



Workplace and Corporate Law Research Group

May 2009

Working Paper No. 14

**CONTINUOUS DISCLOSURE: TESTING THE CORRESPONDENCE BETWEEN
STATE ENFORCEMENT AND COMPLIANCE**

MICHELLE WELSH

The Workplace and Corporate Law Research Group (WCLRG) is a research concentration within the Department of Business Law & Taxation, Faculty of Business & Economics, at Monash University. It has been in operation since March 2008, having previously operated as the Corporate Law and Accountability Research Group (CLARG) since November 2005.

WCLRG invites the submission of papers for publication in its Working Paper Series. Submissions on workplace relations and employment law, labour market regulation, corporate governance, corporate social responsibility, and the intersections between labour law and corporate law are welcomed. For details, go to:

<http://www.buseco.monash.edu.au/blt/wclrg/working-papers.html>

CONTINUOUS DISCLOSURE: TESTING THE CORRESPONDENCE BETWEEN STATE ENFORCEMENT AND COMPLIANCE

MICHELLE WELSH

Senior Lecturer
Workplace and Corporate Law Research Group
Department of Business Law and Taxation
Faculty of Business and Economics
Monash University

Email: michelle.welsh@buseco.monash.edu.au

I INTRODUCTION

The literature on regulation theory asserts that regulators are best able to encourage compliance when they are armed with a wide range of sanctions otherwise to compel compliance. It has been argued that the enactment of a wide range of sanctions and the use of those sanctions by a regulator should deter future contraventions of the law and lead to greater compliance. This paper discusses the early findings of a research project that tests some of the assumptions of regulatory theory in the corporate law context.

The questions to be examined in the research project are whether or not there is a correspondence between the introduction of an enforcement regime and an increase in the level of compliance with the law which is being enforced, and whether or not there is a correspondence between enforcement activity by a regulator and an increase in the level of compliance with the law which is being enforced. This project aims to test these assumptions in the context of ASIC's enforcement of the continuous disclosure provisions contained in *Corporations Act 2001* (Cth) s 674(2).

That provision requires listed disclosing entities to comply with the continuous disclosure obligation contained in ASX Listing Rule 3.1. Subject to certain exceptions, ASX Listing Rule 3.1 states 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.'¹

If an alleged contravention of *Corporations Act 2001* (Cth) s 674(2) occurs, the Australian Securities and Investments Commission (ASIC) can instigate enforcement action under the criminal, civil penalty or administrative penalty regimes. These regimes were introduced in 1994, 2003 and 2004 respectively. This project will examine data on the disclosure of

¹ Australian Stock Exchange Listing Rule 3.1.

information to the ASX to determine whether or not the enactment of the different enforcement regimes, and the use of those regimes by ASIC, corresponded with an increase in the level of compliance with the continuous disclosure requirements by disclosing entities.

This research project is in its initial stages. Funding for the data collection was obtained in 2008. At the date of writing this paper the data collection had not been completed. The paper sets out the research questions which will be examined, the theory underpinning the project, the reasons for the choice of the continuous disclosure regime, the methodology to be employed, some limitations of the study and some preliminary analysis of the data collected to date.

II THE RESEARCH QUESTIONS

The aim of this project is to provide some insights into the broad issues surrounding the use of enforcement regimes as a means of encouraging compliance. In order to provide some insights into these issues the project examines two research questions. These research questions are:

- whether or not there is a correspondence between the introduction of the criminal, civil penalty and/or administrative penalty regimes and an increase in the level of compliance with the continuous disclosure requirements by disclosing entities, and
- whether or not there is a correspondence between enforcement activity undertaken by ASIC and an increase in the level of compliance with the continuous disclosure requirements by disclosing entities.

III REGULATORY THEORY

The theory underpinning this project is strategic regulation theory. This theory recognises that it is not possible for any regulatory agency to detect and enforce every contravention of the law it administers. Therefore it is vital that regulatory agencies are able to encourage actors to comply with the law voluntarily. The goal of strategic regulation theory is to ‘stimulate maximum levels of regulatory compliance.’²

Usually strategic regulation theory is represented graphically by the pyramid model.³ The pyramid model was developed and expanded by John Braithwaite and Ian Ayres.⁴ It requires regulators to be armed with a wide range of sanctions. Strategic regulation theory relies on the premise that the actions of individuals will be motivated by different factors and that a successful regulatory agency will need to have a range of enforcement options available to enable it to deal with actors who are subject to those different motivational factors. Some business actors will be motivated purely by economic factors while others’ actions will be determined by a sense of social responsibility. Some will be induced to act by a combination

² George Gilligan, Helen Bird and Ian Ramsay, ‘Civil Penalties and the Enforcement of Directors’ Duties’ (1999) 22 (2) *University of New South Wales Law Journal* 417, 426.

³ Ibid 425.

