Business Law Section of the Law Council of Australia

Continuous Disclosure Infringement Notice Survey 2012

AUGUST 2012

Australian Survey Research Group Pty Ltd
Level 1, 600 North Road | PO Box 340 Ormond VIC 3204
Level 16, 6 O'Connell Street | GPO Box 3509 Sydney NSW 2000
| **T** 03 9578 5211 | **F** 03 9578 5311 | **E** info@aussurveys.com **www.aussurveys.com**

Introduction

The Business Law Section of the Law Council of Australia (Business Law Section) engaged Australian Survey Research to conduct a survey around the continuous disclosure infringement notice regime. The infringement notice regime was introduced into the Corporations Act in 2004 and was intended to deal with less serious violations of continuous disclosure. Business Law Section designed the questionnaire to obtain feedback from industry participants as to their views on the efficacy of the infringement notice regime. The respondents included but were not limited to directors, senior management, in-house counsel, company secretaries and lawyers in private practice.

The findings of the survey will inform submissions to ASIC and Treasury by the Law Council of Australia, the Australian Institute of Company Directors, Chartered Secretaries Australia and Business Council of Australia.

The survey was conducted online in June through July 2012.

This report outlines how the survey was conducted, the response profile, key findings and general observations.

Methodology and responses

Survey Development

Business Law Section developed the questionnaire used to collect the feedback. It was designed to assess certain aspects around the use of the continuous disclosure infringement notice regime to determine if it is an effective way of dealing with violations.

Deployment method

The survey was deployed online in June 2012 and was open for around five weeks. An anonymous hyperlink was provided to Business Law Section for distribution to relevant parties by various methods.

The web survey was presented and deployed in ASR's proprietary SurveyManager – a web survey software application.

Analytical notes

The findings in this report are at an overall level, including all respondents. ASR conducted several statistical tests to determine if different groups within the response profile had statistically significant difference of opinion. The groups tested where based on questions within the questionnaire itself, they are as follows:

1. Employment Role
2. Has been or is an officer of an ASX-listed entity
3. Familiarity with the infringement notice scheme.

The tests conducted, indicated that there were very few to no significant difference in opinions of the above groups. Where appropriate comments have been made if noticeable differences are apparent.

Overall key findings

Response profile

1. *Current Role*

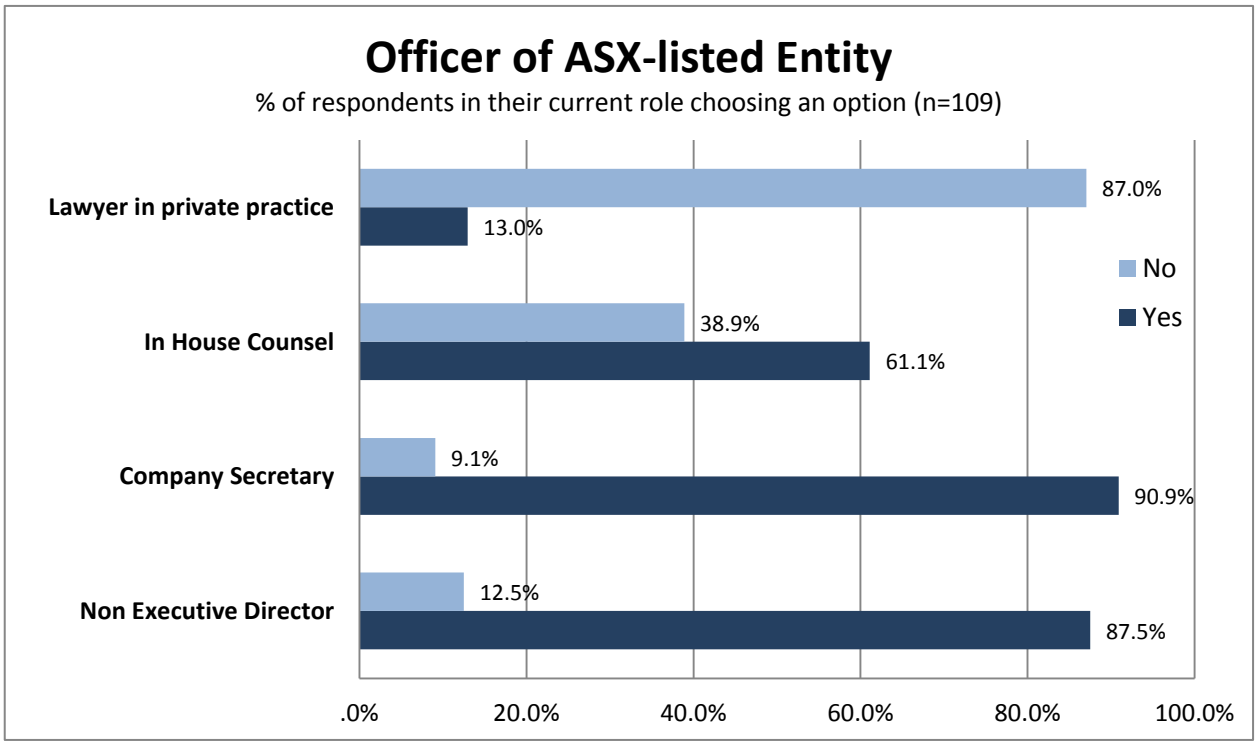
Respondents were asked to indicate their current role**.** Of the total 109 respondents, around half (49.5%) work as a lawyer's in private practice. Company Secretaries (20.2%) were the second largest represented group, followed by In-house Counsel (16.5%) and Non-Executive Director's (14.7%).

