governing the management of managed investment schemes.

The data analysed in this submission was obtained from two sources, the ASIC media releases and the civil penalty judgments issued between 1993 and 2006.

II. INTRODUCTION

An examination of ASIC's use of the civil penalty regime produces much useful information. Between 1993 and 2006 ASIC issued 40 applications for civil penalty orders. Very few of these applications were issued in the first few years of the regime's operation. However, in recent years ASIC has been applying these provisions more frequently. ASIC has achieved successful outcomes in all but one of the civil penalty applications that were finalized up until the end of 2006. The original civil penalty provisions were the directors' duty provisions, insolvent trading provisions, financial benefits to related parties provisions and accounting provisions. Despite the fact that the civil penalty regime has expanded to include other provisions of the *Corporations Act 2001* (Cth), the majority of civil penalty applications issued by ASIC between 1993 and 2006 alleged contraventions of the original civil penalty provisions. Increasingly, ASIC is utilizing the civil penalty regime as an enforcement mechanism for contraventions of the market misconduct provisions.

The major reason for the introduction of the civil penalty regime and its later expansion was to overcome the difficulties faced by ASIC in enforcing certain provisions of the *Corporations Act 2001* (Cth). The difficulties faced by ASIC arose largely because the provisions in question were criminal provisions and were subject to the criminal rules of evidence and standard of proof. The examination of ASIC's use of these provisions leads to the conclusion that the civil penalty regime has enabled some of these difficulties to be overcome.

III. ASIC'S USE OF THE CIVIL PENALTY PROVISIONS

The ASIC media releases and civil penalty judgments indicate that a total of 40 civil penalty applications were issued by ASIC between 1993 and 2006. Table one contains a breakdown of the number of civil penalty applications issued by ASIC per year during this period. Some of the early media releases do not indicate the year that the proceedings were issued. Where this information is not available from ASIC's media releases or the civil penalty judgments the application has been included in the table under the year in which the matter was finalised.[1]

[1] For a detailed discussion of ASIC's enforcement patterns generally see Helen Bird, David Chow, Jarrod Lenne and Ian Ramsay, 'ASIC Enforcement Patterns', Centre for Corporate Law and Securities Regulation, The University of Melbourne, 2003.

Table One
Number of civil penalty applications issued by ASIC by year between 1993 and 2006

Year	No. of civil penalty applications issued where the date of issue is known	No. of civil penalty applications finalised in the year indicated where the date of issue is not known	Total No. issued or finalised (when date of issue not known)	Cumulative total
1993	0	0	0	0
1994	0	0	0	0
1995	0	0	0	0
1996	2	3	5	5
1997	1	2	3	8
1998	2	0	2	10
1999	0	2	2	12
2000	3	1	4	16
2001	7	0	7	23
2002	0	0	0	23
2003	7	0	7	30
2004	4	0	4	34
2005	2	0	2	36
2006	4	0	4	40
Total				40

Very few applications for civil penalty orders were issued in the first seven years of the civil penalty regime's operation. The ASIC media releases and the civil penalty judgments indicate that ASIC issued applications for civil penalty orders in 12 cases in the first seven years of the regime's operation from March 1993 until the end of 1999. In cases where the issue date is available the data indicates that the earliest civil penalty applications were issued in 1996. In cases where the issue date is not available, the media releases indicate that the earliest civil penalty orders were obtained in 1996.

Moodie and Ramsay noted in 2002 that in the early years there was a marked disparity between the intrinsic enforcement capabilities of the civil penalty provisions

contained in the *Corporations Act* 2001 and the enthusiasm of regulators to use them.[2] This seems to be borne out by the early figures.

It has been argued that ASIC is now using the civil penalty provisions more frequently[3] and this would seem to be supported by the evidence. Since 2000 the use of the civil penalty provisions by ASIC has increased. In the seven years from 2000 to 2006 ASIC issued 28 applications for civil penalty orders. This is more than double the number of applications issued in the first seven years.

Many of the civil penalty applications issued between 2000 and 2006 related to high profile cases. These included the applications issued against the directors of the HIH group of companies, the directors of the Water Wheel group of companies, and the directors of One.Tel Ltd, Steve Vizard and Citigroup.

There will be a variety of reasons why ASIC has made greater use of the civil penalty regime since 2000. The timing of the increase in the use of these provisions by ASIC coincides with the commencement of the amendments to the regime introduced by the *Corporate Law Economic Reform Program Act 1999* (Cth) (*CLERP Act).* These amendments would have had some impact on the number of civil penalty applications issued by ASIC.

