

Working paper summary

[Financial Services Misconduct and the Corporations Act 2001](#)

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The paper discusses enforcement under the Corporations Act through the lens of a study of court-based enforcement by ASIC of financial services misconduct. The paper first considers current debates about penalties regimes available to ASIC before discussing the provisions and penalties presently operating under the Corporations Act for financial services misconduct. The paper then examines the actual penalties handed down for corporate wrongdoing for financial services misconduct in Australian Courts by way of a small case study of ASIC court based enforcement cases from 2011-2013.

This study shows that, over the observation period, there have been few cases where ASIC has sought either pecuniary civil penalty orders or pecuniary criminal penalties, namely fines, in relation to financial misconduct. Instead, ASIC has sought to achieve a deterrent effect by operating at the higher levels of the regulatory enforcement pyramid, typically seeking the strongest available sanction.

The study also shows that imprisonment terms applied by the courts are cautiously and conservatively applied. The maximum terms set out in the legislation appear to be imposed only in cases where there are multiple contraventions of the law. Accordingly, any increases in the size and range of penalties available will not guarantee their subsequent universal application and use by the courts.

It is almost 15 years since the enactment of the current financial criminal and civil penalty regime, and 12 years since the enactment of Chapter 7 of the Corporations Act. ASIC's calls for penalty reform reflect its determination to impact more effectively on organisational culture and drive normative change within the financial services sector.

The key considerations that shape the approach taken by ASIC in an enforcement action are:

- Strategic significance - the extent of the harm or loss suffered;
- Benefit of pursuing misconduct - the cost-effectiveness of any pursuit action undertaken;
- Features of the matter – the extent and nature of available evidence; and
- Non-investigative alternatives – that may warrant an alternative course of action.

The punitive approaches that ASIC can choose to pursue include civil or criminal financial penalties, prison terms and court orders. ASIC also has options for ensuring that assets remain within a specific jurisdictional authority, and for seeking disqualification orders and enforceable undertakings.

ASIC believes that its regulatory capacity to achieve higher levels of individual and general deterrence to counter corporate wrongdoing is inhibited by a limited flexibility to impose more stringent non-criminal penalties, and to apply these against a wider range of wrongdoing. For example, civil penalties are available for a range of corporate wrongdoing in Australia, but they are not available in the following instances that represent serious contraventions of the Corporations Act:

- Carrying on a financial services business without a licence (s911A);
- Failing to comply with the general obligations of financial services licensees (s912A); and

- Making false or misleading statements that would induce a person to buy or sell a financial product, or could have an effect on the market for that product (s1041E).

If higher standards of regulatory compliance are to be achieved within the business sector, individuals and organisations, whose interests are largely commercial, have to be sufficiently motivated to maintain meaningful regulatory compliance and crime prevention strategies. Deterrence will play a significant part in this process, hence the current efforts by ASIC to strengthen the penalty regime. However, before taking the significant step of widening the ambit of the existing regime, it is important to first evaluate it.

As a contribution in this regard, this paper presents an empirical study of court proceedings in Australia over the period from 1 July 2011 to 30 June 2014. In each of these cases, either a criminal sanction or a pecuniary civil penalty was imposed against a person or corporation for contravening Chapter 7 of the Corporations Act. The study encompasses two forms of proceedings: criminal penalty sentencing and pecuniary civil penalty determinations.

Specifically, the study provides a snapshot of one part of the overall enforcement picture, namely the application of criminal or civil penalties. It reveals that civil penalties are hardly used. Rather, there is a strong emphasis on criminal enforcement involving custodial and suspended prison sentences, with a ratio of 9.25:1 of criminal penalties versus pecuniary civil penalties. Of the penalty outcomes, 90% were criminal, with 51% being custodial and 22% being suspended sentences. While the purpose of regulation is both to deter and punish wrongdoing, this study indicates the importance of empirical research on the application of penalties to any future review of penalty regimes under the Corporations Act.