Role (n=109)	Freq	%
Lawyers in Private Practice	54	49.5
Company Secretaries and in-house counsel	40	36.7
Non-Executive Director, CEO/Executive Director, Other	29	26.6
Total	**123**	**112.8**

The question allowed respondents to select more than one current role, thus the total adds to more than 100%.

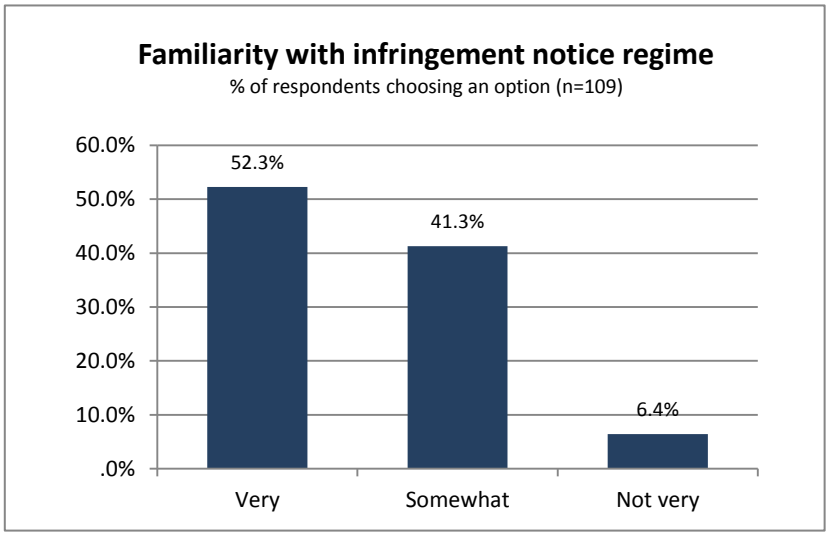
2. *Officers of an ASX-listed entity*

The respondents were asked to indicate whether they are or have been officers of an ASX-listed entity**.** Of the total response profile 43.1% are or have been an officer of a listed entity. There are noticeable differences by the type of role the respondent has. Non-Executive directors and Company secretaries have a higher representation of officers of an ASX listed entity, 87.5% and 90.9% respectively.



3. *Familiarity with the detail of the infringement notice regime*

Respondents were asked how familiar they are with the detail of the infringement notice regime. More than half (52%) of the participating respondents were very familiar and a further 41.3% indicated that were somewhat familiar with the detail of the regime. This would suggest that we have a response sample that knows enough relevant information about the regime to offer an informed and considered opinion.