According to Bird one of the major difficulties with the civil penalty provisions as they existed prior to the *CLERP Act* was that Part 9.4B of the Corporations Law set up two competing civil and criminal regimes.[4] The Corporations Law provided that the commencement of proceedings for a civil penalty order was a bar to a subsequent prosecution for the corresponding criminal offence.[5] In 1999 the Centre for Corporate Law and Securities Regulation at the University of Melbourne (CCLSR) released its report entitled 'Regulating Directors' Duties - How Effective are the Civil Penalty Sanctions in Australian *Corporations Law?*'.[6] The CCLSR argued that one of the factors leading to a lack of use of these provisions was the fact that the legislative regime required the Australian Securities Commission ('ASC') to interact with the Commonwealth Director of Public Prosecutions ('the DPP') and the judiciary in order to seek a civil penalty order. The complexities of the working relationship between these bodies provided a disincentive to the ASC to use these penalty provisions.[7] The CCLSR concluded that the problems identified by Bird prevented the ASC from making full use of the civil penalty provisions.

Many of the difficulties identified by Bird and the CCLSR were overcome when the *CLERP Act* came into operation on 13 March 2000. The *CLERP Act* 1999 repealed the whole of Part 9.4B and replaced it with a new Part 9.4B. The new Part 9.4B contained provisions dealing with the interplay between criminal prosecutions and proceedings for civil penalty orders which arose out of the one contravention of a civil

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2 Grant Moodie and Ian Ramsay, 'The Expansion of Civil Penalties Under the Corporations Act' (2002) 30(1) *Australian Business Law Review* 61, 62.

3 Ibid 61.

4 Helen Bird, 'The Problematic Nature Of Civil Penalties In The Corporations Law' (1996) 14(7) *Companies and Securities Law Journal* 405 at 411.

5 *Corporations Law* s 1317FB.

6 G Gilligan, H Bird and I Ramsay, 'Regulating Directors' Duties – How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?" Centre for Corporate Law and Securities Regulation The University of Melbourne, Melbourne 1999.

7 George Gilligan, Helen Bird and Ian Ramsay, 'Regulating Directors' Duties – How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?" Centre for Corporate Law and Securities Regulation The University of Melbourne, Melbourne 1999 at 36.

penalty provision. The *CLERP Act* removed the bar against the issuing of subsequent criminal proceedings, after the institution of civil proceedings.

However, the amendments introduced by the *CLERP Act* will not account for all of the increase in the number of civil penalty applications issued after March 2000. Other factors may assist in explaining that. Since its inception the regime has expanded to include extra provisions of the *Corporations Act 2001* (Cth) so it is likely that the number of contraventions committed has increased. Time and experience with the operation of the new provisions will be relevant factors. It would be expected that the number of applications issued would increase over time as the enforcement personnel at ASIC gain experience in the use of these provisions.

The combination of these factors and the amendments made by the *CLERP Act* explain the increase in the number of civil penalty applications issued by ASIC after March 2000. The following section of this submission considers ASIC's success with the civil penalty applications it has issued.

A. ASIC's Success Rate

The main reason given for the introduction of the civil penalty regime and its later expansion was to overcome the difficulties faced by ASIC in enforcing certain provisions of the *Corporations Act 2001* (Cth). The difficulties faced by ASIC arose largely because the provisions in question were criminal provisions and were subject to the criminal rules of evidence and standard of proof. ASIC has been successful in obtaining the declarations of contravention that it has sought in all but one case. Much of this success will be attributable to the lower standard of proof applied under the civil penalty regime. ASIC's success rate with civil penalty applications will be considered in this section.

Since the inception of the civil penalty provisions in March 1993 ASIC has applied for civil penalty orders in 40 different cases. These applications have been finalised in 31 cases. In the 31 cases that have been finalised, ASIC was successful in all but one of them. Success is defined as the issuing of a declaration of contravention against at least one of the defendants in the proceeding and the obtaining of civil penalty orders. Some of these situations were resolved by the filing of consent orders and some were resolved by orders of the court. In most cases that proceeded to a full hearing the court was satisfied that the contraventions alleged by ASIC had occurred. These figures are represented in table two.