⁴ See for example John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985) and Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

of these and other factors. Moreover, the motivational factors influencing the behaviour of individual actors will change over time.⁵

As business actors are motivated by different factors, a range of enforcement strategies are required to ensure that those actors comply with the law. Business actors who are motivated by a sense of social responsibility could be regulated effectively by a regime which relies on persuasion or self-regulation. A regime based on punishment would be required to regulate business actors who are influenced solely by economic considerations.⁶

As regulatory agencies deal with numerous actors subject to differing motivational factors, they will need to have a range of enforcement mechanisms at their disposal. A regulatory regime could not operate effectively if it was based solely on a strategy of persuasion and self-regulation; nor could it operate successfully if it relied solely on a punishment strategy. A system based solely on persuasion and self-regulation could operate well in relation to those persons within the group who are motivated by a sense of social responsibility. However, those actors who are motivated solely by economic considerations could exploit such a regulatory system. A regime based solely on punishment may be an effective regulatory regime in relation to those actors who are motivated by economic considerations. On the other hand, such a regulatory regime could undermine the goodwill of business actors within the group who are motivated by a sense of social responsibility.⁷

Braithwaite argues that usually actors who are motivated by a sense of social responsibility will be committed to compliance. However, the virtue of these actors may be destroyed if the regulator treats them as if they are not trustworthy. Braithwaite states that:

[c]ommon sense and a wealth of experimental psychological research instructs us that when human beings are compelled to do something their commitment to doing it erodes. More precisely, commitment erodes in comparison with a situation where they voluntarily choose to do a thing because they are persuaded that it is the right thing to do.⁸

Therefore a successful enforcement regime must allow virtuous actors the chance to be virtuous and to comply voluntarily with the law. However, in situations where corporate actors do not respond to persuasion or self-regulation, a successful regulatory regime would be required to have at its disposal some form of punishment to force these non-responsive actors to comply.⁹

In 2001, Brown applied strategic regulation theory in the context of corporate crime in the United States and stated that:

[t]he rationales behind the Ayres-Braithwaite proposal are now widely accepted in regulatory debate and increasingly characterize enforcement practice. A driving motivation of this approach is to reduce the "psychology of resentment," the prospect that firms and individuals confronted with inflexible commands and harsh punishments adopt a critical, noncooperative posture toward compliance goals and enforcement personnel. Those attitudes foster norms and legitimacy problems that work against legal compliance. Conversely, new regulatory strategies aim to foster self-regulation, voluntary compliance, and a sense of social responsibility. Cooperative, nonconfrontational approaches begin enforcement with dialogue and efforts to coax voluntary responses, followed only later, for a

⁵ Ayres and Braithwaite, above n 4, 24.

⁶ Ibid 25-6.

⁷ Ibid 24.

⁸ John Braithwaite, 'Responsive Business Regulatory Institutions' in C A J Coady and Charles Sampford (eds), *Business Ethics and the Law* (1993) 83, 85.

⁹ Ayres and Braithwaite, above n 4, 26.

recalcitrant subgroup, with warnings, civil sanctions, and criminal prosecution. They strengthen the legitimacy of the legal rules and social influences that support them. Regulators and scholars have become increasingly sensitive to the importance of such informal, nonlegal means of fostering compliance; the goal is to design enforcement strategies that foster social norms, corporate cultures, and market contexts in which "corporate virtue" can develop and be maintained. (citations omitted)¹⁰

Apart from the requirement to deal with actors motivated by different factors there are other reasons regulators need to be armed with a range of sanctions. Ayres and Braithwaite argue that difficulties can arise if a regulator only has a single enforcement option.¹¹ This is especially true when the single enforcement option is severe. If a regulator has only one severe enforcement option, it is impossible to use it except in situations of the most serious offences. Conversely, when less serious offences occur regulators have no appropriate enforcement mechanisms at their disposal. When only one drastic enforcement mechanism is available, regulators:

often find themselves in the situation where their implied plea to co-operate or else has little credibility. This is one case of how we can get the paradox of extremely stringent regulatory laws causing under-regulation.¹²

To illustrate this argument, Ayres and Braithwaite provide an example of a regulator who has the responsibility of enforcing five different offences of increasing severity. They label the five offences as A, B, C, D and E. In the example, the regulator responsible for enforcing these provisions is able to seek two different enforcement outcomes. Ayres and Braithwaite label the enforcement outcomes X and Y. In the example, enforcement outcomes X and Y are punishments which the community would judge to be acceptable for offences C and D. However, these enforcement outcomes are unacceptably severe for offences A and B and are not severe enough for offence E. In this example there is no politically acceptable way of punishing offences A and B. In addition, offence E can be punished but only at a level that the community judges to be too lenient.¹³

To combat these problems, Ayres and Braithwaite argue that the regulatory regime must have at its disposal a variety of enforcement mechanisms so that for each level of contravention, there is a corresponding measure of penalty. When a regulator has a number of enforcement mechanisms in its armory, it is able to choose the enforcement outcome which best suits the actions of the contravening party. To ensure that the regulatory regime in Ayres and Braithwaite's example complies with strategic regulation theory, three additional enforcement outcomes which are appropriate for offences A, B and E are required.¹⁴

In order to encourage compliance, not only do regulatory agencies require a variety of enforcement mechanisms but those enforcement mechanisms must also be ordered correctly. Ayres and Braithwaite argue that compliance is most likely to be achieved when a regulatory agency is able to display an explicit enforcement pyramid which contains a variety of enforcement measures that escalate in severity in proportion to the nature of the contravention which has been committed.¹⁵ Strategic regulation theory requires a regulator to

¹⁰ Darryl Brown, 'Street Crime, Corporate Crime and the Contingency of Criminal Liability' (2001) 149 *University of Pennsylvania Law Review* 1295, 1330, 1313-4.

