Australian Government
Australian Law Reform Commission

INTERIM REPORT B – ADDITIONAL RESOURCES

LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

Recent Developments — Penalties and enforcement

September 2022

Interim Report B is the second of three Interim Reports to be published as part of the Australian Law Reform Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation. This document is one of several additional resources, published on the ALRC's website, which provide further detail relevant to particular aspects of Interim Report B.

View Interim Report B and the Summary Report

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

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RECENT DEVELOPMENTS — PENALTIES AND ENFORCEMENT

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Introduction

1. This note supplements Chapter 5 of Interim Report B by outlining a number of recent developments in relation to penalties under, and enforcement of, corporations and financial services legislation.[1]

ASIC Enforcement Review (2017)

2. In October 2016, the Australian Government established a taskforce (the 'ASIC Enforcement Review') to review the enforcement powers available to the Australian Securities and Investments Commission ('ASIC'). This was established in response to a recommendation of the Financial System Inquiry in 2014.[2] The ASIC Enforcement Review reported in December 2017, making numerous recommendations in relation to penalties, enforcement, and investigation powers, including:

- standardising the calculation of criminal penalties in ASIC-administered legislation;[3]
- increasing the maximum civil penalty available under ASIC-administered legislation (including by reference to a company's turnover or benefit gained or loss avoided from a contravention);[4]
- increasing penalties for a number of identified criminal offences;[5]
- extending civil penalty liability to a number of identified provisions;[6]
- introducing ordinary offences to complement certain identified strict and absolute liability offences;[7] and
- increasing the number of contraventions for which infringement notices are available.[8]

3. The Review's recommendations reflected a number of concerns. These included concerns about unnecessary complexity in offence and penalty provisions and a lack of consistency in the penalties applicable to similar types of conduct.[9] The recommendations also responded to concerns that pre-existing penalties in ASIC-administered legislation were 'not substantial

1 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022).
2 David Murray et al, *Financial System Inquiry* (Final Report, November 2014) rec 29.
3 Australian Government, *ASIC Enforcement Review Taskforce Report* (2017) recs 33, 38, 44, 45.
4 Ibid rec 40.
5 Ibid recs 6, 32, 34, 38.
6 Ibid recs 7, 43.
7 Ibid rec 37.
8 Ibid recs 39, 44.
9 Ibid 96.

enough to represent a credible deterrent or meet community expectations as to the seriousness of misconduct'.[10] In relation to civil penalties, the ASIC Enforcement Review emphasised that their purpose 'is to set a price for offending behaviour sufficient to promote compliance'.[11]

Legislation to strengthen corporate penalties (2019)

4. A number of the ASIC Enforcement Review's recommendations were implemented by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth), leading to significantly increased maximum penalties and more penalty 'pathways' for certain contraventions.[12] These amendments were expressly intended to 'deter misconduct and improve community confidence in the corporate and financial sector'.[13]

Financial Services Royal Commission (2019)

5. In the wake of significant reports of alleged misconduct in the banking and financial services sector, the Australian Government established the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('Royal Commission') in December 2017, led by the Hon KM Hayne KC AC. The Royal Commission submitted its final report to the Government in February 2019.[14] Commissioner Hayne did not directly criticise the theory of responsive regulation, or (in general) the array of penalties, offences, and other action open to regulators.[15] However, Commissioner Hayne expressed concern about the choices ASIC, the main conduct regulator, had been making with respect to the enforcement actions it chose to pursue from those available to it for breaches of the law.[16] The Royal Commission's Final Report recommended both:

- simplification of the law to promote meaningful compliance;[17] and
- an approach to enforcement by regulators that recognises that the law is to be obeyed and enforced and that 'serious breaches of the law by large entities call for the highest level of regulatory response'.[18]

The Final Report underscored that 'adequate deterrence of misconduct depends upon visible public denunciation and punishment'.[19]

10 Ibid 58.

11 Ibid 94 referring to Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Report No 95, 2002) rec 26–1.

12 For amendments to the *Corporations Act 2001* (Cth), see Sch 1 of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth).

