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Infringement notices and federal regulation: Wolves in sheep’s clothing?

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This article reviews the growth in the use of infringement notices in federal regulation from being “fines” for low level offences to sometimes being significant penalties in their own right, lacking transparency and oversight. It argues that the practices of some regulators in relation to infringement notices raise additional concerns of fairness. The article suggests that a Regulatory Contraventions Statute of general application supplemented by regulatory practice guidelines may assist to ensure that infringement notice schemes avoid a growth by stealth of executive power into areas that are clearly judicial.

This article discusses the use of infringement notices in federal regulation. It identifies a number of concerns about fairness including the potential for coercion to pay, their use in legislation involving standards, the size of some of the penalties, the use of associated adverse publicity and hence their appearance in the eyes of the community of being equivalent to a finding by a court that an entity has been fined for breaking the law. Given the scale of federal regulation, the discussion is necessarily selective highlighting those areas which raise particular concerns.

This article does not argue that infringement notices should not be used in federal regulation. They add to regulatory flexibility, can be proportionate to the wrongdoing and may advantage both the regulated and regulators in disposing of matters quickly and cheaply avoiding use of the courts. But there needs to be greater clarity about their role and their limits. One way of improving their use would be through a statute of general application that sets out clear parameters supplemented by regulatory practice guidelines.1 The Australian Law Reform Commission (ALRC) in its review of federal civil and administrative penalties (ALRC 95)2 recommended that Parliament enact a regulatory contraventions statute of general application3 and recommended that such a statute include a model scheme for infringement notices.4 The Regulatory Powers (Standard Provisions) Bill 2012 (Cth) was such a Bill, but while it appeared to be receiving general bi-partisan support,5 lapsed when Parliament was prorogued prior to the 2013 election. An example of a statute of general application is the Regulatory Enforcement and Sanctions Act 2008 (UK). That statute implemented many of the recommendations of the Macrory Report6 which had recommended increasing the range of enforcement tools available to regulators in the United Kingdom including the increased use of intermediate sanctions7 including monetary administrative penalties.8

In the absence of a regulatory contraventions statute of general application, the Commonwealth Attorney-General’s Department has published A Guide to Framing Commonwealth Offences, 9

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1 BA, BLegS, LLM, Professor and Co-Head, School of Law, University of the Sunshine Coast.
2 The Commonwealth’s Model Litigant Rules might serve as a model: Legal Services Direction 2005 (Cth).
3 Australian Law Reform Commission, Principled Regulation: Federal Civil & Administrative Penalties in Australia, Report 95 (2002) (ALRC 95). Disclosure: the author was an ALRC Commissioner on this reference. However any views expressed in this article are those of the author personally.
4 Australian Law Reform Commission, ALRC 95, n 2, at Rec 6-7.
5 Australian Law Reform Commission, ALRC 95, n 2, at Rec 12-8.
6 House of Representatives, Hansard (18 June 2013) p 6124 (Michael Keenan MP).
7 Macrory, n 6, p 42.
8 Macrory, n 6, Rec 4, p 52. One of the issues identified in the report was the low level of criminal penalties for many regulatory offences. At the time, civil penalties were not a feature of UK regulatory practice. The Macrory Report recommended both fixed and variable monetary administrative penalties. Variable penalties of the type recommended in the Report would run into Chapter III issues in Australia.
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Infringement Notices and Enforcement Powers\(^9\) for use by Australian Government departments when drafting provisions of this nature. As this article discusses, there are numerous examples where these guidelines have not informed practice.

**BACKGROUND**

Infringement notices, sometimes also known as penalty notices, have been used for decades in Australia in relation to high volume, low-level, often quasi-criminal, matters such as traffic offences and parking infringements. Their use has increased markedly in recent years at both State and federal level.\(^10\) In 2002, ALRC 95 identified more than 15 pieces of Commonwealth legislation with provision for infringement notices.\(^11\) However, since then the use of infringement notices in federal regulatory schemes has become much more common and significant. Of particular note is the use of infringement notices by the Australian Securities and Investments Commission (ASIC) under the National Consumer Credit Protection Act 2009 (Cth), National Consumer Credit Protection Regulations 2010 (Cth), Australian Securities and Investments Commission Act 2001 (Cth), and the Market Integrity Rule\(^12\) and continuous disclosure requirements of the Corporations Act 2001 (Cth);\(^13\) their availability to the Australian Competition and Consumer Commission (ACCC) under the Competition and Consumer Act 2010 (Cth);\(^14\) and their use by the Australian Communications and Media Authority (ACMA) under the Do Not Call Register Act 2006 (Cth), Spam Act 2003 (Cth), Telecommunications Act 1997 (Cth), Broadcasting Services Act 1992 (Cth), Telecommunications Regulations 2001 (Cth) and Radiocommunications Regulations 1993 (Cth). These have been singled out because some aspects of these schemes or their use by the relevant regulator falls outside the recommended model scheme and raises the concerns identified above.

Infringement notices are an allegation of a contravention of the law, payment of which causes the allegation and the regulator to go away at least in relation to that allegation.\(^15\) Payment is not an admission of wrongdoing. ALRC 95 suggested they could be described as “an offer of an alternative penalty”.\(^16\) In federal regulation, an infringement notice may be used as an alternative to criminal or civil penalty proceedings. The fact that costly and time-consuming court proceedings are avoided is attractive to government and to regulators and, subject to the discussion below, may be attractive to the regulated community in some instances. Indeed because legal proceedings are avoided, even where an entity has a defence, there may be an incentive to pay the notice to avoid the inconvenience and costs of legal proceedings.\(^17\) Infringement notices provide for more nuance in the regulatory

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\(^{10}\) The NSW Law Reform Commission noted that in 1986 in New South Wales there were eight statutory offences authorising penalty notices; by 1996 the Fines Act 1996 (NSW) contained 38 provisions authorising penalty notices and by 2010 114 statutory provisions created more than 7,000 offences that could be enforced by way of penalty notice: New South Wales Law Reform Commission, Penalty Notices (Consultation Paper 10, 2010) at [1.4]-[1.8].

\(^{11}\) Australian Law Reform Commission, ALRC 95, n 2, p 432.

\(^{12}\) Corporations Act 2001 (Cth), ss 798H(1), 798K.

\(^{13}\) Corporations Act 2001 (Cth), ss 674(2) and 675(2).

\(^{14}\) Competition and Consumer Act 2010 (Cth), s 134A.

