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Articles

Does the *Westpoint* litigation signal a revival of the ASIC s 50 class action?

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Section 50 of the Australian Securities and Investments Commission Act confers a wide power on ASIC to bring civil action in the name of the company, or a class action for shareholders or investors for the recovery of damages for corporate misconduct. Despite its broad scope, this power has been little used by ASIC. Until the recent ***Westpoint*** *litigation it appeared that this trend seemed set to continue due to the recent growth in ASIC's arsenal of enforcement powers, in particular the ability to bring proceedings seeking civil penalties, together with what promises to be a new age of private enforcement of shareholders rights through class actions funded by litigation funding corporations. In the context of this likely expansion of private enforcement action and the current legislative framework of ASIC's enforcement powers, this article will examine when ASIC should bring civil action under this provision.*

Introduction

On 8 November 2007 the Australian Securities and Investments Commission (ASIC) announced that it had commenced an action under s 50 of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) seeking $308 million in compensation for investors in the failed Westpoint Group.[1] Rather than depending upon investors to bring a class action to recover their losses and the liquidators of the various Westpoint companies to bring an action on behalf of the companies, ASIC used its power under this provision to bring an action on behalf of the companies involved as well as the majority of the victims of the collapse.

This development was somewhat unexpected for a number of reasons. First, a class action had already been commenced in relation to some of the investors. Second, the liquidator had already commenced action in the name of the relevant companies. Lastly ASIC has shown a marked reluctance to use its power under s 50 in recent years.[2] ASIC had adopted a position of supporting the growth in private enforcement by liquidators and shareholder class actions on the basis that this allowed it to focus its enforcement activities

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1 ASIC Media Release, 'ASIC to pursue compensation for Westpoint investors', 8 November 2007, at <http://www.asic.gov.au>.

2 Ibid, where ASIC said that it has taken 21 such actions since 1991. The major reported instances of s 50 actions taken by ASIC are set out in App A. Most of these occurred in the 1990s.

elsewhere.[3] ASIC's primary enforcement focus over the last decade has been characterised by a preference for other types of civil action, such as seeking injunctions under s 1324 of the Corporations Act 2001 (Cth) to protect investors or shareholders from future damage.[4] Alternatively it had commenced action for civil penalties or criminal proceedings.[5] The decision to use its s 50 power in relation to the Westpoint collapse may signal a shift in attitude by ASIC to take civil action to recover funds lost by victims of corporate fraud or it may be that it was influenced by factors peculiar to the Westpoint collapse. An alternative or perhaps additional reason may be that it is a response to the difficulties ASIC has encountered with some of its other enforcement mechanisms, in particular the use of civil penalty proceedings.

Just as ASIC is reviving its s 50 power which many had left for dead, this article will also attempt to breathe some new life into the section. Part I outlines the history, reach of the section and its use by ASIC to date. In Part II private class actions and civil penalties are examined as the growth in these remedies appears to have contributed to the decline in the use of s 50. In Part III these remedies will be compared and contrasted with s 50 proceedings. Part IV considers the usefulness of s 50 in today's enforcement landscape and critically evaluates when and how it should be used in the future.

I Section 50 of the ASIC Act

Section 50 of the ASIC Act provides ASIC with a broad power to bring a civil action on behalf of another for damages or the recovery of property. It provides:

> Where, as a result of an investigation or from a record of an examination (being an investigation or examination conducted under this Part), it appears to ASIC to be in the public interest for a person to begin and carry on a proceeding for:
>
> (a) the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed in connection with a matter to which the investigation or examination related; or
>
> (b) recovery of property of the person;
>
> ASIC:
>
> (c) if the person is a company — may cause; or
>
> (d) otherwise — may, with the person's written consent, cause;
>
> such a proceeding to be begun and carried on in the person's name.

ASIC does not become a party to the proceedings, rather its role is limited to commencing and carrying on the proceedings. As such the provision has been described as 'extraordinary' as it gives a power to ASIC to begin and conduct proceedings in the name of another person in respect of a cause of action of that other person.[6]

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3 See J Cooper, Deputy Chairman — ASIC, 'Corporate wrongdoing: ASIC's enforcement role', address to the International Class Actions Conference, 2 December 2005, pp 11 and 15, at <http://www.asic.gov.au>.

4 See H Bird, D Chow, J Lenne and I Ramsay, 'ASIC Enforcement Patterns', Centre for Corporate Law and Securities Regulation, University of Melbourne, 2003.

5 Ibid.

6 Lindgren J in *Deloitte v ASIC* (1995) 54 FCR 562 at 570; 35 ALD 519 at 526; 128 ALR 318.

The scope of s 50

As the words of the section make clear, the preconditions for ASIC being able to bring such an action is that it must firstly appear to ASIC to be in the 'public interest'. Second it must be 'as a result of an investigation' or 'from a record of an examination'. Third, if it is brought on behalf of someone other than a company, their consent must be obtained. The effect of each of these preconditions will be considered below.

Public interest

In *ASC v Deloitte Touche Tohmatsu*[7] the Full Court of the Federal Court considered the scope and content of s 50. While finding that the decision made by ASIC to bring an action under this provision was reviewable under the Administrative Decisions (Judicial Review) Act 1977 (Cth) the result of this decision is such that it would be difficult to mount a successful challenge under that Act. The court held that the phrase 'it appears to ASIC' conferred an extremely wide discretion on ASIC which could not be subject to challenge unless no reasonable person in the position of ASIC could have made the decision.[8] Similarly the court said that 'public interest' involved a value judgment which is made by reference to undefined factual matters constrained only by the subject matter and scope of the Act.[9] In evaluating whether the action was in the public interest the decision was one of fact and degree 'and by its very nature it will be something that is not easily susceptible to judicial review'.[10]

Clearly a cause of action for a victim would not, if this was the sole factor, result in the action being in the public interest. However there are a whole host of matters which ASIC can take into account. In *Deloitte* the court said that considerations which were relevant to the provisions of s 1(2) of the ASIC Act, which sets out ASIC's functions and powers, were proper matters to take into account in considering the 'public interest'. However it is implicit in the judgment that public interest considerations are not to be confined to matters which fall within these functions and powers. For instance, in *Deloitte* the fact that the company did not intend to take civil proceedings was a relevant consideration.[11] It also appears that once ASIC has made its assessment that the action is in the public interest, it does not have to revisit this issue should circumstances change.[12]

Cited by Lockhart J in *Somerville v ASIC* (1995) 60 FCR 319 at 324; 131 ALR 517 at 523 and Brownie J in *Walsh v Permanent Trustee Australia Ltd* (1996) 21 ACSR 213 at 217.

7 (1996) 70 FCR 93; 138 ALR 655.

8 *ASC v Deloitte Touche Tohmatsu* (1996) 70 FCR 93 at 121; 138 ALR 655 at 679–81.

9 Ibid, at FCR 128; ALR 682. As to the meaning of 'public interest' the court followed the decision of the High Court in *O'Sullivan v Farrer* (1989) 168 CLR 210; 89 ALR 71 which concerned the Liquor Act 1982 (NSW) where objection to an application to remove a licence could be made on 'public interest' grounds.

10 (1996) 70 FCR 93 at 124; 138 ALR 655 at 682.

11 Ibid, at FCR 125; ALR 683–4.

12 See *Selangor United Rubber v Craddock* [1969] 3 All ER 965 which considered a similar provision in the Companies Act 1948 (UK).