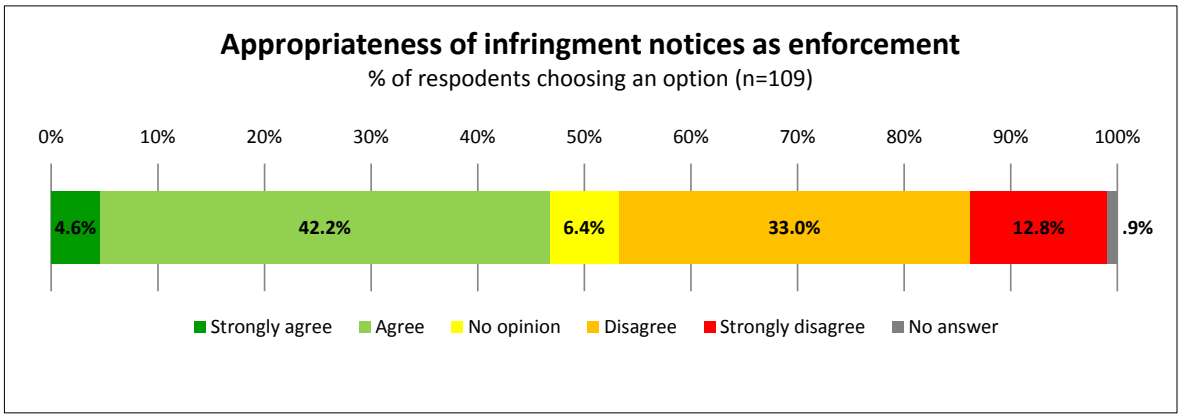
Findings

4. *Enforcement of the continuous disclosure regime*

Respondents were asked to indicate their level of agreement that infringement notices are an appropriate method of enforcing the continuous disclosure regime.

Opinions were evenly divided on this question, with 46.8% of respondents in agreement and 45.9% in disagreement.

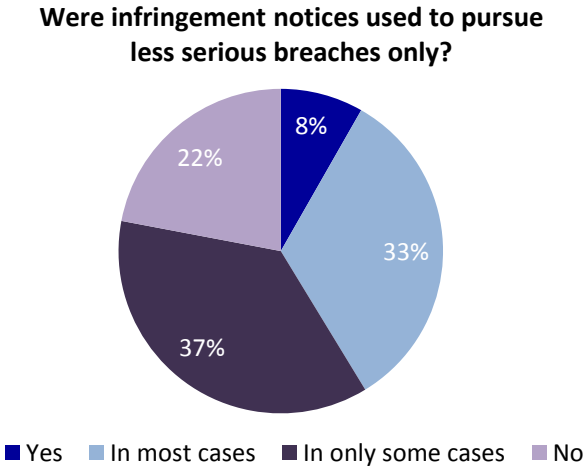
Infringement notices are an appropriate method of enforcement	Freq	%
Strongly agree	5	4.6
Agree	46	42.2
No opinion	7	6.4
Disagree	36	33.0
Strongly disagree	14	12.8
No answer	1	0.9
Total	**109**	**100.0**



5. *Serious and 'less serious' breaches*

Respondents were asked to indicate if they believed that in practice, the ASIC has used the infringement notice regime to pursue "less serious" breaches only. 59% of respondents indicated that this was the case in no cases or in only some cases.

Were infringement notices used to pursue less serious breaches only	Freq	%
Yes	9	8.3
In most cases	36	33.0
In only some cases	40	36.7
No	24	22.0
Total	**109**	**100.0**

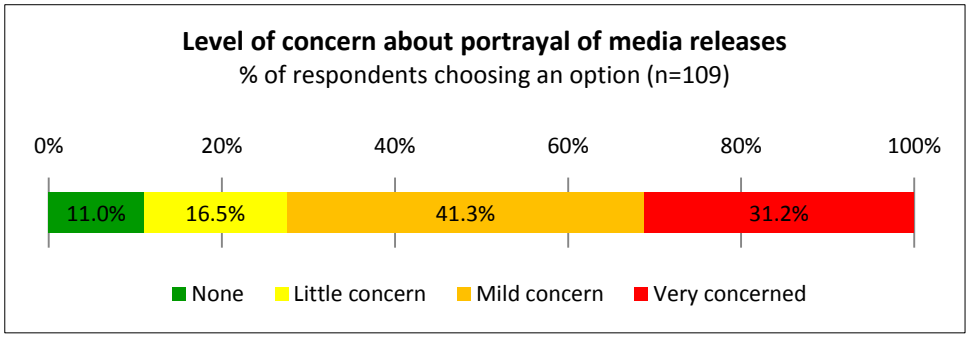


6. *ASIC use of media releases*

The law states that acceptance of an infringement notice is not an admission of liability. As such, some entities may make the decision to accept an infringement notice rather than submit to a court process. In this context respondents were asked whether they have any concerns as to the way ASIC has used media releases to portray acceptances of infringement notices.

Over two thirds (72.5%) of respondents indicated they were mildly to very concerned around the use of the media releases.