\(^{15}\) Legislation providing for the use of infringement notices typically spells out that once an infringement notice is paid, and unless withdrawn in accordance with the legislation or not complied with, no proceedings (civil or criminal as relevant) may be started or continued against the entity for the same matter: eg, Competition and Consumer Act 2010 (Cth) s 134D; Corporations Act 2001 (Cth), s 1317DAF; Spam Act 2003 (Cth) Sch 3, s 7; Broadcasting Services Act 1992 (Cth), s 205ZC.

\(^{16}\) Australian Law Reform Commission, ALRC 95, n 2, p 427.

\(^{17}\) Even where a defendant is successful, they will normally not recover all their own costs.
pyramid\textsuperscript{18} and allow regulators to be standard-setters choosing when and in what circumstances they will issue penalties. There is, however, risk of an incremental growth in this use of executive power without effective judicial oversight.

\textbf{Nature of Contraventions}

ALRC 95 recommended that infringement notices should apply in the case of criminal penalty schemes, only to “minor offences of strict or absolute liability”,\textsuperscript{19} and, in the case of civil penalty schemes, only to “minor contraventions in which no proof of a fault element or state of mind is required”.\textsuperscript{20} The Commonwealth Attorney-General’s Department guidelines state: “Schemes should only apply to minor offences with strict or absolute liability, and where a high volume of contraventions is expected”.\textsuperscript{21}

Section 134A of the \textit{Competition and Consumer Act} gives the ACCC power to issue an infringement notice in relation to “an infringement notice provision” in the \textit{Australian Consumer Law}. Subsection (2) lists those provisions. They include unconscionable conduct under Pt 2-2; certain unfair practices listed in Pt 3-1; contravention of the display notice provision of s 66(2); certain product safety, Pt 3-3, and product information, Pt 3-4, provisions. As may be apparent from a recital of those provisions, some require the application of considerable judgment perhaps most notably the unconscionable conduct provisions. It is worth noting what Spigelman CJ said in \textit{Attorney-General (NSW) v World Best Holdings Ltd} (2005) 63 NSWLR 557 at 565 about the term “unconscionable” in s 62B of the \textit{Retail Leases Act 1994} (NSW):

Over recent decades legislatures have authorised courts to rearrange the legal rights of persons on the basis of vague general standards which are clearly capable of misuse unless their application is carefully confined. Unconscionability is such a standard.

Although the author has no examples of the ACCC issuing infringement notices in relation to the unconscionability provisions of the \textit{Australian Consumer Law}, it is hard to think of any provision, in any legislation, less suited to an infringement notice scheme. “Unconscionability” imposes a standard of conduct. As Karen Yeung says, “[o]nly courts have the legitimacy to provide legally binding interpretations of legislative standards”.\textsuperscript{22} Yeung identifies further concerns about the use of administrative sanctions for legislatively imposed standards:

Regulators can exert very substantial influence over the way in which legal standards are understood and implemented in practice through the exercise of their informal authority, thus generating the risk of “abuse”.\textsuperscript{23}

This is an important point and should be an issue for Parliament when determining the types of contraventions that are suitable for infringement notices.

Misleading conduct is also a legislative standard arguably ill-suited to the use of infringement notices.\textsuperscript{24} In one example, the retailer, Coles, paid six infringement notices totalling $61,200 for

\begin{footnotes}
\item[19] Australian Law Reform Commission, ALRC 95, n 2, Rec 12-1.  
\item[21] Commonwealth Attorney-General’s Department, n 9, p 56.  
\item[23] Yeung, n 22 at 336.  
\item[24] The Australian Compliance Institute in a submission to the Treasury following the release of \textit{An Australian Consumer Law: Fair Markets – Confident Consumers Discussion Paper 17 February 2009}, raised this point stating “[I]t would be inconsistent with Australian Government guidelines and with core principles of justice to introduce an infringement notice regime to any provision that does not have ‘physical elements on which an enforcement officer can make a reliable assessment of guilt or innocence’ [footnote omitted]. The misleading or deceptive conduct provisions depend on an assessment of the overall impression on a target audience: clearly this is a subjective issue”: Australasian Compliance Institute, Submission to the Treasury Paper, An \textit{Australian Consumer Law: Fair Markets – Confident Consumers Discussion Paper 17 February 2009} (24 March 2009) http://archive.treasury.gov.au/documents/1501/PDF/Australasian_Compliance_Institute.pdf.  
\end{footnotes}
displaying imported fruit in five stores beneath signs stating “Helping Australia Grow” accompanied
by the triangular “Australian Grown” symbol. The ACCC described this as misleading representations
about country of origin.\textsuperscript{23} ACCC’s media release noted that the individual fruit or the packing or the
display bin was correctly marked with stickers indicating that it was imported but the ACCC said this
was not enough to correct a misleading impression. According to the media release, Coles advised that
the conduct arose out of stock relocation in the stores. On the one hand it may be argued that if this
was a transgression, it was a relatively minor one and hence suited to the use of infringement notices
rather than costly court proceedings leading to a pecuniary penalty. However, if the matter were in
court, the ACCC would need to adduce evidence of the conduct in the light of the target audience and
this would provide more general guidance on the appropriate conduct in the light of the standard.\textsuperscript{26} It
might also be an example of where enforceable undertakings, perhaps directed at the relevant stores
and staff training, could have been more appropriate.

The continuous disclosure provisions of the \textit{Corporations Act}\textsuperscript{27} are similarly ill-suited to an
infringement notice scheme and, it has been suggested, are potentially in breach of Chapter III of the
\textit{Constitution}. These provisions require listed corporations to notify the relevant market operator of
information that is not readily available and “is information that a reasonable person would expect, if
it were generally available, to have a material effect on the price or value”\textsuperscript{28} of their securities. ALRC
95 said it was:

not convinced that alleged contraventions of continuous disclosure provisions are appropriate
contraventions to be dealt with by way of an infringement notice as they involve subjective judgments
as to the materiality of information and are, therefore, contraventions involving a “state of mind”
element.\textsuperscript{29}

Hyland argues that they amount to an unconstitutional exercise by ASIC of Commonwealth
judicial power because the “character of the proceedings for infringement notices do not simply
require the application of a formula to facts as found”.\textsuperscript{30}