As a result of an investigation or from a record of an examination

The second precondition to commencing a s 50 action is that it must be the result of an investigation or from a record of examination conducted under Pt 3 of the ASIC Act. This Part contains ASIC's general power to commence investigations in accordance with s 13 and its power to examine persons pursuant to s 19. Because of the broad terms of s 13 and s 19, this precondition in s 50 is not an onerous requirement for ASIC to satisfy. It also appears that the investigation does not have to be complete before ASIC commences an action under s 50, although its public interest determination must only take into account those matters of which it was aware at the time it commences the action.[13]

The need for consent

If the action is taken by ASIC in the name of a company, it is not necessary for ASIC to obtain the company's consent.[14]

In contrast if the action is brought in the name of another person s 50 requires that ASIC obtains that person's written consent.[15] When there are a large number of potential litigants this can act as a significant constraint to the use of the power. This requirement was described in 2005 by the Deputy Chairman of ASIC as 'a headache and sometimes means proceedings are impracticable'.[16]

There are important reasons why this consent is required. If ASIC brings a s 50 on behalf of a plaintiff this may create an issue estoppel which may limit an individual exercising their legal rights in the future.[17] Questions also remain as to whom will bear the court costs. Under s 90 of the ASIC Act ASIC must pay the expenses of an investigation. 'Expenses' is defined in s 5 of the ASIC Act to include 'costs and expenses incurred in relation to a proceeding begun under section 50 as a result of the investigation'. It appears that this provision would also make ASIC liable to pay any costs awarded against the company or person in whose name the action was commenced.[18] However it may not extend to the costs of defending cross claims as it is unlikely that the terms of s 50 permits ASIC to defend such claims.[19] On the issue of costs it

13 (1995) 54 FCR 562 at 573; 35 ALD 519 at 546; 128 ALR 318. This aspect of the judgment was not overturned on appeal.

14 See s 50(c) of the ASIC Act. In *Deloitte*, above n 7, the Full Court of the Federal Court rejected the proposition that the rule in *Foss v Harbottle* should be applied to the provision. The rule in *Foss v Harbottle* has now been abolished by virtue of s 236(3) of the Corporations Act and replaced with a the statutory derivative action contained in Pt 2F.1A of the Corporations Act. There is nothing in that Part which suggests that it applies to an action brought by ASIC under s 50 of the ASIC Act.

15 It does appear however that once proceedings are commenced other plaintiffs can be added at a later stage, see *Walsh v Permanent Trustee Australia Ltd* (1996) 21 ACSR 213.

16 Cooper, above n 3, p 10.

17 *Australian Corporations Principles & Practice*, electronic database, at <http://www.LexisNexis.com.au>, at [15.2.0060] (accessed 2 January 2008).

18 *Somerville v ASC* (1995) 60 FCR 319 at 325; 131 ALR 517 at 524 per Lockart J.

19 D Richardson, 'Section 50 of the Australian Securities Commission Act 1989: White Knight or White Elephant?' (1994) 12 *C&SLJ* 418 at 436.

should be noted that s 91 of the ASIC Act would allow ASIC to seek reimbursement of its investigation costs against a defendant to the s 50 proceedings.

Presumably given that s 50 allows ASIC to 'carry on' the proceeding this would allow ASIC to settle the proceedings without the consent of the parties to the action. However this issue is not settled and Lockhart J in *Somerville v ASC*[20] expressed a contrary view, namely, that while the person could not require ASIC to settle the matter on the person's terms, ASIC could not settle the proceedings without the person's consent.[21] As a matter of practicalities, to avoid having to approach victims for a second time, ASIC should, in obtaining a person's consent to commence the action, also seek to obtain their consent for ASIC, as agent, to settle the proceedings if the circumstances are such that it becomes desirable to do so.

The history of s 50

A provision similar to s 50 was first introduced into Australian corporate law in 1958.[22] It was introduced as a response to a report of the Victorian Statute Law Revision Committee on Freighters Ltd.[23]

Freighters Ltd was a public company listed on the Stock Exchange of Melbourne involved in the manufacture of trailer vehicles and associated products. In July 1956 the Attorney-General of Victoria appointed an Inspector under the Companies (Special Investigations) Act 1940 (Vic) to investigate its affairs. In brief, the Inspector identified three main problems. First, in order to raise funds to takeover another company, Australian Machinery Co Pty Ltd, the directors issued new shares in Freighters to themselves at a discount to the then market price and without disclosure to shareholders or providing them with the opportunity to participate in the issue. Second, the directors had an interest in a number of distribution companies which sold products sourced from Freighters. These companies were sold to Freighters for the issue of shares in Freighters to the directors and their associates. Independent valuations were not obtained, nor were the shareholders informed of the directors' interest in the transaction. Third, the directors used an issue of shares for employees to issue further shares to themselves and associates. Again the shareholders were not informed of the extent and nature of the issue of the shares to the directors.[24]

The Victorian Statute Law Revision Committee was directed to consider the report of the Inspector. The committee made a number of recommendations which were adopted, including that a section be inserted in the Companies Act 1958 (Vic) similar to that of the then s 169 of the Companies Act 1948 (UK).[25] This new provision allowed the Attorney-General to, following the report of

20 (1995) 60 FCR 319; 131 ALR 517.

21 (1995) 60 FCR 319 at 325; 131 ALR 517 at 523.

22 Initially it was introduced as s 144(6) of the Companies Act 1958 (Vic). Similar provisions were introduced around Australia shortly thereafter see Companies Act 1961 (NSW).

23 Victorian Parliamentary Debates, 9 September 1958, p 324.

24 'Report of the Inspector Appointed to Investigate the Affairs of Freighters Ltd Pursuant to the Provisions of the Companies (Special Investigations) Act 1940', 17 September 1956.

25 This provision was introduced into the UK Companies Act as a result of a recommendation of the Cohen Committee in 1945: see 'Report of The Committee on Company Law

an Inspector, bring proceedings in the name of the company if it appeared to the Attorney that it was in the public interest that such proceedings be brought by such company:

> for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation of that company or the management of its affairs or for the recovery of any property of the company which has been misapplied or wrongfully retained.[26]

This was one response by the parliament to increase protection for minority shareholders such as those disadvantaged by the Freighters transactions.[27] The protection of minority shareholders also appears to be the reason behind the equivalent provision in the Companies Act of the United Kingdom.[28] This provision was subsequently adopted throughout Australia in 1961 as s 169(7) of the Uniform Companies Act 1961.

In 1969 the Company Law Advisory Committee to the Standing Committee of the Attorney-Generals[29] (the Eggleston Report) considered s 169(7) and noted that it had not been used to date. It said:

> In our view, it should be regarded as the responsibility of government to take civil proceedings in the name of the company in cases where there are seen to be good prospects of recovery, but in which, by reason of the relative poverty of the shareholders or creditors, the inability of the company itself to finance proceedings, or the practical impossibility of organising financial support for the litigation, it is improbable that action will be taken without the support of government. Such support would need to extend to the provision of security for the defendant's costs (see s 363). If the action were successful, the Crown's costs would be recouped if and so far as the defendant had assets to meet the judgment. While we consider it important in the interests of shareholders and creditors that this obligation to take court proceedings should be accepted by the Crown, we do not suggest that any attempt should be made to write such an obligation into the legislation, since it would be in our view be impossible to specify in advance the circumstances in which the power should be exercised. Much would depend on the strength of the legal opinion in support of the claim, and on the financial circumstances of the prospective defendant. Accordingly, we do no more than express the view that it would be in accordance with modern views as to the responsibility of the State for enabling under-privileged citizens to enjoy the benefits of the legal system if governments considered themselves as bound to lend them assistance in

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Amendment', 1945 Cmd 6659. The Cohen committee pointed at [155] to the then deficiencies in the UK legislation which were unduly restrictive on minority shareholders who held a genuine grievance.

