The Enforcement Regime of the Australian Securities and Investment Commission (ASIC) under Chapter 7 of the Corporations Act: Reform Required

Key words:
Australian Securities and Investment Commission; Enforcement regime; Integrity of financial markets; Civil penalty powers; Law reform

Abstract:
The Australian Securities and Investment Commission (‘ASIC’) seeks to facilitate the fair and transparent performance of Australia’s financial services market, and support the confident and informed participation of investors and consumers in this system. In 2014, the Senate Economics References Committee stated in its report, Performance of the Australian Securities and Investments Commission, that: ‘ASIC’s enforcement role is one of its most important functions. ASIC needs to be respected and feared. It needs to send a clear and unmistakeable message … that ASIC has the necessary enforcement tools and resources and is ready to use them to uphold accepted standards of conduct and the integrity of the markets’ (at xxi).

In light of this observation, this essay analyses the enforcement options available to ASIC under Chapter 7 of the Corporations Act 2001 (Cth), focusing on the civil penalty provisions. As hybrids between criminal and civil sanctions, civil penalty provisions play an important role in ASIC’s enforcement regime and assist ASIC to uphold the integrity of the financial market. However, analysis of recent cases of corporate wrongdoing demonstrates that ASIC’s civil penalty powers under the Corporations Act fall short when compared to the legislative schemes of other Australian and international financial market regulators.

In order to effectively deter and punish corporate wrongdoing that adversely impacts financial markets and confident market participation, ASIC’s civil penalty powers under Chapter 7 of the Corporations Act need significant reform. Broadening the range and strengthening the level of civil penalty provisions available to ASIC will promote consistency with other regulators’ powers, and enable courts to impose penalties adjusted to the seriousness of the wrongdoing. Clarifying the rules governing procedural and evidentiary requirements for civil penalty proceedings will further uphold the envisaged role of civil penalty powers within ASIC’s enforcement regime. A stronger civil penalty regime would enable ASIC to deliver better market outcomes by improving the cost-effectiveness of enforcement actions, and maximise their impact and deterrent effect on market participants. Importantly, ASIC must be well-resourced and willing to implement these powers in order to promote public confidence and compliance with the law. (346)
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The Australian Securities and Investment Commission (‘ASIC’) seeks to facilitate the fair and transparent performance of Australia’s financial services market, and support the confident and informed participation of investors and consumers in this system.¹ In addition to consultative, educative and surveillance functions to promote these aims, ASIC’s major responsibility is to enforce the law.² Remodelling the enforcement regime under the Corporations Act (‘CA’),³ particularly the civil penalty provisions, would assist ASIC to uphold the integrity of the financial market. However, ASIC must be well-resourced and willing to effectively implement these powers.

Unmitigated corporate wrongdoing will adversely affect the efficiency and development of the economy, and undermine investor confidence and participation in financial markets.⁴ Thus, ASIC needs appropriate enforcement powers to efficiently deter and, if necessary, punish corporate misconduct. A range of criminal, civil and administrative sanctions are available to ASIC to improve compliance, protect the public, punish wrongdoers and deter future misconduct.⁵ According to strategic regulation theory, civil penalty powers are lower than criminal powers on the ‘enforcement pyramid’, and are intended to be used more widely by regulators like ASIC.⁶ However, it does not appear that ASIC is using civil penalty powers in this way.⁷ Accordingly, this essay focuses on ASIC’s power to apply to the court for pecuniary penalty orders following the contravention of Chapter 7 provisions, such as insider trading, misleading conduct, and providing unlicensed financial services.⁸ It also discusses the impact of disgorgement and enforceable undertakings as supplements to civil penalty powers.