\textbf{The size of the penalty}

Related to the argument that infringement notices should be used for “minor offences” or “minor
contraventions” is the size of the penalty that is specified. As might be expected across the range of
regulatory schemes that exist under Commonwealth law, there is a very significant variation in the size
of payment that may be required under an infringement notice but a number go beyond what could
realistically be called “minor”. The Commonwealth Attorney-General’s Department guidelines state
that the “amount payable under an infringement notice scheme should not exceed 12 penalty units\textsuperscript{31}
for a natural person or 60 penalty units for a body corporate”\textsuperscript{32}. An example of a scheme that limits the amount payable for infringement notices to what might be
expected for something called an “administrative penalty” is that proposed by the \textit{Customs Amendment (Infringement Notices) Regulation 2013 (Cth)}. Subsection 243X(2) of the \textit{Customs Act 1901 (Cth)} provides that the maximum penalty under the scheme must not exceed either:

\begin{itemize}
  \item Yeung makes a similar point about the value of “authoritative interpretation of … standards which can then serve as more general guidance”: Yeung, n 22 at 336.
  \item \textit{Corporations Act 2001 (Cth)}, Pt 9AA. Section 1317DAB provides for infringement notices for an alleged contravention of ss 674(2) or 675(2) as an alternative to civil penalty proceedings under Pt 9.4B.
  \item \textit{Corporations Act 2001 (Cth)}, ss 674(2) and 675(2).
  \item Australian Law Reform Commission, ALRC 95, n 2, p 438.
  \item A penalty unit is now $170 (previously $110): \textit{Crimes Act 1914 (Cth)}, s 4AA(1).
  \item Commonwealth Attorney-General’s Department, n 9, p 59.
\end{itemize}

(2014) 42 ABLR 276

279
• one-quarter of the maximum penalty a court could impose on a person for that penalty, and
• either 15 penalty units [$2,550] for a natural person or 75 penalty units [$7,650] for a body corporate.

By contrast, ACMA has available very significant amounts for alleged contraventions of ss 68 and 101 of the Telecommunications Act. Pursuant to the Telecommunications (Infringement Notices Penalties) Determination 2012 (Cth), ACMA may issue a single infringement notice for 9,000 penalty units – $1.53 million – where a service provider is in breach of a carrier licence and fails to meet a benchmark standard by 5 percentage points or more.\textsuperscript{33} Infringement notices of this nature have moved well beyond being mere administrative penalties for minor transgressions.

**Multiple infringement notices**

Even where the penalty units in a single infringement notice are not large, the use of multiple infringement notices may still result in high “penalties”. Schedule 3 of the Spam Act adopts a system where the infringement notice may vary depending on the number of alleged contraventions covered in a single notice and whether the infringement notice is being issued to a body corporate or an individual. An infringement notice that relates to more than 50 alleged contraventions on a single day of ss 16(1), 16(6) or 16(9) by a body corporate may lead to 1,000 penalty units or $170,000. While the legislation does not authorise the giving of two or more infringement notices for contraventions on a single day,\textsuperscript{34} it does not limit the number that may be given for contraventions on multiple days. In Australian Communications and Media Authority v Clarity1 Pty Ltd [2006] FCA 1399, a case where ACMA was seeking civil penalties for contraventions of ss 16(1) and 22(1) of the Spam Act, ACMA argued that it could have issued infringement notices for multiple breaches of the same provisions on 300 days totalling, respectively, $33 million and $16.5 million against the corporate respondent and $6.6 million and $3 million against the individual respondent. As it was, ACMA sought civil penalties of $9.9 million against the company and $1.98 million against the individual respondent. Nicholson J in the Federal Court ordered penalties of $4.5 million and $1 million respectively. Nicholson J described the potential maximum pecuniary penalties as “so high as to give rise to ‘an unrealistically large penalty’”\textsuperscript{35} and applied what he said was “commercial realism”\textsuperscript{36} in setting the penalties. While there is no evidence that ACMA would have issued 300 infringement notices, the fact that the regulator used this in argument is at odds with the discretionary “totality principle” that the courts use in setting penalties\textsuperscript{37} and highlights the lack of restriction on the use of multiple infringement notices.

The ACCC too has used multiple infringement notices, turning what is a small individual sum into a large total. In one example it issued 27 infringement notices each of $6,600 totalling $178,200 to Singtel Optus for what were said to be false or misleading representations about the price of its services.\textsuperscript{38} While $178,000 might not be a significant sum for Singtel Optus, and $6,600 just petty cash, nevertheless the principle of using multiple infringement notices can change their character from being small sums to large “fines”. As noted above, the approach of issuing multiple infringement notices has moved well beyond being mere administrative penalties for minor transgressions.

\textsuperscript{33} The Determination is a legislative instrument. The infringement notices are found in Schs 1 and 2 and relate to alleged breaches of ss 68 and 101 of the Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth).

\textsuperscript{34} Spam Act 2003 (Cth), Sch 3, s 3(3).

\textsuperscript{35} Australian Communications and Media Authority v Clarity1 Pty Ltd [2006] FCA 1399 at [56].

\textsuperscript{36} Australian Communications and Media Authority v Clarity1 Pty Ltd [2006] FCA 1399 at [55].


notices based as it was on the number of advertisements in a single campaign may be at odds with the approach of the courts when setting penalties. As Lockhart J said in Trade Practices Commission v Bata Shoe Company of Australia Pty Ltd [1980] A TPR ¶40-161 at 42,277:

Guidance is given in the field of sentencing for criminal of fences by the well-known principle that where several of fences are heard together and arise out of the same transaction it is a sound working rule that the sentences imposed for those offences should be made concurrent; it is inappropriate to sentence consecutively when the offences were all really involved in the same episode: see R v Duff a decision of the full court of this court, judgment delivered 6 December 1979; R v Walsh (1965) 109 Sol J Pt 1 150; R v Melville (1956) 73 WN (NSW) 579; R v Hussain Crim LR 712; R v Hally (1965) 58 QR 582 and Re: PJ Kästercum (1972) 56 Cr App R 298.

There is a difference between multiple infringement notices for different alleged contraventions and multiple infringement notices for effectively the same contravention. The ACCC indicates that in deciding whether to issue multiple infringement notices, the Commission takes into account:

whether there are circumstances which make it desirable to issue multiple notices to deter similar conduct by the specific business involved or the broader industry.

The Law Council of Australia in a submission to the ACCC argued that deterrence is not a purpose of infringement notices and that if multiple infringement notices are used to “maximise deterrence value” there is the risk of “equating the role of the ACCC when issuing infringement notices to that of the Court when it imposes financial penalties”. This highlights the need for clear guidelines around the use, if at all, of multiple infringement notices. At minimum regulatory practice guidelines should address this issue, but it may be better addressed in relevant legislation.

