ASIC has fine case to make – in court

The corporate regulator should not have the power to fine for breaches of continuous-disclosure rules, says **Bob Baxt**.

It might seem a good idea to vest in a regulator such as the Australian Securities and Investments Commission a power to issue what are, in essence, speeding fines for minor breaches of the Corporations Act (the failure to file documents, etc).

But to provide it, or indeed any other regulator, with the power to in effect impose fines of up to $100,000 on a company for an alleged breach of something as important as the continuous-disclosure regime of the act is playing with legal dynamite.

Our system of justice quite sensibly and responsibly vests in our courts the power to impose fines. No cogent evidence has been produced to justify vesting in ASIC such an extraordinary power, especially in the context of the relatively untested continuous-disclosure regime (contained in sections 674 and 675 of the act).

This proposal first mooted in September 2002 was opposed by many organisations. The Australian Law Reform Commission in its 2003 report on civil and administrative penalties strongly criticised elements of the proposal (see chapter 11). The federal government has not responded formally to that criticism, but the proposals, contained in the CLERP (Audit Reform and Corporate Disclosure) Bill are an improvement on the original discussion document.

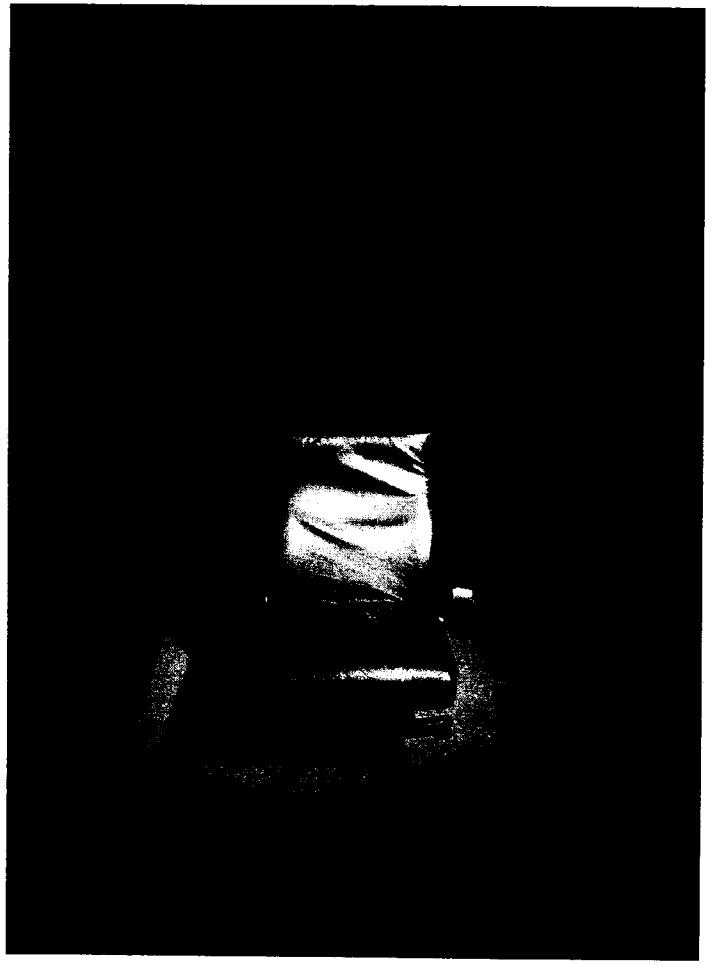
If a breach of the continuous-disclosure regime occurs, a number of alternatives are available to ASIC, or indeed the Australian Stock Exchange. Apart from seeking injunctions and other court orders, ASIC can negotiate undertakings from parties in appropriate cases (as it did from AMP earlier this year).

A company can, of course, refuse to pay the fine. ASIC may then pursue the matter in the courts, which can impose a higher fine than ASIC or indeed reject the claim. Although the changes ensure the relevant company is given details of the alleged breach and an opportunity to "defend itself" in a hearing, there are still serious defects in the provisions.

It is unclear whether the investigator/s of the alleged breach will be the same person/s sitting in the hearing and issuing the final decision. There must be a division of responsibility between the investigators and those making the decision – and binding guidelines issued to deal with this issue.

It is important to note that in Britain the Financial Services Authority, which has similar powers to ASIC (subject, however, to review in the courts) divides the responsibilities for investigation and actual decision-making between "divisions" within the FSA. Such a critical division of responsibility is not only appropriate but highly desirable from a natural justice perspective.

ASIC is given a discretion to publicise the fact the fine has been paid. That it does have a power of discretion suggests a power to bargain, and while the legislation identifies what ASIC must publicise, it does not impose any penalty on the regulator if it fails to follow the guidelines set out.



It is unclear whether the investigator/s of the alleged breach will be the same person/s sitting in judgement.
Photo: TANYA LAKE

The continuous-disclosure regime is an extremely important area of the law. Failure to disclose may be linked to claims of insider trading, market manipulation, etc; the insinuation that a company has paid the fine, even without an admission of liability, will be an invitation to third parties to seek appropriate damages against the company, and where relevant against directors and others involved – see proposed sections 674 (2A) and 675 (2A).

Claims that such voluntary fines will enable ASIC to be more efficient in regulating this area of the law are neither justified nor defensible. ASIC, like other regulators, must do the "hard yards" in enforcing the most important provisions of the legislation such as the continuous-disclosure provisions. There has been no history of cases being run and lost by ASIC in relation to this area of the act. Mere assertions that it is too difficult or too slow to run such cases are not good enough. If our court system is deficient or slow, let us fix that up first rather than vest more power in a regulator.

In my view there is no basis for this reform. My real fear is that it will be the start of a new campaign for regulators to be given this kind of power of "lazy regulation" as well as the ability to "persuade" parties into agreeing to "penalties" rather than pursue the relevant matter in the courts.

If the legislation is to remain, a sunset clause should be introduced. The legislation should be reviewed, say, after three years (compare the powers vested in the Australian Competition and Consumer Commission in relation to the goods and services tax). Other regulators will no doubt jealously be seeking similar powers in an extraordinary range of areas.

To give regulators the power to become, in essence, judge and jury in these and other important areas of our law is a major step in changing one of the most sacrosanct and important presumptions in our law – that you are innocent until proved (in a court) to be guilty.

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