¹ See Australian Securities and Investments Commissions Act 2001 (Cth) (‘ASIC Act’), s 1(2); Australian Securities and Investments Commission, ‘The performance of the Australian Securities and Investments Commission: Main Submission by ASIC’ (Submission to Senate Economic References Committee, October 2013), 100.
² Australian Securities and Investments Commissions Act 2001 (Cth), s 1(2)(g).
³ 2001 (Cth).
⁵ Australian Securities and Investments Commission, Main Submission to Senate Economic References Committee, above n 1, 101, 168.
⁶ See Ian Ayres and John Braithwaite, Responsive Regulations: Transcending the Deregulation Debate (Oxford University Press, 1992), 21-7; Australian Securities and Investments Commission, Main Submission to Senate Economic References Committee, above n 1, 115, 173.
⁸ See Corporations Act 2001 (Cth), ss 911A, 1041E, 1043A, 1317E, 1317G.
Hybrids between civil and criminal law, civil penalties occupy an important place between criminal and civil sanctions within the regulatory enforcement pyramid. However, the civil penalty powers under the CA fall ‘well short’ of other Australian and international legislative schemes, which provide greater flexibility for regulators to enforce higher non-criminal penalties against a wider range of wrongdoing. These limitations in the CA fail to meet community expectations that ASIC will take strong action against corporate wrongdoers. This, in turn, adversely impacts deterrence and investor confidence.

A Insufficient Range of Civil Penalty Powers

While civil penalties exist for several corporate misconduct provisions, they are not available for some serious contraventions of the CA, including making false or misleading statements under s 1041E. Contravention of this provision is a criminal offence, entailing imprisonment and/or a maximum fine the greater of: $765,000 or three times the benefit obtained for an individual; or $7.65 million or 10% of the annual turnover for a corporation. Problematically, criminal prosecutions are often complex, and time and resource intensive. Indeed, the average time for the Commonwealth Deputy of Public Prosecutions (CDPP) to assess ASIC’s claims in 2011-2012 was not including the time to lay charges, undertake


13 See Corporations Act 2001 (Cth), ss 1317G, 1317E.

14 See also Corporations Act 2001 (Cth), s 912A; ASIC v Camelot Derivatives Pty Ltd [2012] FCA 414.

15 Ibid, ss 1311, Sch 3 item 310; Crimes Act 1914 (Cth), s 4AA(1).
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the trial, and impose sentences) was over 48 weeks.\textsuperscript{16} Further, criminal prosecution requires ASIC to satisfy more stringent rules of evidence.\textsuperscript{17} These factors may deter ASIC from initiating proceedings, or hinder its ability to prosecute successfully.\textsuperscript{18} Thus, civil penalties should be available for misconduct where pursuing criminal charges is not appropriate, including when there is insufficient evidence to prove the offence beyond reasonable doubt.\textsuperscript{19}

B Insufficient Level of Civil Penalty Powers

Because the range of civil penalties under the \textit{CA} is relatively low, ASIC’s ability to deter wrongdoing is hampered, as the maximum penalty imposed may be lower than the financial benefit obtained – especially in relation to misconduct such as insider trading.\textsuperscript{20} Insider trading refers to misconduct where a person knowingly uses price-sensitive information that is not generally available in relation to particular financial products, to trade in those products, or disclose to another person likely to trade in those products. This trading constitutes a criminal offence and a contravention of a civil penalty provision.\textsuperscript{21} Since insider trading can have a detrimental effect on investor confidence in the fairness and transparency of the financial market,\textsuperscript{22} the pecuniary criminal penalties for an individual were increased in 2010 from $220,000 to the greater of $810,000 or three times the profit gained.\textsuperscript{23} Conversely, the maximum civil penalty for an individual has been $200,000 since introduced in 2001.\textsuperscript{24} This is a low civil penalty given the high potential profits from insider trading, and the fact that courts have discretion not to impose maximum penalties.\textsuperscript{25}

\textsuperscript{16} Australian Securities and Investments Commission, Main Submission to Senate Economic References Committee, above n 1, 129.

\textsuperscript{17} Vicky Comino, ‘Effective Regulation by the Australian Securities and Investments Commission: The Civil Penalty Problem’ (2009) 33 Melbourne University Law Review 802-832, 805; The Treasury, above n 4, 18.

\textsuperscript{18} Australian Securities and Investments Commission, Main Submission to Senate Economic References Committee, above n 1, 100.

\textsuperscript{19} Australian Securities and Investments Commission, ‘Penalties’, above n 4, 25.

\textsuperscript{20} Ibid, 11, 17.

\textsuperscript{21} See \textit{Corporations Act 2001} (Cth), ss 1043A, 1311(1), 1317E(1), Sch 3.


\textsuperscript{23} \textit{Corporations Act 2001} (Cth), sch 3 item 310 (penalties for a corporation were also increased); \textit{Crimes Act 1914} (Cth), s 4AA(1).