Concern about portrayal of admission/acceptance in media releases	Freq	%
Very concerned	34	31.2
Mild concern	45	41.3
Little concern	18	16.5
None	12	11.0
Total	**109**	**100.0**



Both the rating and comments offered indicate a considerable level of concern about the ASIC's use of media releases to portray the acceptance of infringement notices.

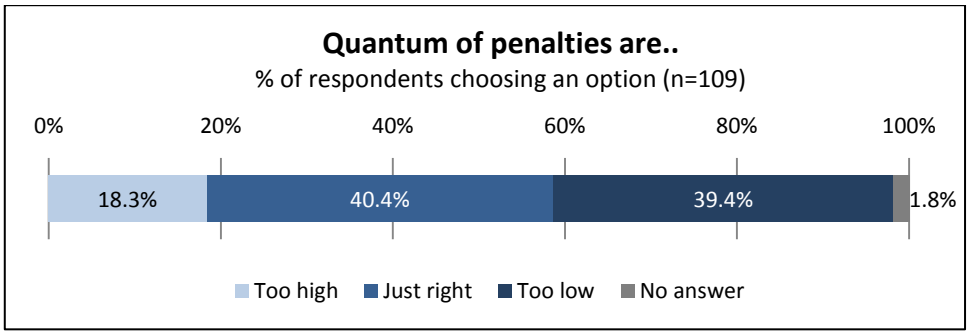
Respondents were also given the opportunity to offer any comments around the use of the ASIC media releases. 38 respondents, representing 35% of the sample, chose to do so. Three-quarters of these respondents indicated that they are very familiar with the infringement notice regime.

Of the 38 additional comments, 20 expressed misgivings about ASIC's use of the media releases. Many of these respondents reported that accepting the infringement notice is financially favourable to contesting it and that this informs decisions of entities to accept.

7. Quantum of penalties

Under the Corporations Act, penalties are based on market capitalisation: less than $100 million – penalty of $33,000; from $100 million to $1 billion – penalty of $66,000; more than $1 billion – penalty of $100,000. Respondents were asked to indicate how they feel about the quantum of the penalties that apply to the infringement notice regime.

Quantum of penalties	Freq	%
The amounts are too high	20	18.3
The amounts are just right	44	40.4
The amounts are too low	43	39.4
No answer	2	1.8
Total	**109**	**100.0**



The 43 respondents, who indicated that the current quantum of the penalties are too low, were subsequently asked to specify the maximum penalty amount they would support for breaches of the continuous disclosure regulations.

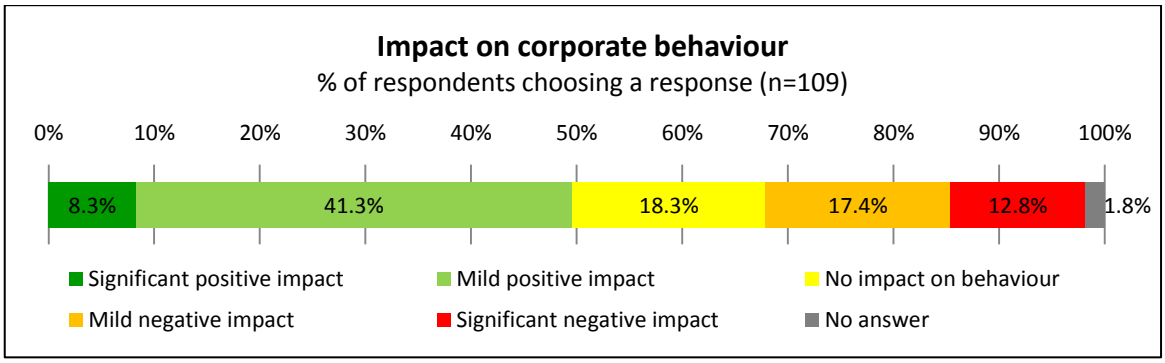
Maximum supported infringement amount	Freq	%
More than 1 million	7	16.3
1 million	15	34.9
500,000	5	11.6
200,000- 499,999	5	11.6
less than 200,000	1	2.3
No answer	10	23.3
Total	**43**	**100.0**

All respondents were given the chance to provide any further comments about the quantum of penalties. Of the sample 41 respondents, provided a comment. No clear pattern indicating a cohesive majority opinion pertaining to the appropriate amount emerged. Rather the majority of the comments pointed to a contextual and/or understanding of appropriateness which was based on variables such: as size of company, seriousness of breach, and others.