Clause 112(c) of the Regulatory Powers (Standard Provisions) Bill 2012 (Cth) stated that the Part did not “prevent the giving of 2 or more infringement notices to a person for an alleged contravention of a provision subject to an infringement notice under this Part”. It is clear from the examples above that there is a considerable risk that current practice in some schemes is in danger of altering the character of infringement notices and of circumventing the intention of Parliament when setting relatively low penalty units.

Capacity to pay

Because of the nature of infringement notices as a fixed penalty, the impact on the individual entity cannot be taken into account. This is in contrast to the usual approach of the courts in setting penalties and to the use of maximum penalties in legislation allowing courts discretion to consider all the circumstances of a particular case. In 2010, in an early use by the ACCC of infringement notices, the regulator targeted restaurants that appeared to breach s 53C of the Trade Practices Act 1974 (Cth), (now s 48 of the Australian Consumer Law) by failing to display prominently the single price of items on menus when there was a weekend or public holiday surcharge. A media release

39This is not to say that the use of different advertisements across a range of media as part of a single campaign would be treated as a single contravention, see eg Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54 at [61].


42Law Council of Australia, n 41.

43In, eg, Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2) [2002] FCA 559 at [50], Finkelstein J took account of the impact of a penalty on the respondent’s capacity to trade.

44See Commonwealth Attorney-General’s Department, n 9, p 38.

45This followed amendments to the Trade Practices Act 1974 (Cth) to permit the ACCC to issue infringement notices (s STZE(1) now s 134A of the Competition and Consumer Act 2010 (Cth)).

46The ACCC indicated in its website that it had inspected 130 restaurants around Australia: Australian Competition and Consumer Commission, Misleading Menus Invite Infringement Notices (1 July 2010)
stated that the ACCC had issued infringement notices to eight traders; four of whom paid the notices. It is not known what the impact of a penalty of $6,600 (now $10,200) was on the businesses but one can speculate that it must have been significant.

Section 134C of the *Competition and Consumer Act* makes some acknowledgement of differences in capacity to pay but it is not finely nuanced. For example, the infringement notice amount for alleged breaches of Pt 2-2 of the *Australian Consumer Law* is 12 penalty units for an individual, 60 penalty units for a body corporate other than a listed body corporate and 600 penalty units, or $102,000, for a listed body corporate. Similarly, the new infringement notice scheme under the *Customs Act 2001* (Cth) provides for a corporate multiplier for infringement notices. Providing for a higher sum for a listed body corporate addresses the issue that an infringement notice for a small number of penalty units may be nothing more than a “slap on the wrist” for a large company while at the same time keeping the sums more proportionate for individuals and small businesses. Similarly, the continuous disclosure provisions of the *Corporations Act* link the size of the amount in the infringement notice to the market capitalisation of the entity and whether it is listed or not. Such an approach has merit in attempting to deal with the issue of entities of very different size, but it does have the potential to keep pushing infringement notices even larger in a bid to make sure that they have an impact on larger companies. This is one of the tensions inherent in infringement notice schemes. In order to allow for “responsive regulation”, an infringement notice needs to be significant enough to induce a change in behaviour but not so high that it has all the hallmarks of a punitive judicial penalty.

**PAYMENT**

**Implication of payment**

Statutes that authorise the use of infringement notices provide that payment of an infringement notice is not of itself a finding of a contravention by the entity paying the infringement notice; it is merely an allegation of a breach. This raises the issue of the use of the fact of payment in subsequent court proceedings for different alleged contraventions. Lucev FM in *Olsen v Sterling Crown Pty Ltd* (2008) 177 IR 337 declined to take an earlier payment into consideration when determining the quantum of a penalty under the *Workplace Relations Regulations 2006* (Cth). He stated the principle:

> To have regard to the previous conduct of the respondent where an infringement notice was paid seems to contradict the stated purpose of the infringement notice section of the WR Regulations, and particularly the provisions in ch 2 reg 19.51(d) of the WR Regulations. If an infringement notice is paid, the recipient who paid the fine is not to be taken as having been convicted of a contravention.

However, in *Australian Communications and Media Authority v Mobilegate Ltd A Company Incorporated in Hong Kong (No 4)* [2009] FCA 1225, a case concerning breaches of the *Spam Act*, Logan J took into account payment of an earlier infringement notice. The court noted that the director had previously been involved with another company that had paid an infringement notice in relation to an alleged contravention of the same legislation. In determining the director’s penalty ($3-million),


47 *Customs Act 1901* (Cth), s 243X(2)(a).  
48 *Corporations Act 2001* (Cth), ss 674(2), 675(2).  
49 This type of approach to reflect corporate capacity was recommended by Macrory, n 6, Rec 4.  
50 Ayres and Braithwaite, n 18.  
51 See eg, s 134D(2) *Competition and Consumer Act 2010* (Cth); *Corporations Act 2001* (Cth), s 1317DAF(4). See also Commonwealth Attorney-General’s Department, n 9, p 66.  
53 *Australian Communications and Media Authority v Mobilegate Ltd A Company Incorporated in Hong Kong (No 4)* [2009] FCA 1225, [49].
Logan J said his role as a director of the other company meant, inter alia, meant his “involvement [in the current case] has occurred against a background of aggravating factors”.  

Section 108(1)(i) of the *Regulatory Powers (Standard Provisions) Bill 2012* (Cth) provided that “payment of the amount is not an admission of guilt or liability”. In the light of the *Mobilegate* above, should a similar Bill be reintroduced there is an argument for expansion of this point to prohibit disclosure of payment of an infringement notice in any future court proceedings. This highlights a further tension in infringement notice schemes. Regulators should be able to make use of compliance history in deciding whether to bring enforcement proceedings and as part of their submissions with regard to penalty. However, fairness dictates that the fact of payment of an infringement notice should not be taken as evidence of a history of law-breaking.

### Payment with enforceable undertakings

Given that payment of an infringement notice is neither an admission nor a finding of guilt or liability, the practice of using enforceable undertakings coupled with infringement notices in which the paying entity “admits” their guilt looks coercive and raises further concerns about fairness. There are a number of instances where the ACCC has engaged in this practice. It also potentially exposes the entity making the admission to private action for the same alleged contravention. The issue is of particular concern when the entity making the admission is not a well-resourced company and hence where there is a significant bargaining imbalance between it and the regulator. This is a matter that should be addressed in a statute of general application or in regulatory practice guidelines.