26 Report from the Statute Law Revision Committee upon the Provisions of The Companies Acts (re Freighters Ltd) at [12] adopted in s 144(6) of the Companies Act 1958 (Vic).

27 See Victorian Parliamentary Debates, 9 September 1958, p 324 where the Attorney-General, Mr Rylah, stated in relation to the Bill: 'The rights of minorities have been protected, and the powers of the court to protect minorities and to deal with the fraudulent have been increased.' The Victorian Parliament it went further and also introduced statutory directors duties in an attempt to deal with the type of activity uncovered by the report (see s 107 of the Companies Act 1958 (Vic) and Explanatory Memorandum to the Victorian Companies Bill 1958 at 331).

28 See above n 23.

29 Company Law Advisory Committee to the Standing Committee of the Attorney-Generals, 'Investigation Provisions of the Uniform Companies Act', NSW Government Printer, 1969.

> circumstances of the kind we have described. The fact that circumstances may exist in which it would be proper for them to do so is already recognised by s 169(7).[30]

Section 169(7) of the Uniform Companies Act 1961 became s 306(11) of the Companies Code 1981. The provision was broader and also allowed the National Companies and Securities Commission (NCSC) to bring proceedings in the name of the company for negligence, default, breach of trust and breach of duty. Sections 30(9) and 36(9) of the Securities Industries Code 1981 and s 36(9) of the Futures Industries Code 1981, respectively, contained a similar provision that gave the NCSC the power to commence civil proceedings on behalf of persons.

Section 50 of the Australian Securities Commission Act 1989 (Cth) (the predecessor to the ASIC Act) replaced these provisions removing the requirement that it had to be 'in connection with the promotion or formation of that company or the management of its affairs' or that it had to follow the report of an Inspector. It only required, as with the current provision, that it be in connection with a matter relating to a particular ASIC investigation or examination. Initially the bill for this Act also required the written consent of a company if ASIC commenced an action on the company's behalf as well as the consent of a person if ASIC commenced an action on a person's behalf. The requirement for the consent of the company was abandoned as a result of a submission by the NCSC which was concerned that the company might not consent if the persons in control of the company were the persons who misappropriated the money or property.[31]

From the history of the provision it is evident that the section is designed for the dual purposes of providing a 'class action' type remedy for those who do not have sufficient funds as well as a form of derivative action when the company refuses to act. Both, however, are subject to the overriding requirement that the action must be in the public interest. Accordingly it is not enough for the action to be brought to compensate a victim, there must be an overriding benefit to the community.

Some of these functions are reflected in the observations of Lockhart J in *Somerville*:

> An evident function of s 50 is to permit the commission, acting in the public interest, to cause proceedings to be taken where persons or corporations have suffered loss or harm arising from fraud, negligence or misconduct, but do not have the resources to maintain expensive and complicated litigation. The section cannot be invoked without the intervention of the commission. In the case of a company, the commission may cause the proceeding to be begun and carried on in the company's name whether it consents or not. Doubtless the reason for the commission being empowered to commence and carry on a proceeding if the person is a company without the person's consent is that the company would often be the party who has engaged in the relevant misconduct.[32]

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30 Ibid, p 8.

31 'Report of the Joint Select Committee on Corporations Legislation', Australian Government Publishing Service, Canberra, April 1989, at [4.45]–[4.51]. See also Lindgren J in *Deloitte v ASC*, above n 6, at 536 where the history of the provision is outlined.

32 (1995) 60 FCR 319 at 324; 131 ALR 517 at 523.

These observations were adopted by the Full Court of the Federal Court in *Deloitte*.[33]

ASIC's use of s 50

The public interest requirement gives ASIC a wide discretion as to whether or not it will take action under s 50. Accordingly it is perhaps not surprising that ASIC's use of this provision has been somewhat haphazard, driven not so much by a shortage of causes of actions, but by how high ASIC decides to raise the public interest hurdle for possible plaintiffs.

Nor is there much in the way of guidance as to how ASIC will exercise its discretion in ASIC's published material. Regulatory Guide 4 titled 'Intervention', published in 1991 and not changed in this respect to this issue since that time, makes a brief reference to s 50 and states:

> The ASC believes that the private plaintiff is best able to assess the costs and benefits of litigation. The ASC is reluctant to undertake civil proceedings, where there is a potential plaintiff with sufficient funds to bring those proceedings, but is not prepared to do so. However, where the ASC is satisfied that civil proceedings which may be justified by reason of a contravention of the Corporations Law cannot be brought, because of the financial circumstances of a potential plaintiff, the ASC will consider an application for assistance. The ASC may be prepared to undertake a greater role in ensuring the prosecution of those proceedings if it appears to be in the public interest for the proceedings to be brought.[34]

In 2005 ASIC Deputy Chairman Jeremy Cooper said that in determining whether it is in the public interest to bring a s 50 action it considers:

- the regulatory effect of successfully bringing an action;
- strength of cause of action and ability to identify plaintiffs and obtain consent to bring proceedings;
- whether shareholders are able to bring an action;
- the ability of the defendants to pay the damages sought; and
- the prospects of winning.[35]

From what can be gleaned from this statement it appears that for ASIC to bring an action it interprets the public interest requirement by assessing its regulatory effect. This would depend upon factors such as whether the action is likely to test an important issue or whether the nature of the conduct or the frequency with which it occurs is such that the result of ASIC's action may deter similar conduct.[36] Presumably ASIC also assesses whether there are other alternative actions available which would have a similar or greater regulatory impact.

When the Westpoint litigation was announced the media release stated that ASIC has used its s 50 powers on 21 occasions.[37] It appears that this may be a reference to the actual number of proceedings commenced rather that the

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33 (1996) 70 FCR 93 at 117; 138 ALR 655 at 676–7.

34 ASIC Regulatory Guide 4, 'Intervention Chapter 9 — Miscellaneous', at RG4.4, at <http://www.asic.gov.au>.

35 Cooper, above n 3, p 9.

36 See also P Thompson, 'Section 50 of the ASIC Law — The Power and its Application' (1993) 3 *ASIC Digest* SPCH75.

37 Above n 1.

number of matters in relation to which ASIC has taken s 50 action. The actual number of matters in relation to which ASIC has taken s 50 action may in fact be smaller.[38] Set out in App A are the major reported instances of the use by ASIC of its s 50 power. This illustrates that the main occasions of ASIC taking s 50 action occurred before 2000, particularly in the early to mid 1990s. Since 2000 ASIC's use of s 50 has been infrequent.

Other empirical studies, while not focusing on s 50, have shown that ASIC's focus has been on penal enforcement actions, covering criminal and civil penalties, rather than on civil action. A study by Helen Bird, Davin Chow, Jarrod Lenne and Ian Ramsay into court based enforcement activities undertaken by ASIC during 1997 to 1999 found that ASIC predominately opts for penal enforcement action rather than civil action.[39] Civil action was primarily used as a restraint to prevent or reduce future damage to investors and shareholders.[40] The aim was to preserve the status quo rather than to obtain compensation for past wrongs.