8. Impact of infringement notices on corporate behaviour

Respondents were asked to consider whether the notices had an impact on corporate behaviour and, if so, whether that has been positive or negative to the efficacy of Australia's public markets. On a whole the indication was that infringement notices had no, to mild impacts with a lean to that impact being one of a positive nature.

Impact of notices on behaviour	Freq	%
Significant impact on behaviour and that impact has been positive	9	8.3%
Significant impact on behaviour and that impact has been negative	14	12.8%
Mild impact on behaviour and that impact has been positive	45	41.3%
Mild impact on behaviour and that impact has been negative	19	17.4%
No impact on behaviour	20	18.3%
No answer	2	1.8%
Total	**109**	**100.0**

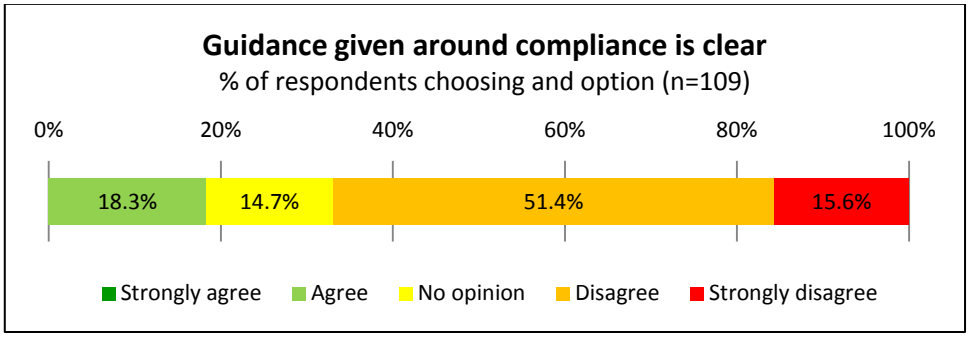


Respondents were again, given the chance to offer comments on the impact of the infringement notices. On the whole their comments reinforced the prevailing opinion that the notices had a small impact on corporate behaviour and market efficacy. The reasons that underpinned this opinion were variable ranging from: notices are a minor part of the regulatory framework, notices are applied too infrequently, notices chiefly promote awareness to notices chiefly promote over-reporting.

9. *Guidance for compliance with the continuous disclosure regime*

Respondents were asked to provide their opinion on the statement that infringement notices to date have given corporations clear guidance in relation to appropriate practices for compliance with the continuous disclosure regime. More than two thirds of respondents indicated they disagree or strongly disagree about the infringement notices providing clear guidance.

Clear guidance for compliance given in infringement notices to date	Freq	%
Strongly agree	0	0.0
Agree	20	18.3
No opinion	16	14.7
Disagree	56	51.4
Strongly disagree	17	15.6
Total	**109**	**100.0**



Respondents were also given the opportunity to make any comments about clear guidance. Of the total sample, 37 people offered a comment. The comments offered further support observations that can be made from the above question. Of the 28 comments that can be clearly classified, 25 express a negative assessment of the guidance given to corporations in relation to compliance, while only 3 express a positive assessment. Note that 10 of the 37 respondents raised the "requirement of immediacy" as an issue in relation to clear guidance for compliance.

10. Best placed entity to issue guidance on continuous disclosure compliance

Respondents were asked to rank from 1 (best placed) to 4 (least placed), which entity they think is best placed to issue guidance on compliance with continuous disclosure obligations.

To be able to present meaningful information, the rankings have to be reversed to indicated which entity was best placed, the rankings were recoded as per below:

- Most appropriate = 4
- Second = 3
- Third = 2
- Least appropriate = 1

The recoded values were then totalled and provide an overall score, the highest score indicates which entity is best placed to issue guidance on continuous disclosure compliance. It is clear the two best placed entities according to the respondents are 'a panel of market peers' and 'ASIC'. The number of respondents who selected each entity as best fit to issue guidance as a first preference is also indicated in the table below.