¹¹ Ayres and Braithwaite, above n 4, 36.

¹² *Ibid.*

¹³ *Ibid* 36-7.

¹⁴ *Ibid* 37.

¹⁵ *Ibid* 35.

be armed with a wide range of sanctions that escalate from persuasion at the bottom of the pyramid, to incapacitation at the apex.¹⁶

The base of the pyramid should contain mechanisms which allow the regulator to coax compliance by persuasion. The next level of the enforcement pyramid may include measures such as the sending of a warning letter. If the warning letter fails to secure compliance the next level of the enforcement pyramid may allow for the imposition of a civil penalty (monetary or otherwise). The penultimate level of the pyramid may contain criminal fines and other non-custodial sentences for individuals, and temporary plant shutdown or licence suspension for bodies corporate. Incarceration for individuals and permanent licence cancellation or deregistration for bodies corporate may be at the apex of the pyramid.¹⁷

IV REASONS FOR CHOOSING CONTINUOUS DISCLOSURE

As stated previously this research project examines two research questions. Those questions are whether or not there is a correspondence between the introduction of a range of enforcement regimes and an increase in the level of compliance with their continuous disclosure obligations by disclosing entities. The second research question is whether or not there is a correspondence between enforcement activity undertaken by ASIC and an increase in the level of compliance with their continuous disclosure obligations by disclosing entities.

There are three reasons why the continuous disclosure provisions were selected for purposes of this study. First, it is possible to measure compliance with the continuous disclosure provisions to a reasonable degree of certainty. The continuous disclosure requirements are contained in the ASX Listing Rules, which require listed disclosing entities to continuously disclose price sensitive information to the ASX. Subject to certain exceptions ASX Listing Rule 3.1 states 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.'¹⁸

The announcements made by disclosing entities are listed on the ASX website. The ASX designates the announcements which are considered to be price sensitive. Not all announcements designated price sensitive by the ASX will have been made pursuant to the requirements of ASX Listing Rule 3.1. Some price sensitive announcements will be made pursuant to the requirements of other ASX Listing Rules. For example, Chapter Four of the ASX Listing Rules requires disclosing entities to periodically disclose certain information. That information includes annual¹⁹ and half yearly²⁰ reports.

It is possible to draw some conclusions about the level of compliance with ASX Listing Rule 3.1 and thereby with *Corporations Law 2001* (2001) s 674, by counting the number of price sensitive announcements listed on a company's ASX web site, provided that the price sensitive announcements made pursuant to other listing rules are excluded. An increase in the number and length of these price sensitive announcements provides an indication of an increase in compliance with the continuous disclosure requirements.

¹⁶ Ibid 36-9.

¹⁷ Ibid 35-6.

¹⁸ Australian Stock Exchange Listing Rule 3.1.

¹⁹ Australian Stock Exchange Listing Rule 4.3.

²⁰ Australian Stock Exchange Listing Rule 4.1 and 4.2.

The second reason for selecting the continuous disclosure provisions for purposes of this research project is that these provisions are enforced by criminal, civil penalty and administrative penalty regimes. The enforcement regime for continuous disclosure accords with strategic regulation theory, because ASIC is able to display an explicit enforcement pyramid which contains a variety of enforcement measures that escalate in severity in proportion to the nature of the contravention which has been committed. In addition, the criminal, civil penalty and administrative penalty enforcement regimes were introduced in different years. As indicated earlier in this paper, they were introduced in 1994, 2002 and 2004 respectively. Therefore it is possible to compare the levels of compliance before the introduction of the three separate regimes with the levels of compliance after the introduction of each of these regimes.

The third reason for choosing the continuous disclosure provisions is that, despite the fact that the criminal regime has been available since 1993, the civil penalty regime has been available since 2002 and the administrative penalty regime has been available since 2004, very little enforcement action was undertaken by ASIC until 2006. Prior to 2006, a total of four enforcement actions were instigated by ASIC in relation to contraventions of the continuous disclosure provisions. Civil penalty applications were issued against Southcorp Ltd²¹ in 2003 and Chemeq Ltd²² in 2004. Administrative penalty notices were issued against Solbec Pharmaceuticals Limited²³ and QR Sciences Holdings Limited²⁴ in 2005.