This is also consistent with statements made by ASIC which suggest that obtaining compensation for victims is not a significant part of its enforcement strategy. In ASIC's published guide as to how it operates it states in relation to complaints it receives:

> How do we decide whether to use our powers? We aim for maximum regulatory impact within our powers and resources, to:
>
> - protect those who have suffered or may suffer serious harm as a result of misconduct
> - deter or punish those whose misconduct has caused serious harm
> - educate about what constitutes unacceptable behaviour.[41]

II The growth of civil penalties and class actions

Civil penalty proceedings

The decline in the use of s 50 actions by ASIC seems to correspond with an increase in the use by ASIC of its power to bring proceedings for civil penalties under Pt 9.4B of the Corporations Act. Often the same fact situation would give rise to a possible s 50 action or a civil penalty action. However it seems that ASIC has taken the view that regulatory impact of civil penalty proceedings would be greater than bringing a s 50 action and/or that such civil penalty proceedings would be quicker and cheaper.

Part 9.4B was introduced into the Corporations Law, the predecessor of the Corporations Act, on 1 February 1993.[42] Initially it only applied to breaches

38 Cooper, above n 3, p 10.
39 Bird et al, above n 4, p 107.
40 Ibid, p 104.
41 'ASIC: a guide to how we work, An ASIC Better Regulation Initiative', at <http://www.asic.gov.au>. See also ASIC's Service Charter also available at <http://www.asic.gov.au> which states in relation to complaints: 'However, we generally won't be able to recover money for you, and you will often need to get your own professional advice. If we cannot help you, we will suggest someone who can or some action you may be able to take yourself.'
42 Corporate Law Reform Act 1992 (Cth).

of directors' duties. However, subsequent legislative amendments[43] have extended the reach of civil penalties so that it now also covers breaches of a number of other sections of the Corporations Act such as the market misconduct provisions and transactions which improperly change the share capital of a company.[44]

The introduction of civil penalties originated from the report of the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee).[45] The Cooney Committee was influenced by the 'enforcement pyramid' model advocated by a number of legal theorists.[46] Under this model it was envisaged that a regulator such as ASIC would make greatest use of low level enforcement tools such as persuasion and education rising to a low use of the most severe sanctions, being criminal prosecution. Civil penalties were designed to sit somewhere below criminal penalties but above pure civil based remedies.[47] It was therefore envisaged that civil penalties would be used less frequently than pure civil based remedies but more frequently than criminal prosecution.

Although not expressed by the Cooney Committee, civil penalties were seen to overcome some of the difficulties associated with securing criminal convictions. It was envisaged that, because of the lower standard of proof, civil penalties would be quicker, cheaper and easier to prove for the regulator. Furthermore some of the procedural protections available to a person accused of a crime would not be afforded to a person the subject of civil penalty proceedings.[48]

In the mid to late 1990s when the cases which may have given rise to applications for civil penalties would have started to flow through to court applications, ASIC's use of civil penalties was relatively low with only 14 actions being brought between 1993 and 1998.[49] This lack of use of civil penalties in those early years has been attributed to the structure of the then legislation which, in effect, prevented ASIC from commencing criminal penalties after it had commenced civil penalty proceedings.[50] The Corporations Act was amended in 1999 to remove this impediment.[51] Since that time there has been a steady increase in ASIC's use of this remedy.[52] This

43 In the Financial Sector Reform (Consequential Amendments) Act 1988 (Cth) and Financial Services Reform Act 2001 (Cth).

44 Corporations Act s 1317E.

45 Senate Standing Committee on Legal and Constitutional Affairs, *Directors Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors*, AGPS, Canberra, 1989.

46 Ibid, p 190.

47 Ibid, p 191.

48 See M Welsh, 'Eleven years on — An examination of ASIC's use of an expanding civil penalty regime' (2004) 17 *AJCL* 175 at 177.

49 See G Gilligan, H Bird and I Ramsay, Research Report; *Regulating Directors's Duties — How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?*, Centre for Corporate Law and Securities Regulation, The University of Melbourne, 1999, p viii

50 Ibid.

51 Corporate Law Economic Reform Program Act 1999 (Cth).

52 See R Baxt, 'The expansion civil penalties under the Corporations Act' (2002) 30 *ABLR* 61; Welsh, above n 48; V Comino, 'The enforcement record of ASIC since the introduction of the civil penalty regime' (2007) 20 *AJCL* 183.

seems to correspond with a drop in ASIC s 50 actions.[53]

Developments in shareholder rights and class actions

Coupled with the introduction of civil penalties, over the last 20 years there has been a steady increase in the power of shareholders and investors to bring actions to enforce their rights.

Significantly the ability of shareholders and investors to bring a class action is now often a realistic option.[54] While the ability for such class actions to be brought was introduced into legislation in 1988, it is only in recent years that there has been a significant increase in the number of such class actions.[55] This appears to be due to the establishment of litigation funding companies willing to underwrite such actions. In addition there has been recent clarification of a number of legal principles which were once thought to be obstacles to such proceedings,[56] together with what appears to be a changing attitude by investors, shareholders and institutional shareholders who are now apparently more willing to seek redress for wrongs that have been committed against them.[57]

Furthermore legislative intervention has also increased the ability of minority shareholders to take action to enforce a company's rights. In 2000 the provisions of Pt 2F.1A of the Corporations Act was introduced,[58] abolishing the common law rule of *Foss v Harbottle*[59] and its exceptions[60] and replacing them with a statutory derivative action whereby a shareholder can now enforce the rights of a company provided certain statutory requirements are met.[61] The aims of this legislation include obtaining compensation for the company and also to act as a form of private enforcement action to punish managerial misconduct and thereby deter future wrongful conduct.[62]

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53 See App A.

54 A recent example is *King v GIO Australia Holdings Ltd* [2000] FCA 1543; BC200006571. This was a class action where 22,000 shareholders received $97 million. See B Murphy and C Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2007) 30 *MULR* 399 at 414.

55 C Waters, 'The new class conflict: The efficacy of class actions as a remedy for minority shareholders' (2007) 25 *C&SLJ* 300 at 300–1.

56 Such as *Campbells Cash And Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; 229 ALR 58 in which the High Court said that litigation funding was not an abuse of process or contrary to public policy and *Sons of Gwalia v Margaretic* (2007) 232 ALR 232; 81 ALJR 525 the effect of which is that shareholders claims can, in certain circumstances, rank equally with other unsecured creditors in insolvency.

57 Waters, above n 55, at 302–4.

58 Corporate Law Economic Reform Program Act 1999 (Cth).

59 (1843) 2 Hare 461.

60 Corporations Act s 236(3).

61 Corporations Act s 237.

62 I M Ramsay and B B Saunders, 'Litigation by Shareholders and Directors: An empirical study of the Statutory Derivative Action', Centre for Corporate Law and Securities Regulation, The University of Melbourne, 2006, pp 15–17.

Emerging difficulties with civil penalties actions

With the case law that has grown from the surge in ASIC's use of the civil penalty remedy since 2000, a number of obstacles have arisen for ASIC effectively reducing its allure as an enforcement option.[63]

In particular, although s 1317L of the Corporations Act provides that the court must apply the rules of evidence and procedure for civil matters in civil penalty proceedings, the High Court in *Rich v ASIC*[64] said that where a person is exposed to a penalty the court should apply the body of law developed in relation to the privileges against penalties and forfeiture. As a result the court should not order discovery on the defendant nor will it make orders for the filing of affidavits before the trial. The High Court also held that even if ASIC was only seeking disqualification orders, as these also exposed a person to a penalty, these also attracted the privilege against penalties and forfeiture. As such the proper course was also to refuse discovery and the filing of affidavits.[65] As a result of a recent legislative amendment to the Corporations Act the penalty privilege in relation to disqualification proceedings has been removed[66] although the procedural difficulties where ASIC is seeking a pecuniary penalty remain.