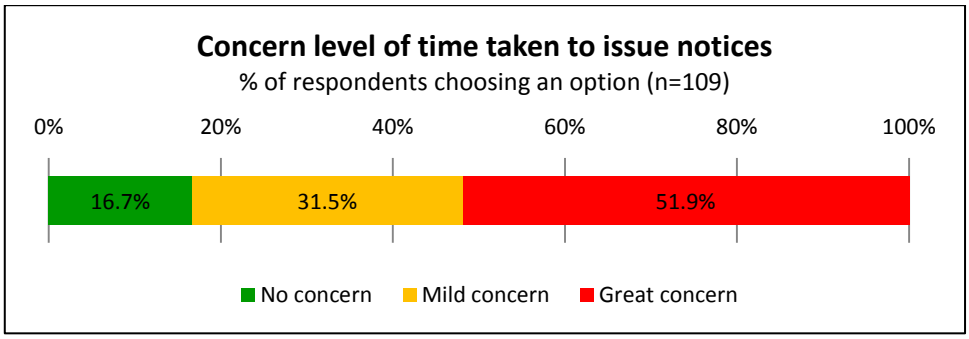
Preferred entity to issue guidance	Score	Number of 1st preference ratings
A panel of market peers	318.00	8
ASIC	311.00	26
Courts	215.00	7
Other	160.00	30
Total	**1004**	

Those who ranked 'other' were asked to note the entity. Of all 'other' entities the 'ASX' accounted for 78%.

11. Time taken to offer infringement notices

ASIC has 12 months to offer a notice and has taken, on average, 246 days to issue the notices issued to date. Respondents were asked how they felt about the length of time that ASIC has taken in practice to offer infringement notices. Majority of responses indicated that there is mild to great concern about the time taken to issue an infringement notice among the industry.

Concern over time taken to issue infringement notices	Freq	%
The time periods are of great concern	56	51.4
The time periods are of mild concern	34	31.2
The time periods are of no concern	18	16.5
No answer	1	0.9
Total	**109**	**100.0**



12. ASIC practice of providing reasons

Respondents were asked to provide their opinion on the practice of ASIC in providing reasons as to why it has offered an infringement notice. Respondents feel that ASIC should not be allowed to imply that it thought the corporate was culpable (47.7%) and are concerned that ASIC's approach assists class actions (45.9%), these are by far the most prevalent opinions.

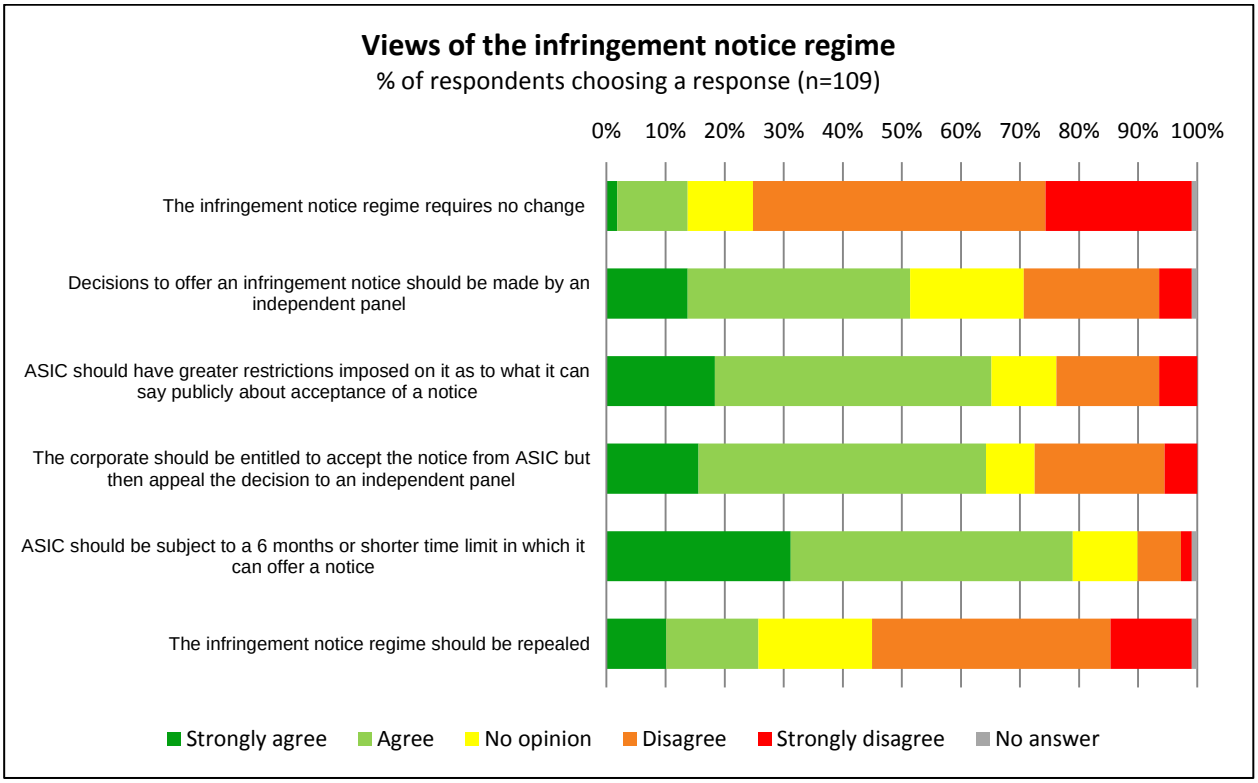
Practice of providing reasons (n=109)	Freq	%
ASIC should not be allowed to imply that it thought the corporate was culpable	52	47.7
I am concerned that ASIC's approach assists class actions	50	45.9
I support the current practice	27	24.8
I have no opinion	12	11.0
Other	5	4.6
Total	**146**	**134**