ASIC increased its enforcement activity in relation to alleged contraventions of the continuous disclosure provisions in 2006. A total of six enforcement actions were initiated during that year. This included the first criminal prosecution which was commenced against Mr Steven Hart and Mr Richard Hayter, two executives of Harts Australasia Limited.²⁵ In addition, in 2006 a civil penalty application was initiated against Fortescue Metals²⁶ and administrative penalty notices were issued against Avastra Limited,²⁷ SDI Limited,²⁸ Astron Limited²⁹ and Avantogen Limited.³⁰

A comparison can be made between the level of compliance prior to 2006, when the enforcement regimes were available but were not being utilised frequently, with the period after 2006, the year in which there was a sharp increase in enforcement activity. Prior to undertaking this analysis, this paper provides some detail of the history of the enforcement of the continuous disclosure provisions.

V HISTORY OF THE ENFORCEMENT OF CONTINUOUS DISCLOSURE

The continuous disclosure requirements contained in the ASX Listing Rules received statutory backing in 1994. *Corporations Act 2001* (Cth), s 674 requires listed disclosing

²¹ ASIC media release 03/070.

²² ASIC media release 04/426.

²³ ASIC media release 05/223.

²⁴ ASIC media release 06/042.

²⁵ ASIC media release 06/176.

²⁶ ASIC media release 06/062.

²⁷ ASIC media release 06/156.

²⁸ ASIC media release 06/124.

²⁹ ASIC media release 06/242.

³⁰ ASIC media release 06/428.

entities to comply with the obligation to disclose contained in ASX Listing Rule 3.1. When the continuous disclosure provisions were enacted in 1994, they were criminal provisions.

Despite the fact that the criminal penalties were available since 1994, no enforcement of the continuous disclosure provisions occurred until 2003. It has been argued that during this period, many breaches of the continuous disclosure provisions were not pursued because of the difficulty in proving the elements of the offence to the required criminal standard.³¹ In 2002, the Department of Treasury noted that no prosecutions had been launched in relation to contraventions of the continuous disclosure provisions and that the lack of criminal prosecutions was due in part to the requirement to satisfy the criminal evidentiary burdens.³² The first criminal prosecution alleging a contravention of the continuous disclosure provisions was not commenced until 2006.³³

The lack of criminal prosecutions of contraventions of the continuous disclosure provisions was recognised on 11 March 2002, when the *Corporations Act 2001* (Cth) was amended by the enactment of the *Financial Services Reform Act 2001* (Cth) (*FSR Act*). The *FSR Act* provided that in addition to criminal sanctions, the continuous disclosure and other market misconduct provisions could be enforced by the civil penalty regime.³⁴

The civil penalty regime deems certain provisions of the *Corporations Act 2001* (Cth) to be civil penalty provisions.³⁵ If ASIC believes that a civil penalty provision has been contravened it can issue proceedings seeking a declaration of contravention and civil penalty orders.³⁶ Civil penalty proceedings differ from criminal prosecutions in that proceedings for a declaration of contravention and civil penalty orders are treated as civil proceedings for the purposes of the application of the rules of evidence and procedure.³⁷ The standard of proof is proof on the balance of probabilities.³⁸

If the court is satisfied that a civil penalty provision has been contravened, the court is required to issue a declaration to that effect.³⁹ Once a declaration of a contravention of the continuous disclosure provisions has been made, the court can impose a pecuniary penalty if certain conditions are satisfied.⁴⁰

³¹ Explanatory Memorandum, Financial Services Reform Bill 2001 at [2.78]. See also Department of Treasury, Commonwealth of Australia, *Corporate Disclosure Strengthening the Financial Reporting Framework* (2002), 147.

³² *Ibid.*

³³ As indicated above, two former executives of Harts Australasia Limited were charged with contraventions of the continuous disclosure provisions in 2006: ASIC Media Release 06-176.

³⁴ The other market misconduct provisions enforced by the civil penalty regime are the market manipulation, false trading and market rigging, dissemination of information about an illegal transaction and insider trading provisions. As a result of the *FSR Act*, civil penalty provisions are now categorised as either corporation/scheme civil penalty provisions or financial services civil penalty provisions. The provisions which were civil penalty provisions prior to the enactment of the *FSR Act* are categorised as the corporation/scheme civil penalty provisions. The continuous disclosure provisions and the other market misconduct provisions are categorised as the financial services civil penalty provisions.

³⁵ *Corporations Act 2001* (Cth) s 1317E.

³⁶ *Corporations Act 2001* (Cth) s 1317J.

³⁷ *Corporations Act 2001* (Cth) s 1317L.

³⁸ *Corporations Act 2001* (Cth) s 1332.

³⁹ *Corporations Act 2001* (Cth) s 1317E.