There has also been a reluctance by the courts in allowing ASIC to adduce fresh evidence in a civil penalty proceeding after its case has closed.[67] In *ASIC v Rich*[68] Austin J noted that although the general principle that a plaintiff should not split its case applies in civil proceedings just as it does to the prosecution of a criminal case, the principle is generally understood to be applied less strictly in civil cases.[69] However where the matter is a civil penalty proceeding with serious consequences attaching to the relief sought, it is unlikely that the discretion to allow a plaintiff to split its case will be applied as liberally.[70]

In addition it has long been established that, while the standard of proof for civil proceedings is the balance of probabilities, this standard is flexible depending upon the seriousness of the consequences.[71] If the allegation and the consequences are serious a judge must require a higher level of satisfaction to find that a contravention has occurred than would otherwise be the case. This *Briginshaw* test has repeatedly been cited by courts in deciding civil penalty proceedings when referring to the level of proof required to be

63 See generally T Middleton, 'The difficulties of applying civil evidence and procedure rules in ASIC's civil penalty proceedings under the Corporations Act' (2003) 8 *C&SLJ* 507 and Comino, above n 52.
64 (2004) 220 CLR 129; 209 ALR 271.
65 Ibid.
66 Corporations Amendment (Insolvency) Act 2007 (Cth) which introduced into the Corporations Act s 1349.
67 Middleton, above n 63, at 522; *ASIC v Adler* (2001) 40 ACSR 214; *ASIC v Rich* (2006) 235 ALR 587.
68 (2006) 235 ALR 587.
69 Austin J in *ASIC v Rich* (2006) 235 ALR 587 at 592.
70 Ibid, at 593.
71 Dixon CJ in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361.

adduced by ASIC in making out its allegations.[72] Austin J in *ASIC v Vines* went so far as to say that it required an 'exactness of proof' on the part of ASIC.[73]

There have also been suggestions in the case law that in conducting civil penalty proceedings ASIC is adopting the role of the prosecutor and must adhere to the rules in relation to prosecutorial fairness. The issue has not been conclusively resolved. Santow J in *ASIC v Adler*[74] said that these rules applied, however, on appeal the Court of Appeal opined that these rules did not apply but that, even if they did, ASIC was not in breach.[75]

As a result in an application for a civil penalty, ASIC is only in a marginally better position than it would be to prove a criminal offence. To obtain a civil penalty ASIC has to prepare its case to meet a high standard of proof without knowing what matters will be raised in defence of the allegations. In fact in some cases it may find itself worse off than if it were running a criminal prosecution. For example, under s 136 of the Criminal Procedure Act 1986 (NSW) if a matter is a complex criminal trial the prosecution can seek orders for limited discovery of an accused's case before the trial. There is no such equivalent procedure for civil penalty proceedings.

Nor is ASIC finding that civil penalty proceedings are a quick and cheap enforcement option. The most stark example of this is the civil penalty proceedings ASIC commenced against the former directors of One Tel Ltd in December 2001. While the proceedings against two of the directors were settled with banning and compensation orders, the proceedings against Jodie Rich have been the subject of multiple procedural challenges and the hearing of the substantive issue was not concluded until August 2007 after 232 hearing days.[76] Whatever the result it is likely that appeals in respect of this matter will continue for some time into the future. The cost of these proceedings have been such that they were mentioned as one reason ASIC received an additional allocation of funds in the 2005/06 federal budget.[77] If ASIC was to lose, as distinct from criminal proceedings where costs are rarely awarded against the prosecution, ASIC would be liable for Rich's legal costs which would run to many millions of dollars.

ASIC has also been subject to harsh criticism for using civil penalties when perhaps criminal action was warranted, most notably in 2005 in relation to the proceedings brought against Steve Vizard. ASIC reached an agreement with Vizard that he would accept that he had contravened ss 232(5) and 183(1) of the Corporations Law on three separate occasions. In exchange ASIC, sought a civil penalty of $130,000 for each contravention and a five year

72 See, eg, *Adler v ASIC* (2003) 46 ACSR 505 at 534; *ASIC v Loiterton* [2004] NSWSC 172; BC200401865 at [10]; *ASIC v Vines* [2002] NSWSC 1222; BC200207771 at [20].

73 *ASIC v Vines* [2002] NSWSC 1222; BC200207771 at [20]. On appeal the NSW Court of Appeal agreed that the *Briginshaw* test applied although did point out that this could be satisfied by circumstantial evidence *Vines v ASIC* (2007) 62 ACSR 1 at [539], [587] and [811].

74 (2002) 41 ACSR 72 at 81.

75 *Adler & Williams v ASIC* (2003) 46 ACSR 504 at [671]–[682].

76 E Sexton, 'Many Unhappy returns', *The Sydney Morning Herald*, 25 August 2007.

77 Ibid.

disqualification order.[78] This decision by ASIC caused outrage in the media[79] and amongst academics who questioned why Vizard was not prosecuted for insider trading.[80] Even Finkelstein J, who heard the application, was not satisfied with the agreement made by ASIC with Vizard, describing the penalty as low and refusing to endorse the five year disqualification, increasing it to 10 years.[81]

III The effectiveness of s 50 actions as an enforcement option

The re-emergence of s 50 actions?

Given the procedural difficulties ASIC has encountered with its civil penalty proceedings it is perhaps not surprising that ASIC has revisited s 50 as an enforcement mechanism, as shown by the announcement of the Westpoint proceedings. Section 50 actions have a number of advantages over civil penalty actions.

The standard of proof is the balance of probabilities and the consequences of the courts findings are not such to attract the rigors of proof required by *Briggenshaw*. Therefore potentially s 50 actions can be commenced against a greater number of defendants. In this respect it should be noted that in the Westpoint proceedings ASIC has commenced action against 12 separate defendants.[82]

Furthermore ASIC can also make full use of its investigation and examination powers. Examinations conducted under s 19 of the ASIC Act of defendants can be used against them in the court proceedings.[83] As such defendants can be 'locked in' to a version of facts at an early stage of ASIC's investigation. Any attempt by a defendant to shift from that version later at court is inhibited by ASIC's ability to use the transcript of the s 19 examination during cross-examination. Section 68(3) of the ASIC Act effectively does not allow this strategy to be employed during civil penalty proceedings where a defendant claims privilege for his or her answers.

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78 *ASIC v Vizard* (2005) 145 FCR 57; 219 ALR 714.

79 See, eg, T McCrann, 'Insider trading reveals double standards', *The Herald Sun* , 10 July 2005, p 94; S Wilson, 'Gun-shy ASIC needs to win one', *The Australian*, 19 July 2005, p 22; A Kohler, 'Make example of the directors they do catch', *The Sydney Morning Herald*, 6 August 2005, p 43; J McCullough, 'One law for rich, another for Richer', *The Courier-Mail*, 30 July 2005, p 27.