\textsuperscript{24} \textit{Corporations Act 2001} (Cth), ss 1317E, 1317G(1B). See also \textit{Financial Services Reform Act 2001} (Cth), sch 1 item 437.

\textsuperscript{25} The Treasury, above n 4, 21.
In 2010, for example, an equities dealer, John Hartman, was convicted of 25 charges of insider trading for procuring a friend to front run contracts for difference. He was sentenced to three years imprisonment, but was not liable to any monetary penalties under the CA. (He was, however, required to forfeit $1.57 of the $1.59 million worth of profits under the Proceeds of Crime Act). Similarly, two men were imprisoned in 2014 for engaging in Australia’s largest insider trading scheme generating $7 million, but received sentences less than the maximum ten years imprisonment, and were not subject to any criminal fines or civil penalties under the CA. Indeed, due to the common law ‘totality principle’, multiple offences will not usually give rise to a substantially longer sentence than a single offence, as additional offences may be served concurrently.

In contrast, the US has a ‘grid sentencing’ system, which allows judges to impose cumulative penalties for multiple offences arising from the same course of conduct. Thus, in 2011, a hedge fund manager, convicted for insider trading that generated more than $63 million, was sentenced to 11 years in prison with a criminal fine of approximately $13.6 million. In response to serious misconduct, the US Securities Exchange Commission can also enforce a maximum civil penalty of three times the benefit gained for insider trading, and disgorgement (see ‘Pecuniary Administrative Penalties’ below). Consequently, the offender also received a civil penalty of approximately $126.8 million and a disgorgement order. Similar

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27 See Corporations Act 2001 (Cth), sch 3 item 310.


discrepancies exist between the CA civil penalties and those available to foreign regulators for market manipulation.\textsuperscript{33}

Given the increasingly globalised and cross-border nature of modern business dealings, this disparity between regulatory powers exposes Australia to risk.\textsuperscript{34} Numerous commentators have highlighted the need for ASIC to enforce penalties that instil a ‘fear of contravention’ that outweighs any temptation to engage in misconduct.\textsuperscript{35} Yet inadequately low civil penalties make ASIC’s threats of enforcement action under the CA ring hollow.\textsuperscript{36}

\section*{C Inconsistency between Australian Regulators}

Moreover, different legislative schemes provide different penalties for ASIC to enforce comparable corporate misconduct, such as unlicensed conduct.\textsuperscript{37} As entities are increasingly operating across industries in integrated businesses, it is reasonable to suggest that penalties for engaging in unlicensed conduct should be consistent across financial services and credit industries.\textsuperscript{38} Providing unlicensed financial services is a criminal offence under the CA.\textsuperscript{39} In contrast, under the \textit{National Consumer Credit Protection Act} (‘\textit{NCCPA}’), providing unlicensed credit services constitutes a criminal offence \textit{and} contravenes a civil penalty provision.\textsuperscript{40} Accordingly, an unlicensed corporate financial services provider is subject to a maximum criminal penalty of $180,000 under the CA; while an unlicensed credit provider could receive a civil penalty of $1.8 million under the \textit{NCCPA}, and still be susceptible to criminal proceedings.\textsuperscript{41} In addition, and notwithstanding their different regulatory contexts,
the Australian Competition and Consumer Commission also has access to a range of higher civil penalties than ASIC.\(^{42}\)

These discrepancies create regulatory inefficiencies and facilitate regulatory misbehaviour by reducing the deterrent effect on corporate wrongdoing.\(^{43}\) In support of aligning ASIC’s penalty powers from different legislative sources, and with similar Australian regulators, the Attorney-General’s Department recommended that ASIC’s powers under the CA ‘should be consistent with…comparable offences in Commonwealth legislation’.\(^{44}\)

D Procedural Problems Impeding Civil Penalty Proceedings

Furthermore, the current legislative structure and judicial process impedes ASIC’s ability to bring civil actions.\(^{45}\) The CA requires courts to ‘apply the rules of evidence and procedure for civil matters’ when hearing civil penalty proceedings.\(^{46}\) However, this phrase lacks certainty, and provides courts the flexibility to apply a variety of civil evidence and procedural rules.\(^{47}\) Recently, the High Court has interpreted civil penalty provisions in a way that emphasises criminal law values to the detriment of the regulatory rationale of the non-criminal penalty scheme.\(^{48}\) In particular, in *ASIC v Rich*,\(^{49}\) the Court increased the procedural and evidential burden on ASIC when bringing civil penalty proceedings due to the potential for a defendant to claim privilege against exposure to a penalty.