Table Two
ASIC's success rate – civil penalty orders obtained between 1993 and 2006

No. of applications for civil penalty orders issued	40
No. of applications for civil penalty orders outstanding	8
No. applications where the outcome is not known	1
No. of applications for civil penalty orders finalized	31
No. of finalised matters where ASIC was successful	30
No. of finalised matters where ASIC was not successful	1

The only case where ASIC was not successful was in the application that was issued against Nicholas Whitlam. ASIC alleged that Whitlam had contravened his duty as director and proxy holder of shares in NRMA.[8] On 15 August 2002 the Supreme Court of New South Wales found that these contraventions had been committed and issued a declaration of contravention and civil penalty orders against Whitlam. He was banned from managing a corporation for five years and was ordered to pay a pecuniary penalty of $20,000.[9] On 10 July 2003, following an appeal by Whitlam, the New South Wales Court of Appeal overturned these orders.[10] ASIC's application to the High Court for leave to appeal this decision was denied by the High Court on 2 April 2004.

The case against Whitlam is the only reported case where ASIC has not been successful in obtaining a declaration of contravention against at least one of the defendants in the proceeding and civil penalty orders. It is therefore clear that ASIC is enjoying a high success rate with its applications for civil penalty orders.

In addition, ASIC's success can be measured by the fact that in a significant number of the cases where full details are available, ASIC has proven the alleged contravention and obtained the orders that it had sought. Some of the details relating to the earlier cases are not available. In 24 cases full details of the alleged and proven contraventions and details of the orders sought and obtained are available. In 21 of the 24 cases where full details are available all of the named defendants were found to have contravened at least one civil penalty provision. These figures are represented in table three.

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8 ASIC alleged Mr Whitlam contravened ss 232(2), 232(6) and 250(A) of the Corporations Law and s 180 *Corporations Act 2001*(Cth).

9 *ASIC v Whitlam* (No2) (2002) 20 ACLC 1,333 and *ASIC v Whitlam* (No3) (2002) 20 ACLC 1,537.

10 *Whitlam v. ASIC* [2003] NSWCA 183.

Table Three
ASIC's success rate - Contraventions established and orders obtained between 1993 and 2006

No. of finalised matters where the details of the alleged contraventions and the orders sought are available.	24
No. of these finalised matters where a declaration of contravention was made against all of the named defendants.	21
No. of these finalised matters where ASIC obtained all of the civil penalty orders that it sought.	18

The three cases that are classified in the table as not being successful are the proceedings issued against Nicholas Whitlam, the details of which are outlined above; the proceedings issued against Alan Doyle and Derek Satterthwaite, both directors of Chile Minera NL; and the proceedings issued against various directors and corporations in the Procorp Investments and Central Development Group.

At first instance both directors of Chile Minera NL were found to have contravened the directors' duty provisions. Satterthwaite successfully appealed against the declaration of contravention. Doyle's appeal was not successful and the declaration of contravention made against him was upheld.[11]

In the Procorp matter ASIC instituted proceedings against nine natural persons and various companies associated with the Procorp Investments and Central Development Group. ASIC alleged that eight of the nine natural persons named as defendants had contravened various civil penalty provisions. The court was satisfied that all but one of those eight natural persons had contravened a civil penalty provision. The director who was found not to have contravened a civil penalty provision was found to have contravened other provisions of the *Corporations Act 2001* (Cth).[12]

ASIC has also been successful in obtaining the civil penalty orders that it has sought. In 18 of the 24 cases where full details are available ASIC obtained the type of civil penalty order that it sought. One of the cases where the orders sought were not obtained was the Whitlam case. Another case in this category is the case against the directors of Chile Minera NL. While orders were not obtained against one director, ASIC successfully obtained the civil penalty orders it had sought against the other director. The third case in this category is the Procorp matter. In that case ASIC successfully obtained the orders it sought against seven of the eight natural defendants.