There may be circumstances when infringement notices and enforceable undertakings could be validly coupled and indeed an enforceable undertaking may be used to assist an entity to understand its obligations through requirements such as development of a compliance code or it may be used for corrective advertising or to clean up damage. Richard Johnstone and Michelle King characterise their use being “to institutionalise on-going compliance”. ASIC, for example, has used infringement notices and enforceable undertakings together but without requiring an admission of guilt or liability in the enforceable undertaking. Interestingly, the *Regulatory Enforcement and Sanctions Act 2008* (UK) which grants regulators the power to impose a range of regulatory sanctions including fixed monetary penalties and enforceable undertakings, does not permit fixed monetary penalties for the same act or omission that gave rise to the undertaking, unless the person from whom the undertaking was accepted, has failed to comply with it. It is beyond the scope of this article to canvass this issue

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54 *Australian Communications and Media Authority v Mobilegate Ltd A Company Incorporated in Hong Kong (No 4)* [2009] FCA 1225, [80].

55 An enforceable undertaking is a promise made by an entity to a regulator which is enforceable in court. The ALRC did not oppose the use of enforceable undertakings: *Australian Law Reform Commission, ALRC 95*, n 2, Ch 16. See also Baxt R, “Editorial” (2006) 24 ABLR 85 at 86 who argued against the use of infringement notices noting the availability of enforceable undertakings as one alternative.

56 Some commentators have argued that the ACCC engages in “arm-twisting” and dictates the terms of undertakings. See Parker C, “Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission’s Use of Enforceable Undertakings” (2004) 67 MLR 209 at 226 and citations noted therein.

57 See eg, *Australian Competition and Consumer Commission, Undertakings Register, “Brand Republic Pty Ltd”* (16 October 2013); “Red Energy Pty Ltd” (2 September 2013); “Utel Networks Pty Ltd” (2 June 2013); and *CNT Corp Pty Ltd* (15 October 2012), [http://transition.accc.gov.au/content/index.phpml/itemId/815594](http://transition.accc.gov.au/content/index.phpml/itemId/815594). The Law Council of Australia noted its concerns about the practice: *Law Council of Australia, n 41*.


60 *Australian Securities and Investments Commission, Regulatory Guide 100: Enforceable Undertakings* (February 2012) RG 100.37 provides that ASIC will generally not accept an undertaking that does not “at least acknowledge that ASIC’s views in relation to the misconduct which gave rise to the enforceable undertaking are reasonably held”. This is short of the ACCC’s requirement of an admission of breach.

61 *Regulatory Enforcement and Sanctions Act 2008* (UK), s 50(4).
Enforceable undertakings are frequently seen as examples of restorative justice in regulation where ideally the undertaking is developed co-operatively between a regulator and a regulated entity and the regulated entity “accepts” their role in the “contravention” and “makes a positive commitment to cease the offending activity.” The principle underlying this cooperation and “positive commitment” seems at odds with infringement notice schemes that emphasise an infringement notice is a mechanism to force the regulator to go away and certainly there is a difference between a willing acceptance of regret and a forced admission of guilt.

Payment and publicity

A significant implication of payment of an infringement notice is that the regulator will frequently publish a media release as well as noting the payment on its infringement notice register. How the release is worded varies between regulators. Many of the ACCC’s media releases use headlines that imply guilt even if the release itself indicates that it is only an allegation and even that is not consistent. ACMA indicates that it will use publicity for its educative and deterrent effect but does not do so automatically. A media release by the Department of Sustainability, Environment, Water, Population and Communities in 2011 did not state that a payment by the Queensland Gas Company for what was described as “technical” breaches concerned allegations only. ASIC is required by s 1317DAJ to state in any notice that the payment relates to an allegation only and ASIC itself states that it will limit its releases to statements of fact about the allegation, payment and that payment is neither a finding nor admission. The provisions covering publicity in relation to infringement notices in the Corporations Act are comprehensive and could serve as a model in any future Regulatory Powers (Standard Provisions) statute.

In the case, at least, of those penalties that are comparatively small, one might argue that any associated publicity may be more punitive, or at least more significant, than the infringement notice itself. The impact of adverse publicity on corporate behaviour has been well documented and adverse publicity is, in some legislation, an available punitive order. On the ACCC’s own pyramid of enforcement, adverse publicity orders are two rungs above infringement notices, just below disqualification orders and civil pecuniary penalties. Whether therefore it is appropriate for a regulator to use publicity in relation to an allegation is contentious. ALRC 95 recommended that there should be no public announcement about the issuing, payment or non-payment of infringement notices.

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62 See eg, Johnstone and King, n 58 at 280.
63 Johnstone and King, n 58 at 293.
67 See eg, Competition and Consumer Law Act 2010 (Cth), s 86D.
69 Australian Law Reform Commission, ALRC 95, n 2, Rec 12-7.
When regulator-initiated publicity follows payment of an infringement notice, the notion that the infringement notice is merely being used as a means of “forestalling court action” is hard to sustain. Indeed, other than the size of the penalty, it is often difficult to draw a clear distinction between an infringement notice that is coupled with adverse publicity and a civil penalty coupled with such publicity. By way of illustration, when the Collingwood Football Club paid two infringement notices totalling $20,400 in relation to ACCC allegations of breach of s 48 of the Australian Consumer Law, the ACCC issued a media release. Unsurprisingly, the matter attracted significant media attention and headlines such as “Collingwood uses ‘half truths’ to drive up membership”. “Collingwood Football Club fined by ACCC over misleading guernsey advertisement” and “Collingwood Magpies fined over false advertising a members’ offer”. Even though the media release itself stated that the claims were allegations only, the news media does not always pick up on that point.

A media release can have important educative and deterrent effects and publicity is an important tool in a regulator’s compliance armoury. From a regulator’s perspective of ensuring others do not engage in the same conduct, the publicity may be the most important outcome of its decision to issue an infringement notice. In the interests of consumers, it is easy therefore to see the value in education and general deterrence and to overlook that the regulator has had all the advantages of what might have followed from court proceedings without the need to establish a case or carry the burden of proof. The very minimum that fairness would require in such cases to advise an entity that in paying the infringement notice, the regulator may publicise the fact but that may not be sufficient. Again, it is suggested that this is a matter that should be addressed in statute of general application or at least in regulatory practice guidelines. Regulators could also do more to highlight in their releases that the matter is only an allegation that has not been tested in court.