⁴⁰ *Corporations Act 2001* (Cth) s 1317G(1A)(c). In 2002 the maximum pecuniary penalty available for a contravention of the continuous disclosure provisions was \$200 000. In 2004 the maximum penalty was

In addition to the imposition of a pecuniary penalty, the court has the power to order the person who has contravened a civil penalty provision to pay compensation to another person or corporation if the other person or corporation has suffered loss or damage as a result of the contravention.⁴¹ *Corporations Act 2001* (Cth), s 920A(1) gives ASIC the power to ban a person from providing any financial service if that person has not complied with a financial services law or ASIC has reason to believe that that person will not comply with a financial services law. The definition of financial services law in *Corporations Act 2001* (Cth), s 761A includes the continuous disclosure provisions.

The Explanatory Memorandum to the Financial Services Reform Bill 2001 referred to the extension of the civil penalty regime to the continuous disclosure and other market misconduct provisions and stated that:

[t]he application of the civil burden of proof (balance of probabilities) will facilitate the bringing of actions for breaches of the provisions. The application of civil penalties is likely to act as a deterrent to market misconduct.⁴²

The Department of Treasury welcomed the extension of the civil penalty regime to cover the continuous disclosure and other market misconduct provisions. The Department noted that the deterrent effect of the financial penalties would be enhanced by ASIC's capacity to commence civil proceedings as well as criminal prosecutions.⁴³

On 1 July 2004, the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) (*CLERP 9 Act*) amended the civil penalty regime. The reforms to the civil penalty regime introduced by the *CLERP 9 Act* impacted on ASIC's ability to enforce the continuous disclosure provisions. The amendments included an increase in the maximum penalty payable by a corporation for a contravention of the continuous disclosure provisions from \$200 000 to \$1 million.⁴⁴ The *CLERP 9 Act* gave ASIC the power to seek civil penalties against individuals who are knowingly involved in a corporation's contravention of the continuous disclosure provisions.⁴⁵

In addition to amending the operation of the civil penalty regime, the *CLERP 9 Act* introduced the new administrative penalty regime. This regime provided ASIC with an alternative enforcement mechanism to the civil penalty regime. The administrative penalty regime allows ASIC to issue an infringement notice in relation to a relatively minor contravention of the continuous disclosure provisions.

increased to \$1 million for corporations by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth); see further below.

⁴¹ *Corporations Act 2001* (Cth), s 1317HA.

⁴² Explanatory Memorandum, Financial Services Reform Bill 2001, n 31, [2.79].

⁴³ Department of Treasury, above n 31, 133 and 147.

⁴⁴ The increase in the penalty payable by corporations applied to all the financial services civil penalty provisions. For a discussion of the impact of the increase in the maximum pecuniary penalty, see Greg Golding and Natalie Kalfus, 'The Continuous Evolution of Australia's Continuous Disclosure Laws' (2004) 22 *Company and Securities Law Journal* 385; Andrew Cassidy and Larelle Chapple, 'Australia's Corporate Disclosure Regime: Lessons from the US Model' (2003) 15 *Australian Journal of Corporate Law* 81; and Department of Treasury, above n 31, 143-4.

⁴⁵ *Corporations Act 2001* (Cth), s 675(2A) and 1317G(1A). For a discussion of the impact of this change see Entcho Raykovski, 'Continuous Disclosure: has Regulation Enhanced the Australian Securities Market?' (2004) 30 (2) *Monash University Law Review* 269, 297; and Explanatory Memorandum, CLERP 9 Bill.

If ASIC has reasonable grounds for believing that a disclosing entity has committed a minor contravention, it can issue an infringement notice specifying the payment of a fixed penalty. Prior to issuing the infringement notice, ASIC must give the disclosing entity a statement of its reasons for believing that the contravention has occurred and must hold a hearing at which the disclosing entity is given the opportunity to respond.⁴⁶ If, at the conclusion of the hearing, ASIC has formed the view that a contravention has occurred, it can issue the infringement notice specifying that a set penalty be paid.⁴⁷ The entity can choose to pay the penalty within 28 days, and no further action is taken.⁴⁸ If the penalty is not paid within 28 days ASIC can commence court proceedings.⁴⁹

The new administrative penalty regime was introduced for the purpose of increasing compliance with the continuous disclosure provisions by supplementing the existing civil and criminal court procedures.⁵⁰ The Department of Treasury discussion paper argues that the new administrative penalty:

would remedy a significant gap in the current enforcement framework by facilitating the imposition of a financial penalty in relation to relatively minor contraventions of the regime that would not otherwise be pursued through the courts and in relation to which ASIC considers a relatively small financial penalty would be justified.⁵¹

ASIC supported the proposal for the introduction of the new administrative penalty regime. In its submission in response to the Department of Treasury discussion paper, ASIC notes that:

a power to impose administrative fines for contraventions of the continuous disclosure regime will improve the flexibility, cost effectiveness and timeliness of remedies, and underpin the integrity of the law by providing a proportionate remedy for conduct that may not otherwise be addressed. A power to fine is an important tool particularly for late or inadequate disclosure, where existing remedies are ineffective or overly complex.⁵²

As outlined above, ASIC initiated very little enforcement activity in relation to alleged contraventions of the continuous disclosure provisions prior to 2006. A total of four enforcement actions were initiated during this period, ie two civil penalty applications and two administrative penalty notices. ASIC increased its enforcement activity in relation to alleged contraventions of the continuous disclosure provisions in 2006. A total of six enforcement actions were initiated during that year. One criminal prosecution, one civil penalty application and four administrative penalty notices were issued in 2006.