Another case where all orders sought were not obtained is *ASIC v Adler*[13] ASIC applied for pecuniary penalties, banning and compensation orders against three of the defendants. Pecuniary penalties, banning and compensation orders were issued against Mr Adler and Mr Williams. The court declined to impose the pecuniary penalties and compensation orders sought against Mr Fodera because the court was of

[11] *Doyle V ASIC* [2005] WASCA 17.
[12] *ASIC v Maxwell* (2006) 24 ACLC 1,308.
[13] *ASIC v Adler* (No 5) (2002) 20 ACLC 1,146.

the opinion that the contraventions committed by Fodera were of significantly less severity than the other defendants and did not warrant the imposition of these orders.[14]

The two other matters in which ASIC did not obtain all of the orders sought were the proceedings issued against Keith Morton, a director of Forem-Freeway Enterprises Pty Ltd and the directors of QLS Superannuation Pty Ltd. In both of these cases ASIC still achieved a measure of success. In both of these cases ASIC sought banning, pecuniary penalty and compensation orders. Banning orders were imposed and compensation was either paid before trial or orders were imposed. For various reasons pecuniary penalties were not imposed.[15]

Apart from the Whitlam application all finalised civil penalty applications issued by ASIC can be classified as successful. The Whitlam application is the only finalized application issued by ASIC pursuant to the civil penalty regime between 1993 and 2006 that has not resulted in the making of a declaration of contravention against at least one of the named defendants and the issuing of civil penalty orders.

While the number of civil penalty applications issued by ASIC is not large the regulator has been successful in its use of the provisions. The major reason for the introduction of the civil penalty regime and its later expansion was to overcome the difficulties faced by ASIC in enforcing certain provisions of the *Corporations Act 2001* (Cth). The difficulties faced by ASIC arose largely because the provisions in question were criminal provisions and were subject to the criminal rules of evidence and procedure. Most of the civil penalty applications issued by ASIC alleged contraventions of provisions of the Act that, in addition to liability under the civil penalty regime, had the potential to give rise to criminal liability. While the post-*CLERP Act* regime allows a criminal prosecution to be instigated after a civil penalty action has been issued, in most cases this did not occur. Presumably later criminal proceedings were not issued because the regulators deemed that a criminal prosecution could not be sustained. If a criminal prosecution could not be sustained ASIC would have had limited opportunity to enforce these provisions without the civil penalty regime. Therefore it appears that the civil penalty regime has achieved its aim. It has allowed ASIC to obtain orders in situations where criminal sanctions would not have been obtained.

The civil penalty regime applies to a wide range of *Corporations Act 2001* (Cth) provisions. The provisions that are subject to the civil penalty regime are called the civil penalty provisions. While ASIC has achieved a high level of success with the applications it has issued, ASIC has not used the civil penalty regime as an enforcement mechanism for all of the civil penalty provisions. The next section of this submission considers the types of civil penalty applications issued by ASIC between 1993 and 2006.

B. Types of Applications Issued

The original civil penalty provisions were the directors' duty, insolvent trading, financial benefits to related parties and accounting provisions. Despite the fact that the

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14 Ibid 1178-1180.

15 *ASIC v Forem-Freeway* (1999) 17 ACLC 511, *ASIC, In the Matter of QLS Superannuation Pty Ltd v Parker* (2003) 21 ACLC 888 and ASIC Media Release 01/464.

civil penalty regime has expanded to include other provisions of the *Corporations Act 2001* (Cth) the majority of civil penalty applications issued by ASIC between 1993 and 2006 alleged contraventions of the original civil penalty provisions, particularly the directors' duty provisions. The market misconduct provisions became subject to the civil penalty regime in 2002. Between 2002 and 2006 almost half of the civil penalty applications issued by ASIC alleged contraventions of the market misconduct provisions. However, there has been very little use of the civil penalty regime in relation to contraventions of the share capital transaction provisions and the statutory duties imposed on those involved in the management of managed investment schemes.

Twenty eight of the 40 applications for civil penalty orders issued between 1993 and 2006 alleged that contraventions of the directors' duty provisions had occurred. Seven applications alleged that contraventions of the insolvent trading provisions had occurred. Included in these figures is one application that alleged that contraventions of both the directors' duty provisions and the insolvent trading provisions had occurred. Only six applications for civil penalty orders did not allege either a contravention of the directors' duty provisions or the insolvent trading provisions. These figures are represented in Table Four.

Table Four
Types of applications issued by ASIC between 1993 and 2006

Civil penalty provisions	Number of civil penalty applications issued alleging a contravention of these provisions
Directors' duty provisions	28*
Insolvent trading provisions	7*
Provisions other than the directors' duty or insolvent trading provisions	6
Total number of civil penalty applications issued	40

* There was one application that alleged contraventions of the directors' duty and insolvent trading provisions. That application is counted under both categories.