13 Revised Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) [1.3].

14 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (Volume 1, February 2019).

15 Subject to recommendations about limiting the use of infringement notices, introducing civil penalty provisions for some additional contraventions, and including 'enforceable code provisions' in some ASIC-approved industry codes of conduct: ibid 430–1, 440 and recs 1.2, 1.15, 3.6, 3.7, 6.2.

16 Ibid 421–39.

17 Ibid recs 7.3, 7.4.

18 Ibid 433: 'Too often serious breaches of law by large entities have yielded nothing more than a few infringement notices, an enforceable undertaking (EU) not to offend again (with or without an immaterial 'public benefit payment') or some agreed form of media release'.

19 Ibid.

Changes to ASIC’s enforcement strategies (2018–21)

6. In October 2018, prior to the release of the Royal Commission’s Final Report, ASIC publicly announced a change in its enforcement strategy, adopting an approach termed ‘Why not litigate?’.[20] This had a ‘core focus on *deterrence*, *public denunciation* and *punishment* of wrongdoing by way of litigation’.[21] The approach has been somewhat recalibrated after the start of the COVID-19 pandemic, but still emphasises the important preventive and deterrent role of targeted formal enforcement action, and consequent importance in reducing risk to consumers and investors.[22]

7. In November 2021, ASIC again updated its *Information Sheet 151: ASIC’s Approach to Enforcement*. This sets out its criteria for taking enforcement action, which focus on areas of significant harm, broader public benefit, issues specific to the case (such as the nature and impact of the misconduct), and whether there are alternatives for matters that do not involve serious or harmful misconduct.[23] The information sheet emphasises that ASIC will

> pursue criminal proceedings for the most serious and harmful wrongdoing to deter similar misconduct in the future. [ASIC] will generally consider criminal proceedings for offences involving serious misconduct that is dishonest, intentional or highly reckless, even when civil action is also available.[24]

APRA Enforcement Strategy Review (2019)

8. In November 2018, APRA also announced a comprehensive review of its enforcement strategy (‘APRA Enforcement Strategy Review’), in the wake of the Royal Commission and the introduction of the Banking Executive Accountability Regime by the Australian Government.[25] The review recommended increasing APRA’s appetite for using its formal enforcement powers (from a ‘last resort’ to a ‘constructively tough’ approach) and enhancing those powers, including revising and creating additional penalties.[26] The review recognised the role of enforcement action holding entities and individuals to account in promoting APRA’s prudential aims by achieving deterrence.[27] It recommended an enforcement approach that was risk-based, forward-looking, outcomes-based, and that actively considered deterrence.[28]

9. Later that year APRA released a document setting out its ‘Enforcement Approach’, reflecting the findings of the APRA Enforcement Strategy Review. It emphasises that APRA’s enforcement actions are ‘aimed at the proactive remediation of prudential risks’, and that

> APRA may use enforcement to achieve the strategic benefits of general deterrence, including through public enforcement action to deliver wider prudential outcomes where appropriate.[29]

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20 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Transcript, James Shipton, 23 November 2018, 6953, 6958.
21 James Shipton, ‘ASIC Chair’s Introductory Comments’ (Speech, ASIC Annual Forum 2019, Sydney, 16 May 2019) (emphasis in original).
22 See further Ashurst, ‘The Evolution of ASIC’s Enforcement Approach’, <www.ashurst.com/en/news-and-insights/legal-updates/the-evolution-of-asics-enforcement-approach/>.
23 Australian Securities and Investments Commission, *ASIC’s Approach to Enforcement* (Information Sheet 151, 2021) 2–3.
24 Ibid 3.
25 See Australian Prudential Regulation Authority, *Enforcement Strategy Review: Final Report* (2019) 4.
26 Ibid 9–10, especially recs 2, 7.
27 Ibid 13.
28 Ibid 26.
29 Australian Prudential Regulation Authority, *APRA’s Enforcement Approach* (September 2019) 6.