80 Comino, above n 50.

81 Above n 78.

82 'ASIC to pursue compensation for Westpoint investors', ASIC Media Release, 8 November 2007 and 'ASIC announces phase two of Westpoint Compensation Action', ASIC Media Release, 20 December 2007, both at <http:// www.asic.gov.au>.

83 It appears that the only limitation in the use of those powers after an investigation is that ASIC cannot use the powers for the dominant purpose of gathering evidence for use against defendants to the proceedings; see *ASIC v Elm Financial Services Pty Ltd* (2004) 50 ACSR 406. In that case one of the defendants argued that the headings in Pt 3 of the ASIC Act, and the structure of the Part, was such that a court should construe ASIC powers as having been spent once proceedings commenced. Austin J rejected this argument in relation to civil penalty proceedings. His attitude to this argument if it applied to s 50 proceedings is unclear given his comment at [417]: 'The argument would only work if a proceeding under s 50 were the only civil proceeding possible.'

Another advantage for ASIC in conducting s 50 actions over civil penalty actions is that as ASIC is not a party to the proceedings, it is not required to provide discovery.[84] However in some respects not being a party can be a disadvantage as it makes it more difficult for ASIC to resist production of documents under subpoena based on legal professional privilege.[85]

Although ASIC cannot seek disqualification orders in s 50 proceedings in the way that it can in civil penalty proceedings, there are other avenues available to ASIC to disqualify a person from managing a corporation. ASIC can bring separate proceedings under ss 206D, 206E or 206F of the Corporations Act. If the person is also criminally prosecuted they are automatically disqualified for five years.[86] Alternatively ASIC could make disqualification a term of any settlement agreement of the s 50 proceedings. For example in the settlement of the s 50 action ASIC brought on behalf of The Adelaide Steamship Company Ltd (Adsteam) in 1994, it was a condition that each of the defendant directors would not accept a position as a director of a listed public company for a period of three years.[87]

Another advantage of s 50 actions is that it is easier for ASIC to bring proceedings under s 50 and criminal proceedings against the same defendant. The same cannot be said for bringing criminal proceedings and civil penalties against the same defendant. Under s 1317N of the Corporations Act civil penalty proceedings are stayed if criminal proceedings are started for an offence which is substantially the same as the conduct alleged to constitute the corporation. Even if the civil penalty proceedings have been completed when the criminal proceedings are commenced there is a risk that the criminal proceedings may be stayed permanently for infringing the double jeopardy principle. In *R v Adler*,[88] Adler sought a stay of later criminal proceedings on the basis that, as he had previously been the subject of civil penalty proceedings, the criminal proceedings infringed the common law rule against double jeopardy.[89] He was unsuccessful before James J and then on appeal in the Court of Criminal Appeal as the causes of action in the civil penalty proceedings were held to be different to the cause of action in the criminal proceedings.[90] For the same reason his application for special leave to appeal

84 ASIC is only required to give discovery in regard to a challenge to it decisions to commence and carry on s 50 litigation under the Administrative Decisions (Judicial Review) Act (1977) (Cth); see *Somerville v ASIC* (1993) 11 ACSR 595; *ASIC v Somerville* (1994) 51 FCR 38; 128 ALR 132; 33 ALD 405. However see also O 15A r 8 of the Federal Court Rules which provide that a court may order discovery against a person who is not a party.

85 See *Somerville v ASIC* (1995) 60 FCR 319; 131 ALR 517. In that case ASIC could not resist production under a subpoena of documents brought into existence before the commencement of the s 50 of the ASIC Act proceedings on the basis of legal professional privilege. However its claim for public interest immunity over the documents was upheld.

86 Corporations Act s 206B

87 'Adsteam Settlement', ASIC media release, 2 November 2000, at <http://www.asic.gov.au>.

88 (2004) 48 ACSR 693.

89 Although s 1317P of the Corporations Act states that criminal proceedings may be started against a person following civil penalty proceedings, Adler argued that this provision was unconstitutional if it operated to stop a court granting a stay for an abuse of process. James J at first instance and the Court of Criminal Appeal did not decide this issue as they decided, on the facts, that there was no issue of double jeopardy.

90 *Adler v Director of Public Prosecutions (Cth)* (2004) 51 ACSR 1.

to the High Court was refused.[91] However comments made during the course of the argument in the High Court suggest that the decision may have been different if the wrong alleged in both sets of proceedings was identical. Kirby J said:

> sitting where we sit, we have to keep asking ourselves, what happens if this becomes the general rule and what happens if it becomes the general rule that people are prosecuted for civil penalties and then subsequently have to face criminal prosecutions? That is a disturbing possibility that cannot be entirely put out of mind.[92]

In this respect it is worth noting that on 19 December 2007, when ASIC announced that it had commenced civil penalty action against former officers of AWB Ltd, ASIC Chairman Tony D'Aloisio also said that if criminal proceedings are commenced at a later stage the civil penalty proceedings would be stayed.[93]

Public vs private class actions

In relation to the effectiveness as a regulatory enforcement option, clearly s 50 actions share many of the characteristics of private class actions. Private class actions taken by security holders have been described as having the following benefits:

> Firstly, it provides compensation to large groups of defrauded shareholders where the loss each person has suffered would be too small to warrant pursuing an individual action. Secondly by aggregating individual claims, class actions generate greater risks for defendants and provide a deterrent to those who might seek to commit wrongs under the securities laws. Through deterrence of securities fraud, class actions raise investor confidence in the integrity of the market. Further advantages of the procedure (which are not particular to securities actions) include conservation of judicial resources by resolving common issues in a single hearing and elimination of the potential for inconsistent findings of fact or law in relation to the same issues.[94]

The same benefits can be said to accrue from s 50 actions. However it is submitted that when one considers the history and design of s 50, with its overarching requirement that the action be in the public interest, the regulatory objective should be the primary objective in commencing a s 50 action and the possibility of compensation should be seen as secondary.

However the opposite priorities exist in relation to a private class action. As such decisions made during such actions can detract from their effectiveness as a deterrent mechanism. For example, because defendants can, in Australia, recover their costs if successful, it seems defendants are likely to vigorously defend such class actions, resulting in proceedings being drawn out and expensive.[95] There is therefore an incentive to settle such actions at an early

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91 *Adler v R* [2004] HCATrans 546.
92 Ibid, at 15.
93 'ASIC launches court action against AWB', Transcript of ABC News, 20 December 2007.
94 Donnan J, 'Class Actions in Securities Fraud in Australia' (2000) 18 *C&SLJ* 82 at 83.
95 See M Legg, 'Institutional investors and shareholder class actions: the law and economics of Participation' (2007) 81 *ALJ* 478 at 485 and Murphy, above n 54, at 415.

stage, often on undisclosed terms.[96] On the other hand, absent an unforeseen substantial weakening of its case, ASIC is unlikely to settle s 50 proceedings on terms which do not accord with its regulatory objectives. It is likely to seek the ability to be able to publish some aspects of any settlement with the aim of deterring future wrongful behaviour by others.

Similarly, given its regulatory motives, it may also be worthwhile for ASIC to pursue a s 50 action which would be uneconomic to pursue in a private class action, or where the case against the defendant is not strong. Whereas both private class actions and ASIC s 50 actions require, to some extent, a risk assessment considering the strength of the case and prospects of recovery, the bar would generally be higher for a private class action. For example at present it appears that litigation funding companies have little interest in taking on cases where the amount in dispute is below $100,000.[97]

In this respect it is worthwhile to note that in the Westpoint litigation ASIC has brought s 50 action against five financial planning firms whereas a class action had only been commenced against two. It was reported that the litigation funding company, IMF Australia, had rejected commencing action against the other three because the recovery from them would have been significantly smaller.[98]

IV Section 50 — the way forward

When is its use appropriate?