Of the six applications that did not allege either a contravention of the directors' duty provisions or the insolvent trading provisions, two applications alleged contraventions of the continuous disclosure provisions. A further two alleged contraventions of the insider trading provisions, one alleged a contravention of the accounting provisions and one alleged contraventions of the duties owed by responsible entities. These figures are represented in Table Five.

Table Five
Applications not alleging contravention of the directors' duty provisions or insolvent trading between 1993 and 2006

Alleged or proven contraventions	No of civil penalty applications issued
Continuous disclosure	2
Insider trading	2
Accounting provisions	1
Duties of the officers of responsible entities	1
Total	6

The civil penalty regime was expanded in 2002 to include the market misconduct provisions. Five civil penalty applications alleging contraventions of the market misconduct provisions have been issued by ASIC. This represents almost half of the total number of civil penalty applications issued by ASIC between 2002 and 2006. Three of these five applications alleged contraventions of the continuous disclosure provisions and two of these applications alleged contraventions of the insider trading provisions.

The fact that the majority of civil penalty applications were issued in relation to the directors' duty and insolvent trading provisions may partly be explained by the fact that these provisions have been subject to the civil penalty regime for the longest period of time. However, this does not explain the lack of civil penalty applications issued that allege a contravention of the share capital provisions and the statutory duties imposed on those involved in the management of managed investment schemes. These provisions have been subject to the civil penalty regime since 1998, yet only one application has been issued in relation to contraventions of the share capital provisions and two applications have been issued in relation to contraventions of the statutory duties imposed on those involved in the management of managed investment schemes.

The single application for civil penalty orders that alleged a contravention of the share capital transaction provisions alleged that a contravention of the financial assistance provisions had occurred. This application was issued against the directors of the HIH group of companies in 2001. This application also alleged contraventions of the directors' duty provisions and the related party transactions provisions. The first application that alleged a contravention of the statutory duties imposed on the officers of a responsible entity was issued against the directors of Australian Managed Funds Limited (AMF) in 2003 and the second was issued against the directors of Heydon Park Ltd in 2004. The application issued against the directors of Heydon Park Ltd also alleged that contraventions of the directors' duty provisions have occurred.

Table Six provides details of the number of civil penalty applications issued according to the alleged contravention. The table lists all of the civil penalty provisions. The directors duty provisions are grouped together but all other civil penalty provisions are included separately in the table. The table indicates the year that each provision became a civil penalty provision. In addition the table indicates the total number of times each individual civil penalty provision has been the subject of a civil penalty application and the year that the first application was made. This table is useful

because it illustrates the length of time between the inclusion of the provisions within the civil penalty regime and the date of the first civil penalty application.

In addition Table Six illustrates the civil penalty provisions that have not resulted in an enforcement action pursuant to the civil penalty regime. Specifically, there have been no applications for civil penalty orders issued that alleged contraventions of the provisions governing a persons involvement in a company's contravention of the redemption of redeemable preference shares, the share capital reduction provisions and the company's self acquisition and control of shares provisions. There have been no applications for civil penalty orders issued that alleged contraventions of the duties of responsible entities'; employees of the responsible entity and members of the compliance committees. There have been five applications issued in relation to the market misconduct provisions. However no proceedings alleged contravention of the provision governing acquisitions of an interest in the scheme by the responsible entity, market manipulation, false trading and market rigging, dissemination of information about illegal transactions and dealing with demutualisation disclosures for transferring financial institutions and friendly societies.

Table Six - Alleged contraventions in detail (1993 – 2006)

Civil Penalty Provision	Date section became a civil penalty provision	Total No of proceedings alleging contravention to 31/12/06	Date of issue of first of proceedings alleging contravention
Directors duties	1/2/1993	28	1996
S 588G insolvent trading;	1/2/1993	7	1996
S 243ZE(2) and (3) (later s208) the financial benefits to related parties provisions	1/2/1993	3	2001
S 318(1) financial statements and directors reports	1/2/1993	2	1996
- s 254L(2) involvement in a company's contravention of the redemption of redeemable preference shares provisions	1/7/1998	Nil	
S 256D(3) involvement in a company's contravention of the share capital reduction provisions	1/7/1998	Nil	
S 259F(2) involvement in a contravention the company's self acquisition and control of shares provisions	1/7/1998	Nil	
- s 260D(2) involvement in a contravention of the financial assistance provisions	1/7/1998	1	2001
- s 601FC(1) duties of the responsible entity;	1/7/1998	Nil	
- s 601FD(1) duties of the officers of the responsible entity	1/7/1998	2	2003
- s 601FE(1) duties of the employees of the responsible entity;	1/7/1998	Nil	
- s 601FG acquisition of an interest in the scheme by the responsible entity,	1/7/1998	Nil	
- s 601JD(1) duties of the members of the compliance committee	1/7/1998	Nil	
S 674(2) and s 675(2) continuous disclosure	11/3/2002	3	2003
- s 1041A market manipulation	11/3/2002	Nil	
- s 1041B(1) and s 1041C(1) false trading and market rigging	11/3/2002	Nil	
-s 1041D dissemination of information about illegal transactions	11/3/2002	Nil	
- s 1043A(1) and s 1043A(2) insider trading	11/3/2002	2	2004
- subclause 29(6) of Schedule 4 dealing with demutualisation disclosures for transferring financial institutions and friendly societies	11/3/2002	Nil	