The history of the enforcement of the continuous disclosure provisions provides a useful basis for an analysis of compliance with the continuous disclosure provisions. The introduction of the three different enforcement regimes in 1994, 2002 and 2004, and the increase in enforcement activity in 2006, provide useful points of comparison.

⁴⁶ *Corporations Act 2001* (Cth) s 1317DAD.

⁴⁷ *Corporations Act 2001* (Cth) s 1317DAC.

⁴⁸ *Corporations Act 2001* (Cth) s 1317DAF.

⁴⁹ *Corporations Act 2001* (Cth) s 1317DAG.

⁵⁰ Explanatory Memorandum, CLERP 9 Bill, [4.220].

⁵¹ Department of Treasury, above n 31, 149.

⁵² Australian Securities and Investments Commission, *Submission on CLERP 9 Corporate Disclosure: Strengthening the Financial Reporting Network* (2002), [3.10].

VI METHODOLOGY

Stage one of this research project comprises the data collection. Three hundred listed companies that have existed since 1993 have been selected. The selected companies comprise 100 companies from the Materials Global Industry Classification Standard (GICS) sector, 50 from the Health Care GICS sector and 150 from the remaining GICS sectors. The Materials and Health Care GICS sectors were selected because compliance with the continuous disclosure provisions is an issue that arises frequently for these types of corporations. Many of the enforcement actions instigated by ASIC have been against corporations in these sectors.

In addition to selecting companies from these GICS sectors, the companies in the data set were selected so that a representative sample, according to market capitalisation, was obtained. Companies within the data set were selected from the top third, the middle third and the bottom third of companies listed on the ASX according to market capitalisation.

The selection of companies was done in this way so that conclusions could be drawn about disclosing entities in general, disclosing entities falling within the Materials and Health Care GICS sectors and disclosing entities falling within the full range of companies listed on the ASX according to market capitalisation.

Announcements made by disclosing entities are listed on the ASX website. The ASX website designates those announcements that it considers to be price sensitive. Some of the announcements designated to be price sensitive by the ASX will be announcements that have been made in compliance with listing rules other than ASX Listing Rule 3.1 and are not enforced by *Corporations Act 2001* (Cth) s 674(2). These include price sensitive documents which are required to be disclosed pursuant to Chapter Four of the ASX Listing Rules. Examples of these types of documents are annual reports⁵³ and half yearly reports.⁵⁴ These documents will not be included in the data which is collected for the purpose of this project.

To date, data has been collected on the number, length and timing of announcements of price sensitive information made to the ASX by the 100 companies selected from the Materials GICS sector between 1998 and 2007. This data is available on the ASX website. The same data will be collected for the remaining 200 companies within the data set in due course. In addition, the number, length and timing of announcements of price sensitive information made to the ASX by all of the 300 companies in the data set between 1993 and 1997 will be collected. This data is available on CD at the State Library. It is necessary to collect this data to enable comparisons to be made between the period prior to, and post, the introduction of the criminal enforcement regime.

When the data collection is complete, statistical analysis will be undertaken. The purpose of the statistical analysis is to determine if there is a correspondence between the introduction of new enforcement regimes, the use of those regimes and an increase in compliance. If all of these factors are found to have a correspondence with increased compliance, the research will determine the relative significance of these factors. In addition, analysis will be undertaken to determine whether or not correspondence is affected by different GICS sectors, market capitalisation and any other variables.

⁵³ Australian Stock Exchange Listing Rule 4.3.

⁵⁴ Australian Stock Exchange Listing Rule 4.1 and 4.2.

After completion of the statistical analysis, a series of interviews will be conducted with compliance officers from a selection of the companies in the data set in order to test the veracity of the findings of the statistical study. The interviews will test for a correspondence between attitudinal change in relation to compliance and state enforcement. Interviews will also be conducted with officers at the ASX to determine whether any changes in the ASX's processes or procedures may have impacted on the number of price sensitive announcements made.

VII LIMITATIONS OF THE STUDY

There are several factors that limit the conclusions which can be drawn from this study. First, the collection of data from the ASX website provides an indication only of the levels of compliance. The integrity of the data depends upon the ability of the ASX to correctly classify the disclosed information as price sensitive. Second, while the data collected may indicate a correspondence between either the introduction of a new enforcement regime or increased enforcement activity and an increase in compliance, it cannot be used to demonstrate cause and effect. The number of price sensitive announcements may increase for reasons other than the introduction of a new enforcement regime, or an increase in the use of the enforcement regime by the regulator. Other factors may influence the number and length of any announcements made.