Another form of publicly available information is that available on a regulator’s website through the infringement notice register. The detail on these varies among regulators and, curiously, a register that provides barely any detail is that of the ACCC. It states the name of the paying entity and the relevant provision but no factual detail. This is found through searching the media releases. The Law Council in a submission to the ACCC stated that “it remain[ed] concerned … that the information contained on the register is inadequate”. While this article has expressed concerns about the use of media releases for what are only allegations, the register is an important source of education for other entities and transparency about a regulator’s activities.

### Payment and guidance to others

This article has raised concerns about the use of infringement notices for provisions involving legislative standards rather than minor offences of strict or absolute liability or minor contraventions that do not require proof of a fault element or state of mind. Without detracting from that criticism, regulators could also do more to highlight in their releases that the matter is only an allegation that has not been tested in court.

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71 This phrase was used in the Explanatory Memorandum when infringement notices were introduced as part of amendments to the Trade Practices Act 1974 (Cth): Parliament of the Commonwealth of Australia, Explanatory Memorandum Trade Practices Amendment (Australian Consumer Law) Bill No 2 2010 (2010) at [1883].


76 For example, The Australian, n 75, makes no mention that it is an allegation only.

77 Parker, n 56 at 244 cited ACCC Associate Commissioner Watt who indicated that parties who accepted enforceable undertakings were made aware that publicity would be used.

78 Letter from Law Council of Australia to Australian Competition and Consumer Commission, n 41.
one of the further implications of payment of an infringement notice is that the opportunity to educate other regulated entities about the appropriate conduct to meet the relevant standard may be lost. By way of illustration, in 2007 the listed general insurer, Promina Group Limited, paid a $100,000 infringement notice for an alleged breach of the continuous disclosure regime contained in the Corporations Act. The allegation came in the context of a take-over from Suncorp-Metway Limited. According to ASIC, Promina was some hours too slow in disclosing the offer. Aakash Desai and Ian Ramsay suggest the Promina case is an example of a context “where it may be more difficult for a disclosing entity to satisfy … the standards expected by ASIC … and raises a fundamental question of just how long companies should have to disclose”. Because Promina paid the infringement notice, without any admission of liability, any opportunity for broader discussion of the issue or judicial guidance was lost. Guidance via media release from the regulator is no substitute for an objective ruling on the required standard.

NET-WIDENING

One of the concerns about infringement notices is that they may lead to penalties being imposed in circumstances were previously warnings or perhaps enforceable undertakings would have been used. The “menu cases” described above are possible examples of this, particularly in those cases where there had been apparent, albeit belated, compliance. Enforcement is always necessarily selective. But as the “menu cases” illustrate, the availability of low-level, readily imposed penalties, may result in a regulator being overly enthusiastic in a bid to draw attention to an issue. One cannot help but notice that all four restaurants that were ultimately taken to court were located either in Canberra or Sydney. The ACCC said it had inspected 130 restaurants around Australia, but this is a very small number compared with the number overall.

Desai and Ramsay observe that infringement notices for alleged breaches of the continuous disclosure regime under the Corporations Act have been largely confined to four industry sectors. They suggest that these sectors may be “potentially susceptible to higher rates of non-compliance” or it may “be indicative of the sectors in which ASX and ASIC particularly focus their monitoring and enforcement activities”. One might argue that this is no different from other regulatory behaviour where particular industries or problems are targeted. But it becomes an issue if a regulator is singling out particular groups for infringement notices because they are “easy-pickings”. Desai and Ramsay observe that 64% of the companies in its study were smaller companies (Tier 3 infringement notices). They suggest that this may “indicate that smaller companies have more difficulties complying with their continuous disclosure obligations” although they observe that even large entities have been caught. Desai and Ramsay found there was not enough long-term data to determine whether the clustering of infringement notices in particular sectors was due to a “clumping” of problems in a sector or whether it was because the ASX and ASIC focus on certain sectors at certain times. Infringement notices are a low-risk strategy for a regulator with no avenue for appeal and no judicial scrutiny and a fall-back position of withdrawal if challenged. This is not to say that they are being abused, rather any system that lacks oversight, raises concerns of transparency and accountability.

OTHER POSSIBLE EFFECTS

The Australian Bankers Association (ABA) in a submission to the Treasury’s Review of Sanctions in Corporate Law raised the interesting issue that the existence of infringement notices in the continuous disclosure regime may lead to “risk-averse” or conversely, “irresponsible risk-taking behaviour”. The ABA’s reasoning was that some directors and officers may not apply commercial judgment but rather

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81 Desai and Ramsay, n 79, p 13. This was at the time of publication in 2011.

82 Desai and Ramsay, n 79, p 13.

83 Desai and Ramsay, n 79, p 14.
might be acting mindful of the possibility of the sanction but others may behave carelessly or recklessly knowing they would likely avoid civil or criminal proceedings and payment of an infringement notice would have “minimal ramifications”. In either case the ABA argued “the outcome is adverse for market disclosure”.\(^{84}\) The continuous disclosure regime has features that are unusual and sui generis to that regime\(^{85}\) and hence the ABA’s comments might not be applicable to infringement notices generally but they suggest a need for ongoing scrutiny of the impact of infringement notices on corporate behaviour.

**DISPUTING INFRINGEMENT NOTICES**

**Absence of independent decision-making**

One of the criticisms of infringement notice schemes in federal regulation has been the absence of an independent decision-maker when infringement notices are issued.\(^{86}\) As noted, infringement notices are an allegation of a contravention, there is no obligation to pay\(^ {87}\) and no sanction, per se, for non-payment. Should the entity that has been served with the infringement notice wish to dispute it, it may appeal to the issuing regulator and seek to have it withdrawn or it may simply fail to pay and wait to see whether the regulator will bring court proceedings in relation to the same allegation. If the regulator does institute penalty proceedings for the same alleged contravention, the relevant court determines the dispute and sets a penalty (if any).