There will be many reasons why there have been no applications issued alleging contraventions of these provisions. There may not have been any contraventions of these provisions committed, or any contraventions that were committed may not been detected by the regulator. If contraventions have been detected, ASIC may have decided not to pursue civil penalties for a variety of reasons. The contraventions may not have been considered serious enough or resources may not have been available to pursue applications. Contraventions of these provisions may have been enforced via other means or ASIC may have prioritised other enforcement activities in the relevant period

The fact that there has been only one application made in relation to the share capital provisions and two issued in relation to managed investment schemes deserves further investigation. Two possibilities emerge. Either ASIC has taken very little enforcement action in relation to these provisions or ASIC has taken enforcement action in relation to these provisions using mechanisms other than the civil penalty regime. The former appears to be the case with the share capital transaction provisions, and the latter appears to be the case with managed investment schemes. These findings emerge from an examination of the ASIC Annual Reports from July 1998 to June 2006 and a report published by the CCLSR in 2003 entitled *ASIC Enforcement Patterns*.[16]

The ASIC Annual Reports do not provide detailed information about the types of enforcement activities instigated by ASIC during the period from July 1998 to June 2006 but they do provide some general information. There is no mention of any enforcement activity in relation to the share capital provisions. However, it appears that ASIC was engaged in enforcement activity in relation to the managed investment industry during this period. For example, the 2000-2001 Annual Report notes that ASIC 'staff inspected 83 responsible entities, representing one fifth of the industry, and remedial action resulted from 83 per cent of those visits.'[17] According to ASIC the most serious enforcement activities undertaken by it in relation to the managed investments industry in the July 2000 – June 2001 period were the revocation of 4 licences, the imposition of licensing conditions in 13 cases, 22 amendments to compliance plans and the execution of one enforceable undertaking.[18]

The ASIC Annual Reports for the years 2001-02, 2002-03 and 2003-04 indicate that enforcement activities were undertaken in relation to several illegal and unregistered managed investment schemes.[19] The 2004-05 ASIC Annual Report notes that during this period one of the main activities undertaken by ASIC's Compliance Division was ensuring that compliance plans of responsible entities were upgraded in 111 cases. The 2003-04 and 2004-05 ASIC Annual Reports list medium managed investment schemes as an area of particular risk to be targeted in the future.[20]

The CCLSR's report entitled *ASIC Enforcement Patterns* examined the findings of an empirical study of ASIC's court based enforcement activities from 1997 to 1999.[21] The report considered all court based enforcement activities undertaken by ASIC

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16 Centre for Corporate Law and Securities Regulation, University of Melbourne *ASIC Enforcement Patterns* (2003).
17 ASIC Annual Report 2000-01, 30.
18 Ibid.
19 ASIC Annual Report 2001-02, 29-31 and ASIC Annual report 2002-03, 28, ASIC Annual Report 2003-04, 16.
20 ASIC Annual Report 2003-04, 23 and ASIC Annual Report 2004-05, 29.
21 Centre for Corporate Law and Securities Regulation, above n 16.

during the relevant period including civil penalty proceedings. Proceedings issued pursuant to the civil penalty regime were not identified separately.

The CCLSR report provides details of the provisions of the Corporations Law that were most commonly enforced by ASIC during the period from 1997 to 1999. One of the limitations of the findings in the report is that the information supplied by ASIC included all provisions considered in investigations leading up to the issuing of proceedings, not just the provisions that were ultimately alleged to have been contravened.[22] Therefore the findings of this study reflect the provisions that ASIC suspected were contravened, rather than the provisions that were alleged to have been contravened in the proceedings that were issued.