For example, the continuous disclosure provisions themselves have been amended over the period of the study. The changes to the continuous disclosure provisions and not the changes in the enforcement regime may have caused an increase in the number or volume of price sensitive disclosures.

On occasion, disclosing entities make price sensitive announcements in response to queries from the ASX. The number of price sensitive announcements made over the period of the study may be impacted by a change in the number of queries issued by the ASX. An increase or decrease in the number of queries issued by the ASX rather than changes to the enforcement regime may have caused an increase or decrease in the number of price sensitive announcements.

The data analysed to date is drawn from companies in the Materials GICS sector. Many of these companies are mining companies. The period of the study coincides with a period of considerable growth in the mining industry.⁵⁵ The increase in the number of announcements made and the amount of information disclosed may have been caused by the growth in the mining industry and not the introduction of a new enforcement regime or an increase in enforcement activity by the regulator. The increase in mining activity may have generated an increase in the amount of information requiring disclosure.

⁵⁵ There was considerable growth in the mining industry in Australia between 2003 and 2007. See Australian Bureau of Statistics, *150 Years Of Queensland's Economic History: Key Dates, Facts And Figures* (March 2009) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1318.3Feature%20Article14Mar%202009> at 11 April 2009; and Australian Bureau of Statistics, *South Australia's Mining Industry Summary Statistics, South Australia* (February 2008) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1345.4Feature%20Article17Feb%202008?opendocument&tabname=Summary&prodno=1345.4&issue=Feb%202008&num=&view=>> at 11 April 2009.

This research project will attempt to minimise the impact of these factors on the findings in two ways. First, the collection of data relating to the other 200 companies in the data set will allow conclusions to be drawn about corporations not affected by the mining boom. This will limit the impact of this factor on the results. Interviews will be conducted with officers from the ASX in order to determine whether or not the number of queries issued by the ASX has altered over the period of the study. If this has occurred, it will be factored into the statistical study.

Stage two of the research will include a qualitative study which will test the veracity of the findings of the quantitative study. A series of interviews will be conducted with compliance officers from a selection of the companies within the data set in order to test for a correspondence between attitudinal change in relation to compliance and state enforcement.

VIII PRELIMINARY FINDINGS

As stated previously, the data collected and analysed to date consists of the number, length and timing of announcements of price sensitive information made to the ASX between 1998 and 2007 by the 100 companies selected from the Materials GICS sector. During this period the relevant years of interest are 2002, when the civil penalty regime was expanded to cover the continuous disclosure provisions; 2004, when the administrative penalty regime was introduced; and 2006, when ASIC increased its enforcement activity in relation to alleged contraventions of the continuous disclosure provisions. The other year of interest is 1994, when the criminal regime was introduced. The correspondence with the introduction of the criminal regime will be analysed after the data from 1993 to 1997 is collected.

As at the date of writing this paper, preliminary findings can be made in relation to the following questions:

- In relation to corporations within the Materials GICS sector, is there a correspondence between the introduction of the civil penalty regime in 2002 and an increase in compliance with the continuous disclosure provisions?
- In relation to corporations within the Materials GICS sector, is there a correspondence between the introduction of the administrative penalty regime in 2004 and an increase in compliance with the continuous disclosure provisions?
- In relation to corporations within the Materials GICS sector, is there a correspondence between ASIC's increased use of the enforcement mechanisms in 2006 and an increase in compliance with the continuous disclosure provisions?

The data in Table One relates to the first of these questions. It provides information on the number and length of price sensitive announcements made in 2001, the year preceding the introduction of the civil penalty regime, and 2003, the year after the introduction of the civil penalty regime. The table indicates the total number of announcements made in 2001 and 2003 by the 100 companies in the data set, the total number of pages of information contained in the announcements made during 2003, and the average number of pages per announcement made during 2003. The number of pages contained in each announcement is not available for 2001.

TABLE ONE – PRICE SENSITIVE ANNOUNCEMENTS IN 2001 AND 2003

	2001	2003	PERCENTAGE INCREASE
Total no. of announcements per year	615	675	9.75%
Total no. of pages of announcements per year		2283	
Average no. of pages per announcement per year		3.38	

The figures in Table One indicate that there is some correspondence between the introduction of the civil penalty regime in 2002 and an increase in compliance with the continuous disclosure provisions by companies within the Materials GICS sector. There is a 9.75% increase in the total number of price sensitive announcements made in 2003, compared with 2001. As there is no data available on the number of pages per announcement made in 2001, a comparison with 2003 cannot be made.

Table Two contains details of the total number of price sensitive announcements made by the 100 companies within the data set in 2003 and 2005. This enables a comparison to be made between the year immediately preceding the introduction of the administrative penalty regime, and the year immediately after the introduction of the administrative penalty regime. In relation to the 100 disclosing entities in the dataset, Table Two indicates the total number of announcements made in 2003 and 2005, the total number of pages of information contained within the announcements made during 2003 and 2005, and the average number of pages per announcement made during 2003 and 2005.