From the above analysis the fact that ASIC has only made infrequent use of s 50 in the recent past appears to be somewhat misguided. In certain circumstances s 50 actions offer some key advantages as a regulatory mechanism over both civil penalty proceedings and private class actions. This could be where the conduct is reprehensible and an award of damages would make a statement that behaviour such as that engaged in by the defendants will not be tolerated. In addition it may be one, or a combination of, the following scenarios:

- A private class action is not viable or where the amount of money lost by each shareholder/investor was a substantial sum given the financial circumstances of the shareholder/investor. As such it is undesirable that the damages be absorbed by the expenses of conducting a private class action. At present there is no cap on fees

96 For a recent example see the undisclosed settlement of a class action brought by shareholders of Telstra Ltd against that company for an alleged breach of its continuous disclosure obligations as reported in S Moran, 'Telstra settles class action', *The Australian*, 12 November 2007.

97 A recent report noted that of the 12,000 commercial litigation cases in New South Wales and Victoria worth over $100,000 that less than 100 are supported by litigation commercial funding companies. See M Drummond, 'Litigation funder targets smaller end', *Australian Financial Review*, 5 October 2007, p 58.

98 As reported by M Jacobs, 'ASIC sues ex-directors and planners', *Australian Financial Review*, 9 November 2007, p 5, see also P Manning, 'Victims Keep Hopes in Check', *Australian Financial Review*, 9 November 2007, p 4. On 20 December 2007, ASIC announced that it would also commence proceedings against a further financial adviser and the trustee of an issue of unsecured notes: see 'ASIC announces phase two of Westpoint Compensation Action', 20 December 2007, at <http://www.asic.gov.au>.

charged by litigation funding companies so a large proportion of any damages obtained from such a class action may be absorbed by the company funding the litigation, together with legal fees, leaving little for the claimants.[99]

- There is a concern by ASIC that the legal representatives and/or litigation funding companies may not properly represent the interests of the claimants in a private class action. Lawyers and the litigation funding companies are in a powerful position in a class action in that most of the control of litigation is vested in these parties, it being impossible and impractical for class participants to give them instructions.[100]
- It involves a company that does not wish to take proceedings in relation to a cause of action. This decision is adverse to shareholders who do not have the capacity to bring a statutory derivative action.
- ASIC believes there is a real probability of it pursuing criminal action against some or all of the defendants for the same conduct and accordingly does not want to jeopardise these criminal proceedings by conducting civil penalty proceedings.
- There are multiple defendants and the high burden of proof and procedural difficulties of a civil penalty proceeding would put ASIC at a significant disadvantage.

Westpoint may be an example of such a case where a s 50 action is justified. It involves a large number of retired and often unsophisticated investors with limited capacity to lose a large part of their damages to the costs of conducting a private class action. In taking the action ASIC is targeting the conduct of financial planning companies who directed such investors into Westpoint without, it seems, proper analysis of the investment and the circumstances of their clients. ASIC is clearly hoping that this action will deter other financial planning companies from also directing unsophisticated investors into such hazardous schemes.

The risks

However in utilising s 50 ASIC does have to be mindful of the risks of this as an enforcement strategy.

One of the main concerns is whether the regulatory objective justifies the use of taxpayer funds in circumstances where there are others willing to step forward to fund the litigation.[101] For example, in the Westpoint litigation ASIC has taken over litigation commenced by the liquidator of the various companies and has also commenced s 50 action against two financial planning companies which will run parallel with the class actions that have been commenced. This will inevitably result in some duplication of investigation and resources absorbing either public funds (in the case of the s 50 proceedings) or funds which could go to the claimants (in the case of the

99 See 'Litigation Funding in Australia', Discussion paper issued by The Standing Committee of Attorneys-General, May 2006.

100 Murphy, above n 54, at 407.

101 This concern has already been ventilated in media reports on Westpoint: see 'ASIC must deter property rorters', *Australian Financial Review*, Editorial, 9 November 2007, p 82.

private class action). A related concern is if the case is so weak or uneconomic such that no other party is willing to fund the litigation, as is the situation for parts of the Westpoint litigation, should ASIC use public funds to conduct such litigation at all? While ASIC's aim to send a strong message to the financial planning community appears laudable, the success of the Westpoint action, being the quantum of damages awarded, will ultimately dictate whether or not it will be seen to be successful in this aim.

Like civil penalty proceedings and criminal proceedings, s 50 actions can also be lengthy and expensive. As is referred to above, in 1994 ASIC brought s 50 proceedings against the former directors and auditor of Adsteam. The proceedings were eventually settled with a payment of $20 million to Adsteam, out of which ASIC's investigation and litigation costs were deducted. However this settlement did not occur until November 2000 and even at that time there had been no hearing of the substantive issues. In the interim there had been many preliminary hearings, three hearings in the Full Court of the Federal Court and four hearings in the High Court.[102]

If the s 50 action brought by ASIC in relation to Westpoint is not wholly successful or is costly and drawn out, the litigation may be targeted as an unnecessary waste of public funds. This may be fuelled by the fact that ASIC has been criticised for its failure to take action to prevent the collapse of Westpoint and other similar property investment schemes.[103] Opponents may argue that an attempt to divert this criticism was the primary motivation behind ASIC's action.

In this respect it should be noted that ASIC has a broad power pursuant to s 1330 of the Corporations Act to intervene in any proceedings relating to a matter arising under that Act.[104] In addition under s 25 of the ASIC Act ASIC can assist parties to litigation by releasing information obtained during an ASIC investigation.[105] Accordingly where an action has been commenced by a third party and ASIC does not see that it is essential for it to take the lead role, ASIC may have the option of just assisting and/or intervening as it sees fit.

Another difficulty that could arise for ASIC in conducting a s 50 proceeding arises from the fact that the principle reason why ASIC would commence the action is generally the 'public interest' component, that is the regulatory message that ASIC wants to send by the litigation. However this may not necessarily align with the claimants who will usually be seeking to obtain the maximum possible compensation. Accordingly ASIC may want to settle the

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102 Above n 87.

103 See, eg, P Manning, 'Danger do not enter', *Australian Financial Review*, 21 July 2007, p 24; J Collett, 'Human cost of ASIC failures', *The Sydney Morning Herald*, 6 June 2007, p 8; 'Fincorp shows ASIC needs more intelligence', *Australian Financial Review*, Editorial, 31 March 2007, p 62 and T Ryder, 'Shot property; Thousands of small investors and millions in life savings have been sucked into the Westpoint real estate black hole', *The Bulletin*, 22 February 2006.

104 See ASIC Regulatory Guide 4, 'Intervention', at <http://www.asic.gov.au>.

105 See ASIC Regulatory Guide 103, 'Confidentiality and release of information', at <http://www.asic.gov.au>. In relation to the ability of others to obtain access to information obtained by ASIC during an investigation, see *P Dawson Nominess Pty Ltd v Multiplex* (2007) 65 ACSR 239 and J McConvill and D Smith, 'Can minority shareholders "free ride" on ASIC's civil penalty litigation' (2002) 20 *C&SLJ* 302.

proceedings on terms that do not accord with the desires of the claimants, particularly if several years down the track the litigation is putting pressure on ASIC's resources or its enforcement priorities have shifted.