None of the federal regulatory schemes that utilise infringement notices provide for external oversight by way of merits review on the basis that there has been no decision to impose a penalty and hence there is nothing to review. Merits review would have cost and time implications for both the regulator and the relevant entity and would mean some of the advantages of an infringement notice scheme would be lost. ALRC 95 recommended that external merits review not be available as long as any infringement notice scheme was established in accordance with its model scheme noted above\(^{88}\) and this is consistent with the Commonwealth Attorney-General’s Department guidelines.\(^{89}\) However, as discussed, ALRC 95 also recommended that infringement notices should apply to minor contraventions only and it suggested that the amount payable under an infringement notice should not exceed 12 penalty units (now $2,040). In that light an absence of external merits review is understandable. However, as noted above there are now schemes were an infringement notice can be issued for more than a million dollars. Such sums ought not to be available as an administrative penalty and that is the real problem. That they are available highlights another tension in some infringement notice schemes between the laudable aim of resolving matters quickly and cheaply and the risks inherent in lack of review.

In the absence of merits review, a request that an infringement notice be withdrawn is the only avenue of appeal open to recipients other than to await the commencement of any court proceedings. Presumably an entity issued with an infringement notice would request withdrawal if it considers the


\(^{85}\) Section 1317DAD makes provision for a representative of an entity to appear before private hearings before ASIC, to give evidence and make submissions in relation to the alleged contraventions of either ss 674(2) or 675(2).


\(^{87}\) They are sometimes described as a “voluntary financial penalty”. See Desai and Ramsay, n 79, p 6 citing Explanatory Memorandum, CLERP 9 at [5.454]-[5.465].

\(^{88}\) Australian Law Reform Commission, ALRC 95, n 2, Rec 22-2.

\(^{89}\) Commonwealth Attorney-General’s Department, n 9, p 63.
infringement notice has been issued under a mistake of fact or law. However, there is no consistency amongst the schemes about who will make the decision whether an infringement notice will be withdrawn in such circumstances. The Telecommunications (Infringement Notices) Guidelines 2011, states that in most cases the decision as to whether an infringement notice will be withdrawn will be made by the issuing officer on the basis that:

he or she will be aware of the factual issues and will be in a position to make an informed decision, taking into account the reasons for the request and any new information or facts presented, as to whether the information alters his or her belief that the person has contravened the relevant civil penalty provision.\(^{90}\)

A similar approach is adopted by the Australian Customs and Border Protection Service (ACBPS) in relation to its infringement notice regulations which commenced in February 2014.

In some cases, the officer who issued the notice is best placed to consider the request. As the issuing officer, they will be aware of the factual issues and in a position to make an informed and timely decision, taking into account the reasons for the request and any new information or facts presented.\(^{91}\)

While there may be some merit in this approach, the fact that a decision about withdrawal will generally be made by the person who also issued the notice, with no right of even internal appeal, is not good administrative practice. ASIC indicates that it adopts the preferable approach of having the decision made by an officer who is other than the person who issued the notice.\(^{92}\) ALRC 95 recommended that the officer who considers an application for withdrawal be different from the one who issued the infringement notice.\(^{93}\) It is suggested that this approach be adopted by all regulators and this is a matter that ought to be provided for in a statute of general application or in regulatory practice guidelines.

As noted above, one of the arguments made for lack of merits review is that an entity that wishes to challenge the notice can decline to pay and await possible proceedings. However, this makes light of the cost of defending a matter in court over the cost of paying the infringement notice and adds to the coercive nature of the notices.\(^{94}\) Further, as discussed below, when a matter is taken to court the penalty may also be much higher than the amount which was payable under the infringement notice and hence the right to contest the matter begins to look hollow. This is compounded by the fact that withdrawal does not finalise the matter.

**Effect of withdrawal**

As discussed, the effect of payment of an infringement notice is that the matter is disposed of and the regulator cannot bring legal proceedings in relation to the same matter. This acts as one of the incentives to pay. If an infringement notice is withdrawn either at the request of the issuee or at the behest of the regulator, the matter has not been resolved and the regulator could still choose to take other proceedings. This may add to the pressure to pay regardless of whether or not the regulator would have a good case. An entity may also place itself at risk of court proceedings in making its argument for withdrawal should it disclose information that has not otherwise been available to the regulator. While this may not be an issue for a legally-advised entity, it may be an issue for small businesses that are not legally represented. This issue could be addressed through a specific statement in the infringement notice about whether, in seeking withdrawal of the notice, information or evidence provided can be used in any subsequent legal proceedings. The *Competition and Consumer Act* provides that evidence or information given by a person in the course of making representations for a withdrawal of an infringement notice is not admissible against the person in any proceedings except in

\(^{90}\) Telecommunications (Infringement Notices) Guidelines 2011, cl 6.11.

\(^{91}\) Australian Customs and Border Protection Service, Infringement Notice Scheme Guide (January 2014) p 7.


\(^{93}\) Australian Law Reform Commission, ALRC 95, n 2, Rec 12-10.

\(^{94}\) See submission by Australian Compliance Institute to Australian Treasury in response to the consultation paper, n 86.
relation to the falsity of that evidence or information. A similar protection is also found in s 1317DA(2) of the Corporations Act but there is no such protection in the Spam Act or the Do Not Call Register Act nor was this issue addressed in the Regulatory Powers (Standard Provisions) Bill 2012 (Cth).

Effect of non-payment

Australian Competition and Consumer Commission v Le Sands Restaurant and Le Sands Café Pty Ltd t/as Signature Brasserie [2011] FCA 105, was a case that followed the ACCC’s targeting of restaurants that did not prominently display the single price for menu items. Following the issue of infringement notices to eight restaurants, civil penalty proceedings were taken against each of four that did not pay its infringement notice. The impact of not paying the infringement notice of $6,600 is apparent from the size of the subsequent pecuniary penalties. Two of the restaurants – said to be cooperative – were penalised $13,200 each plus $1,500 in costs; a third was given a pecuniary penalty of $15,000 plus $1,500 costs; while the fourth – held by Stone J to be lacking cooperation – was penalised $20,000 plus $4,500 in costs. The respondent in the latter case did not put in an appearance before the court nor did it take part in pre-trial conferences and this contributed to the finding of lack of cooperation, but there was evidence that the respondent had advised the regulator by letter that it had ordered new menus. While this appeared to be some time after the ACCC first made contact with the business and after the infringement notice had been issued, if the menus had indeed been ordered, failure to pay the infringement notice and cooperate with the regulator came at a large price.