The question allowed respondents to select more than one opinion, thus the total adds to more than 100%.

13. Views of the Infringement notice regime

Respondents were asked to indicate their views on the below statements.

Statement	Strongly disagree %	Disagree %	No opinion %	Agree %	Strongly agree %	No answer %
a) The infringement notice regime requires no change	24.8	49.5	11.0	11.9	1.8	0.9
b) Decisions to offer an infringement notice should be made by an independent panel	5.5	22.9	19.3	37.6	13.8	0.9
c) ASIC should have greater restrictions imposed on it as to what it can say publicly about acceptance of a notice	6.4	17.4	11.0	46.8	18.3	0.0
d) The corporate should be entitled to accept the notice from ASIC but then appeal the decision to an independent panel	5.5	22.0	8.3	48.6	15.6	0.0
e) ASIC should be subject to a 6 months or shorter time limit in which it can offer a notice	1.8	7.3	11.0	47.7	31.2	0.9
f) The infringement notice regime should be repealed	13.8	40.4	11.0	15.6	10.1	0.9



Respondents indicated some clear levels of agreement with certain topics. Vast majority of respondents indicated that the infringement notice regime requires change (81%) whilst more than half of respondents also agree that the regime should not be repealed (54.2%).

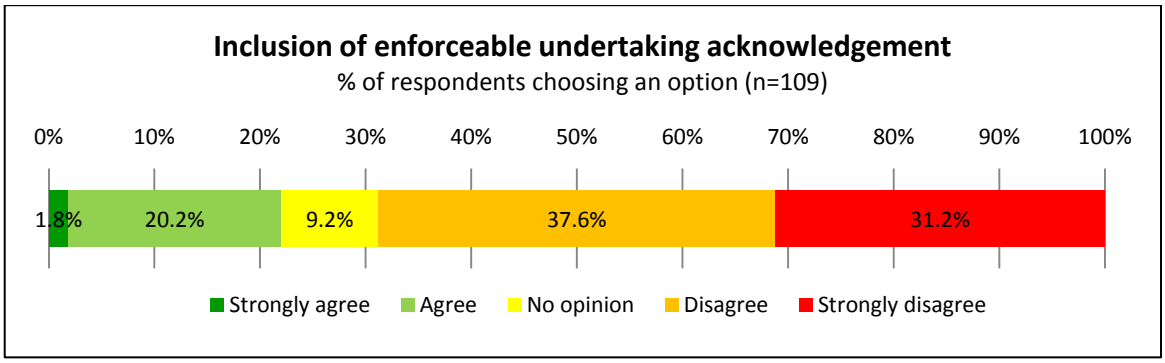
Respondents were given the opportunity to **provide further comments**. Of the sample 17 respondents offered a comment, however comment given have no clear themes.