If ASIC starts to again use s 50 more frequently this may raise an expectation for other plaintiffs that ASIC should take action on their behalf. Shareholders and investors may feel that it would be preferable that ASIC bring the proceedings, rather than bringing their own class action, believing that the recovery is likely to be greater given that a litigation funding company will not get a cut of the damages. ASIC also has available to it extensive investigatory powers which may strengthen the case against the defendants and possibly shorten the duration of the proceedings.

Given this risk ASIC's public statements as to when it will bring a s 50 action and when it will settle such an action are currently inadequate and should be expanded. ASIC should clarify that it interprets the 'public interest' requirement as requiring there be a regulatory purpose behind the action and that this, rather than obtaining compensation for the victims, is the primary focus of any s 50 action. Accordingly any settlement will be first and foremost driven by achieving ASIC's regulatory aims rather than obtaining the maximum compensation for investors. This would assist potential claimants, such as those in the Westpoint litigation, being able to better assess the advantages and disadvantages of joining the ASIC action rather than a private class action.[106]

Conclusion

Actions under s 50 of the ASIC Act still have a role in today's enforcement environment. Despite what initially appeared to be a fast and cheap enforcement option, it is now clear that civil penalty proceedings, like criminal proceedings and s 50 actions, can be difficult, lengthy and costly for ASIC. ASIC has learnt that there is no 'quick fix'. Accordingly ASIC needs to look critically at each matter and consider the facts of the matter, what it is trying to achieve in relation to its enforcement objectives and what tool in its enforcement arsenal is most likely to achieve this objective. In certain circumstances s 50 actions can offer significant advantages over the other options available. However s 50 actions do have their own difficulties and challenges and ASIC needs to clarify in public statements when it will bring such actions and what its involvement will be.

Furthermore, with the growth in private class actions ASIC can look to these as another, albeit indirect, enforcement mechanism. In certain situations, a private class action can operate to deter similar behaviour and this can free up ASIC's resources for other uses. ASIC can also intervene and assist litigants in these class actions limiting its involvement but still with a view to obtaining the desired result. However class actions are likely to continue to be only available for certain litigants. In addition, in some situations it is desirable for ASIC to take the lead role in litigation through a s 50 action,

106 Westpoint investors who are part of the private class action will not be covered by the ASIC class action. See 'Westpoint compensation proceedings: FAQ for investors', at <http://www.asic.gov.au>.

particularly where the litigants are unsophisticated and there is public significance in the outcome.

Appendix A

ASIC s 50 actions

Year of Conduct	Proceedings commenced	Description	Allegation	Result	Source
1990–1991	March 1992	Action taken on behalf of Compass Airlines Pty Ltd and Compass Holdings Ltd against seven of its former directors and three former executives.	Breach of the duty of care and diligence in allowing the company to trade while insolvent.	Proceedings settled for $2m in February 1995.	*Compass Airlines Pty Ltd v Grey* (unreported, Drummond J, 15 July 1992); *Compass Airlines Pty Ltd v Grey* (unreported, Lockhart J, 11 September 1992); V Trioli, S Mann 'Angry Grey to Fight "bloody Lies"' *The Age*, 20 March 1992, p 1; L Kearns 'ASIC, Compass Settle for $2m', *The Age*, 4 February 1995, p 39.
1988–1990	March 1993	Proceedings brought on behalf of unsecured noteholders in Farrow Finance Company Ltd (Farrow) against auditors, trustees and an investigating accountant. Farrow was the finance company of the Farrow building societies group.	Breaches of fiduciary duties and untrue statements and non-disclosure in prospectuses.	Proceedings settled for $15m in November 1995.	*Somerville v ASC* (1993) 11 ACSR 595; *ASC v Somerville* (1994) 51 FCR 38; 128 ALR 132; 33 ALD 405; R Myer 'ASC Launches First Class Action', *The Age*, 24 March 1993, p 21; D Adams, 'Farrow-collapse Class Action Settled', *The Age*, 11 November 1995, p 31.
N/A	1993	Action taken in the name of Premier Gold NL against Anton Tarkanyi (WA SC).	Damages claim for breach of trust.	Discontinued in 1995 as liquidator did not want to take over the proceedings.	3 ASIC Digest (1993); 2 ASIC Digest (1995).

N/A	1993	Action in the name of the Cityscape Pty Ltd against Bibby (Fed Ct).	N/A	Matter referred to mediation. Discontinued in 1994. Defendants contributed to ASIC's costs and some preconditions had to be met.	2 ASIC Digest 1994.
1990	April 1994	Action on behalf of The Adelaide Steamship Co Ltd against its auditor and five former directors.	Claim that profits were overstated resulting in dividends being paid which should not have been paid.	Proceedings settled in November 2000 for a payment of $20 million to the company.	*Adelaide Steamship Co Ltd v Spalvins* [1999] FCA 781; BC9903150; *ASC v Deloitte Touche Tohmatsu* (1996) 70 FCR 93; 'Adsteam Settlement', ASIC Media Release, 2 November 2000.
1988–1990	April 1994	Action against Permanent Trustee Australia Ltd on behalf of unitholders in the Aust-Wide Trust and Flexi Property Fund.	Breach of trust for failing to act in the best interest of unitholders.	Proceedings settled for $100m in May 1997.	*Walsh v Permanent Trustee Australia Ltd* (1996) 21 ACSR 213; T Blue, 'Windfall deal for AustWide', *The Australian*, 31 May 1997, p 55.
N/A	1995	Action on behalf of Pro Image Studios against directors and auditor (Vic SC).	Breach of directors' duties, fraud & negligence.	N/A	2 ASIC Digest 1995.
N/A	N/A	Action against Personal & Business Financial Planning Pty Ltd (WA SC).	Breach of licence conditions for failure to supervise representative.	Clients of representative paid $465,000 in August 1998.	'ASIC Court Action Compensates Investors', ASIC Media Release, 1 August 1998.
N/A	1999	Action on behalf of investors in a Western Australian blue gum plantation project against promoter (Allrange Tree Farms Pty Ltd) and its two directors.	Breach of investor protection provisions and misleading statements.	N/A	'ASIC commences investor protection class action', ASIC Media Release, 5 November 1999.

1994 to 1999	2000	Action against trustee (EPAS Ltd) trustee of the Employees Productivity Award Superannuation Fund and its directors and auditors.	Breach of trust, making of improper loans.	Proceedings continuing.	'ASIC seeks $10 million from EPAS, directors and auditors', ASIC Media Release, 20 April 2000; *EPAS v James* [2007] QSC 038.
2000	2003	Action on behalf of 37 investors in a solicitors mortgage scheme.	False and misleading statements, breach of duty and breach of trust.	Investors awarded $792,509.25 in May 2006.	*A&D Douglas Pty Ltd v Lawyers Private Mortgages Pty Ltd* (2006) 14 ANZ Ins Cas 61-709; ASIC Media Release, 'Queensland investors recover losses in failed solicitors mortgage scheme', 30 May 2006.
>1998	2007	Action against directors and officers of the Westpoint Group and six financial firms and the trustee of an issue of convertible notes.	Misapplication of funds, failure of financial planning firms to comply with licences and under the law.	Proceedings continuing.	'ASIC to pursue compensation for Westpoint investors', ASIC Media Release, 8 November 2007; 'ASIC announces phase two of Westpoint Compensation Action', ASIC Media Release, 20 December 2007.