The report divides ASIC's enforcement activities into civil enforcement actions and penal enforcement actions. Civil enforcement actions are defined as 'court-based actions undertaken by ASIC primarily with a restitutionary aim.'[23] Penal enforcement actions are defined as being 'primarily punitive in nature. In these actions ASIC is seeking a sanction against the wrongdoer as punishment for wrongdoing.'[24] For the purpose of the CCLSR report proceedings issued pursuant to the civil penalty regime were considered to be penal enforcement actions.

One hundred and fifty three civil court-based enforcement actions were issued during the relevant period. The CCLSR report lists the 10 most commonly specified legislative sections. Proceedings issued in relation to the prescribed interests provisions are equal seventh on the list. The prescribed interest provisions were the precursors to the current managed investment provisions. Five matters out of 153 civil enforcement actions were issued in relation to the provision dealing with the issue of prescribed interests.

The list of the ten most commonly specified civil court-based enforcement actions does not include any of the share capital provisions.[25] Four civil court-based enforcement actions were instigated in relation to the provisions that appear 10th on the list of 10. Therefore any provisions not appearing on the list were the subject of civil enforcement actions less than four times during the relevant period. It can be assumed that of the 153 civil enforcement matters issued in the relevant period somewhere between zero and three matters were issued in relation to the share capital provisions.

The figures indicate that 1,652 penal court-based enforcement actions were issued during the relevant period. The report lists the ten most commonly specified legislative provisions. The prescribed interests and share capital provisions do not appear in the top 10. Twenty two court based enforcement actions were instigated in relation to the provisions that appear 10th on the list of 10. Therefore any provisions not appearing on the list were the subject of court-based penal enforcement actions less than 22 times during the relevant period. It can be assumed that of the 1,652 penal matters issued in the relevant period, somewhere between zero and 21 matters were issued in relation to contraventions of the prescribed interests and share capital provisions.

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22 Ibid 56.
23 Ibid 51.
24 Ibid.
25 Ibid 79-81.

In relation to the share capital provisions, it appears from the available information that apart from the one application issued pursuant to the civil penalty regime ASIC is taking very little, if any, enforcement action. In contrast, it appears that ASIC has been actively engaged in the enforcement of the provisions governing the managed investments industry. However most of that enforcement activity has been non-court based. ASIC has issued only two civil penalty applications in relation to the managed investment provisions. This suggests that ASIC finds other remedies or enforcement options more appropriate

The examination of ASIC's use of the civil penalty regime reveals that it provides an effective enforcement mechanism for contraventions of the directors' duty, insolvent trading, continuous disclosure and insider trading provisions. However, there has been very little use of the civil penalty regime in relation to contraventions of the share capital transaction provisions, the statutory duties imposed on those involved in the management of managed investment schemes and the other market misconduct provisions. While ASIC has achieved a high level o success with the civil penalty applications it has issued, the civil penalty regime will not be a suitable enforcement mechanism for all breaches of the *Corporate Act 2001* (Cth)

IV. CONCLUSION

The *Corporations Act 2001* (Cth) civil penalty regime was introduced in 1993 in an attempt to overcome apparent deficiencies in the law relating to the enforcement of the statutory directors' duties. While the number of civil penalty applications issued by ASIC between 1993 and 2006 is not large, the regulator has been successful in its application of these provisions. Thirty one applications for civil penalty orders have been finalised and ASIC was successful in all but one of them. Success is defined as the obtaining of a declaration of contravention against at least one of the named defendants and the obtaining of civil penalty orders.

However, civil penalty proceedings have not been issued alleging contraventions of all of the civil penalty provisions. Despite the fact that the civil penalty regime has been extended to include other provisions of the *Corporations Act 2001* (Cth), the vast number of civil penalty applications issued by ASIC between 1993 and 2006 alleged contraventions of the original civil penalty provisions. In recent years ASIC is making greater use of the civil penalty regime as an enforcement mechanism for contraventions of the continuous disclosure provisions.

Based on the evaluation of ASIC's use of the civil penalty regime this submission recommends that greater use should be made of this regime for breaches of Corporate Law. While greater use should be made of the civil penalty regime it should be recognized that this regime will not provide an effective enforcement regime for all breaches of the Corporations Law. Consideration will need to be given to the type of provisions that are amenable to being enforced by the civil penalty regime.