The risk of penalties at least double that of an infringement notice, plus costs, may place an effective barrier in the way of entities, at least small business ones that wish to challenge an infringement notice. The Commonwealth Attorney-General’s Guidelines provide and the Regulatory Powers (Standard Provisions) Bill 2012 (Cth) provided that an infringement notice must give brief details including “the maximum penalty that a court could impose if the provision were contravened”. This gives an indication of the risk of non-payment and seems on its face to provide a measure of fairness. However, in some instances the maximum penalty may be far greater than that which an entity would be ordered to pay. In such circumstances providing details of the potential penalty may not be very helpful and may in itself be coercive rather than informative. For example, the maximum pecuniary penalty under s 224 of the Australian Consumer Law for a breach of s 48 (the relevant section in the “menu” cases) is $1.1-million for a corporation or $220,000 for an individual. To state that amount as a potential penalty in an infringement notice for $10,200 borders on being misleading and it hardly allows for informed decision-making by an affected small-business entity in the absence of legal advice.

95 Competition and Consumer Act 2010 (Cth), s 134G(2).
96 See discussion above under the sections, “Capacity to pay” and “Net-widening” in this article.
100 Australian Competition and Consumer Commission v Al Constructions (ACT) Pty Ltd [2010] FCA 1377.
101 Australian Competition and Consumer Commission v Al Constructions (ACT) Pty Ltd [2010] FCA 1377 at [9]-[10].
102 Commonwealth Attorney-General’s Department, n 9, p 65.
A survey of infringement notices issued by various regulators shows that not all indicate the potential maximum penalty. Similarly, a survey of the various statutes that provide for the use of infringement notices indicates that many but not all mandate the provision of information about the potential size of the penalty. Those where it is found include the Competition and Consumer Act, s 134B(g); the Corporations Act, s 1317DAE(1)(f); Fair Work Regulations 2009 (Cth), reg 4.05(h); the Fuel Standards Act 2000 (Cth), s 65M(1)(e)(ii) and the Environment Protection and Biodiversity Conservation Regulations 2000 (Cth), reg 14.03(2)(e). However, the information is not mandated in such diverse legislation as the Spam Act, Sch 3, cl 4; the National Electricity Law, s 75; Migration Regulations 1994 (Cth), reg 5.23 or the Fisheries Management Regulations 1992 (Cth), reg 40.

The information is frequently also on regulators’ websites, but especially when dealing with small businesses that might not have legal representation and for which contact with the regulator may be one-off, information about the potential for a higher penalty should be made abundantly clear and this should go beyond just a statement about the maximum penalty that is payable if that maximum bears no relation to the likely penalty.

The author has found one instance where non-payment of an infringement notice did not result in a significantly higher pecuniary penalty. In Australian Securities and Investments Commission v ACN 092 879 733 Pty Ltd [2012] FCA 923, a case concerning breach of s 30(2) the National Consumer Credit Protection Act, Nicholas J in the Federal Court imposed a pecuniary penalty of $7,500 on the second respondent, a director of the first. The corporate respondent was issued with an infringement notice in July 2011 specifying a payment of $27,500. That infringement notice was not paid. A second infringement notice for $5,500 was issued in February 2012, but to the second respondent whom ASIC said was the alter ego of the first. When this infringement notice was not paid, ASIC issued civil penalty proceedings against the company and its director seeking declarations against both but a pecuniary penalty only against the director. The court found that the company had engaged in advertising in breach of the legislation and that the second respondent was knowingly involved in that contravention, but found the company had not engaged in any illegal credit activity and neither respondent had gained any benefit as a result of the contravention and no person had suffered any loss. Accordingly Nicholas J determined an appropriate penalty to be $7,500 plus costs. This at least is an example of where non-payment of an infringement notice appeared to lead to a better outcome for the respondents overall and it potentially raises concerns about the issue of the first infringement notice.

**Administrative or Judicial?**

As has been discussed, infringement notices are usually described as an “administrative penalty”. The name itself speaks to the blurring of the distinction between two arms of government: the executive branch that implements law and policy, or relevantly here, investigates breaches, and the judicial branch that determines whether there has been a breach and imposes a penalty. Hyland has cogently argued that infringement notices issued under the Corporations Act in relation to the continuous disclosure rules are “an unconstitutional conferral of Commonwealth judicial power on ASIC”. This article does not seek to address this complex issue and indeed it would be the basis for an article in its own right. However, even without a detailed examination, it must be apparent from the size of some of the infringement notices and the use of multiple infringement notices “to deter similar conduct by the

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104 Infringement notices issued by the Australian Energy Regulator makes no mention of the potential impact of non-payment and merely indicate that the relevant company may choose not to pay and may defend any proceedings: Australian Energy Regulator, *Enforcement Matters*, http://www.aer.gov.au/publications/enforcement-matters.

105 ACMA’s *Regulatory Guide No 5* states that infringement notice penalties are considerably less than a Court could impose, Australian Communications and Media Authority, *Regulatory Guide No 5 – Infringement Notices* (September 2011) p 2, http://acma.gov.au/webwr/_assets/main/lib100845/regulatory_guide-infringement_notices.doc; ASIC’s website indicates that the effect of non-payment of an infringement notice may be a higher penalty imposed by a court.

106 The “menu” cases described above may be examples of this.

107 Hyland, n 30 at 137.
specific business involved or the broader industry” that there is a risk that some of the infringement notice schemes or the practices adopted by some of regulators are in danger of being an exercise of judicial power. The Commonwealth Attorney-General’s Department Guidelines hint at the danger: “Serious offences should be prosecuted in court and should not be capable of being excused by an administrative assessment.” Whether or not some of the infringement notice schemes transgress too far into the area of judicial power, there is little doubt that many have moved beyond being merely “issued for minor offences that are regulatory in nature”. Their danger is of a growth by stealth of executive power into areas that are clearly judicial and without the oversight and transparency that judicial proceedings offer.

CONCLUSION
This article has not sought to claim that there is no role for infringement notices in federal regulation. In the interests of protecting consumers, shareholders and others who benefit from the actions of regulators, there is merit in having a range of tools in the regulatory armoury. However, in recent years we have seen them develop from small penalty alternatives to being significant penalties in their own right lacking the checks and balances that come when a regulator has to make a case before the courts. The time and expense of bringing matters before the courts means it is understandable that regulators want the power to act quickly in circumstances when persuasion is not enough. It is also understandable that many entities issued with a penalty notice would rather pay it than face the courts. However, there is an argument for a review of the use of infringement notices in federal regulation to ensure they remain as they are meant to be and are not more serious punishments clothed in a benign name.

109 Commonwealth Attorney-General’s Department, n 9, p 58.
110 Commonwealth Attorney-General’s Department, n 9, p 57.