TABLE TWO – PRICE SENSITIVE ANNOUNCEMENTS IN 2003 AND 2005

	2003	2005	PERCENTAGE INCREASE
Total no. of announcements per year	675	799	18.3%
Total no. of pages of announcements per year	2283	2921	27.9%
Average no. of pages per announcements per year	3.38	3.66	8.3%

The figures in Table Two indicate that there is a correspondence between the introduction of the administrative penalty regime in 2004 and an increase in compliance with the continuous disclosure provisions. There is an 18.3% increase in the total number of price sensitive company announcements made in 2005 compared with 2003. By comparison, the percentage increase is much greater than the percentage increase which occurred after the introduction of the civil penalty regime. In addition, there is an increase in the total volume of information disclosed after the introduction of the administrative penalty regime. When the total number of pages of information disclosed in 2005 is compared with the total number of pages of information disclosed in 2003, there is a 27.9% increase. This increase occurred after the introduction of the administrative penalty regime.

There is also an increase in the amount of information disclosed on average in each individual announcement. The average number of pages per announcement increased by 8.3% between 2003 and 2005.

Table Three contains details of the total number of price sensitive announcements made by the 100 companies in the data set in 2005 and 2007. This enables a comparison to be made between the year immediately preceding the increase in enforcement activity initiated by ASIC, and the year immediately after the increase. In relation to the 100 disclosing entities in the dataset, the data in Table Three indicates the total number of announcements made in 2005 and 2007, the total number of pages of information disclosed during these years and the average number of pages per announcement made during 2005 and 2007.

TABLE THREE – PRICE SENSITIVE ANNOUNCEMENTS IN 2005 AND 2007

	2005	2007	PERCENTAGE INCREASE
Total no. of announcements per year	799	1082	35.4%
Total no. of pages of announcements per year	2921	4302	47.3%
Average no. of pages per announcements per year	3.66	3.98	8.7%

The data in Table Three indicates that there is a correspondence between an increase in enforcement activity undertaken by ASIC and an increase in compliance with the continuous disclosure provisions. Between 1994 and 2005, ASIC issued a total of four enforcement actions in relation to the continuous disclosure requirements. In 2006 ASIC commenced six enforcement actions. The first criminal prosecution occurred in 2006. Comparing 2005 with 2007, there is a 35.4% increase in the total number of price sensitive announcements made by the corporations in the data set. In addition, there is a 47.3% increase in the total number of pages of announcements made. The average number of pages per announcement disclosed increased by 8.7 per cent.

Table Four contrasts the findings contained in the previous three tables. It contains details of the percentage increase in the number of announcements made and the total number of pages announced per year during the three periods examined.

**TABLE FOUR – CONTRASTING THE INTRODUCTION OF THE PENALTY REGIMES AND
THE INCREASE IN ENFORCEMENT ACTIVITY**

	% increase in total no of announcements per year	% increase in the total no of pages announced per year
2001 compared with 2003 - intro. of civil penalty regime	9.75%	Not available
2003 compared with 2005 - intro. of administrative penalty regime	18.3%	27.9%
2005 compared with 2007 – increased enforcement activity by ASIC	35.4%	47.3%

The data in Table Four indicates that there is a correspondence between the introduction of the civil and administrative penalty regimes and the use of the enforcement regimes by the regulator, and an increase in the levels of compliance with the continuous disclosure provisions. The increase in compliance was greater after the introduction of the administrative penalty regime (2004) than it was after the introduction of the civil penalty regime (2002). However, the greatest increase in compliance, as measured by an increase in the number of announcements made and the total number of pages of information disclosed, occurred after there was a marked increase in the level of enforcement activity instigated by ASIC (2006).

IX CONCLUSION

The aim of this research project is to test some of the assumptions of regulatory theory. The project tests for a correspondence between the introduction of an enforcement regime and an increase in the level of compliance with the law which is being enforced, and a correspondence between enforcement activity by a regulator and an increase in the level of compliance with the law being enforced. These assumptions are tested in the context of ASIC's enforcement of the continuous disclosure provisions contained in *Corporations Act 2001* (Cth) s 674(2).

As indicated earlier in this paper, the research project is in its initial stages. The findings contained in this paper are preliminary. They relate to a selection of corporations within the Materials GICS sector only. Data must be collected for all of the other corporations within the data set, statistical analysis undertaken and interviews conducted before more definitive conclusions can be drawn.

However, a preliminary analysis of the data collected to date suggests that there is a correspondence between the introduction of the civil and administrative penalty regimes and

an increase in compliance by disclosing entities with the continuous disclosure requirements; and a correspondence between the use of these enforcement regimes by ASIC and an increase in compliance by disclosing entities with the continuous disclosure requirements. The greatest increase in compliance corresponded with an increase in the use of the enforcement regimes by the regulator. If this finding is replicated in the later stages of this research project, it will have important implications for legislators and regulators.