14. Enforceable undertakings

ASIC sometimes requires an enforceable undertaking to be given in relation to the facts of the subject of the infringement notice. The respondents were asked to indicated their view on the following statement:

> **It is appropriate that ASIC requires an entity giving an enforceable undertaking to include in the enforceable undertaking an acknowledgement that "ASIC's views in relation to the misconduct which gave rise to the enforceable undertaking are reasonably held"?**

Should enforceable undertaking acknowledgement be included?	Freq	%
Strongly agree	2	1.8
Agree	22	20.2
No opinion	10	9.2
Disagree	41	37.6
Strongly disagree	34	31.2
Total	**109**	**100.0**



The respondents were offered the opportunity to **provide a brief comment justifying their view on the enforceable undertaking acknowledgement**, 67 respondents offered a comment. The common themes and % of comments are offered below:

Reason for view on enforceable undertaking acknowledgement	Freq	%
Company may not agree with acknowledgement	22	32.8
Acknowledgement exposes company to legal action	18	26.9
Acknowledgement not part of a 'no admission' process	8	11.9
Acknowledgement not useful	7	10.4
Acknowledgement is negative (other reason)	7	10.4
Acknowledgement is positive	5	7.5
Total	**67**	**100.0**

15. Other concerns

Respondents were asked if they had any other concerns about infringement notices or sanctions for violation of the continuous disclosure requirements. A total of 25 people offered other concerns.

1. A flawed and highly compromised regime that ASIC has done its best to make work.
2. Access to the courts being available to both sides, it is acceptable to deal with allegations of contravention by a rough and ready administrative process, provided it is quick and final, and reasons for the penalty are published for the guidance of the market.
3. ASIC seems unapologetic, even pleased that the process might open the door to and encourage the class action bounty hunters. This is I think an appalling outcome.
4. ASIC should be required to establish an alleged contravention in court; infringement notice regime is lazy regulation; many reasons advanced against it at time introduced.
5. ASIC takes too long to decide the matters (especially having regard to the time in which companies have to make difficult decisions)and the sanction is imposed often means that the cost of fighting it cannot be justified (even if with the associated reputational damage).
6. Breach of the continuous disclosure regime is per se material, so it is inappropriate for a ''parking fine'' regime, especially by a government regulator. If it must be retained, for its credibility, the issue of the notice should be by a publicly credible commercial panel - otherwise ASIC is investigator judge and jury and it is not good at playing all roles.
7. I am more troubled by civil liability than sanctions.
8. I do not have a great experience with the system so will leave at this
9. I have concerns about the absence of satisfactory guidance about what is meant by ''immediately'', and whether the test for the materiality of what is to be disclosed has subjective elements (e.g. Jubilee v Riley - Information was not required to be disclosed because the then current management didn't intend to act on the information) or is purely objective (as is implied by the expression ''price or value'').
10. I support the current approach of holding companies to account. I strongly disagree with any changes that would hold individuals to account.
11. I think this survey does a disservice to the Law Council and is only being used to challenge ASIC's infringement notices and create a debate which is unnecessary. It is an unfortunate misuse of the Law Council's good name.
12. If the infringement notice regime is to be retained, it should be amended to be an enforcement structure for only administrative / procedural (less serious) matters.
13. If they truly could be used for less serious breaches where fault was obvious then I would not find them so objectionable. But that is not the case. ASIC is using them a soft enforcement option because proving a case is hard.

14. Improvement on the previous regime which was seen as toothless - however it is now an appropriate time to improve the system, and ensure the manner in which notices are used strikes a better balance between the interests of companies, shareholders and the market generally.
15. Infringement notices are lazy regulation, and the practice of ASIC to date in their use reinforces this notion.
16. Infringement notices are most appropriately issued for areas where there is a clear black and white in terms of behaviour - not where there are grey areas such as continuous disclosure.
17. It must be repealed.
18. Most boards and companies try to the right thing, care should be taken in the issurance of infringement notice so as not to cause unintended consequences and also to unnecessarily expose the company to potential class actions.
19. Notices should be only issued once against the corporation - directors and officers should not be further investigated
20. The ALRC recommended that infringement notices only be used for strict liability offences or civil contraventions in which no proof of a fault

    element or state of mind is required. Continuous disclosure frequently raises difficult questions of judgment which make it unsuitable for such an approach.
21. The Listing Rules are too commercial and flexible to be regulated by class action law firms with incentives to pursue cases for profit
22. The notices are fine but I strongly object to the circumstances in which they have been used where the delay was less than a day. Class actions are the biggest deterrent now.
23. The review of the operation of the legislation promised by then Treasurer Peter Costello has never been done. A comprehensive review of the legislation is required to consider a panel type structure or otherwise clarifying guidance on disclosure obligations.
24. There are too few notices and too few sanctions
25. They have become ridiculous, and require corporations to conduct themselves like a town hall