\(^{42}\) Compare Corporations Act 2001 (Cth), s 1317G; Competition and Consumer Act 2010 (Cth), s 76 (1A).

\(^{43}\) See *ASIC v Ingleby* (2013) 275 FLR 171; Dimity Kingsford Smith et al, ‘The performance of the Australian Securities and Investments Commission’ (Submission No 153 to Senate Economic References Committee, University of NSW Faculty of Law, 21 October 2013), 15, Australian Securities and Investments Commission, ‘Penalties’, above n 4, 4-5, 15.


\(^{46}\) *Corporations Act 2001* (Cth), s 1317L.

\(^{47}\) The Treasury, above n 4, 22-3.


As a result, civil penalty proceedings have become more expensive and time-consuming, two factors ASIC considers when determining whether to commence proceedings.\(^{50}\) This may provide some explanation as to why the number of civil proceedings completed by ASIC declined from 76 in 2006-2007, to just 13 in 2013-2014.\(^{51}\) Unlike the swift and suitable enforcement option envisaged by Parliament, ASIC is only ‘marginally better off’ trying to prove a civil penalty than a criminal offence.\(^{52}\) A more explicit ‘road map’ by way of statute, code or court rules to govern the procedural rules of civil penalty proceedings would ‘promote more timely and cost-effective regulatory outcomes’.\(^{53}\)

II PECUNIARY ADMINISTRATIVE PENALTIES

ASIC has advocated for pecuniary administrative powers like those available in several overseas jurisdictions. For example, the Securities and Futures Commission in Hong Kong may impose unlimited administrative penalties for insider trading;\(^{54}\) while the UK’s Financial Conduct Authority (FCA) has recourse to unlimited civil and/or administrative penalties for contravention of insider trading and market manipulation provisions.\(^{55}\) Comparative studies demonstrate that wrongdoers are more likely to be penalised in enforcement systems with administrative penalties in addition to criminal or civil penalties, thereby protecting the public and enhancing compliance.\(^{56}\) However, as administrative penalties may be imposed

\(^{50}\) See Australian Securities and Investments Commission, Main Submission to Senate Economic References Committee, above n 1, 132. See also Welsh, Short Civil Penalties and Responsive Regulation: The Gap between Theory and Practice above n 7, 928; Economics References Committee, above n 29, 261 citing Memorandum of Understanding, (ASIC and CDPP, 1 March 2006) <http://download.asic.gov.au/files/mou_dpp_mar_2006.pdf>, s 4.1.


\(^{52}\) Comino, The Civil Penalty Problem, above n 16, 828.


\(^{54}\) Securities and Futures Ordinance 2002 (Hong Kong), s 194(2), 257(1)(d), 303(2)(d).

\(^{55}\) Financial Services and Markets Act 2000 (UK), ss 66(3)[a], 118, 206(1).

without court intervention, their use can raise concerns of unbridled regulator power and lack of transparency. 

Addressing these concerns, the administrative sanction of disgorgement could enhance the deterrent effect of ASIC’s enforcement action without raising fears of unilateral penalties. Disgorgement is a remedy that strips a wrongdoer of any financial benefit attributable to their misconduct. This acts as a significant deterrent, especially when accompanied by punitive civil or criminal enforcement. In contrast to compensation orders, there is no need to prove any investor loss, and Parliament can legislate disgorgement schemes governing to whom the money is returned. The UK, US, Hong Kong, and Ontario in Canada, all have disgorgement powers for insider trading and market manipulation. In addition, the US and Ontario have disgorgement powers for unlicensed conduct. While ASIC can brief the CDPP to bring an action to confiscate the proceeds of crime in criminal matters, there are no equivalent disgorgement provisions for civil penalty proceedings.

III ASIC’S INSUFFICIENT IMPLEMENTATION OF ENFORCEMENT POWERS
Importantly, ASIC must be ‘ready to use [its enforcement powers] to uphold accepted standards of conduct and the integrity of the markets’. However, ASIC has been criticised for being risk averse, and not utilising its enforcement powers to their full capacity.
particular, ASIC’s ‘facilitative’ approach during major policy reforms is concerning.\textsuperscript{72} For example, following Government proposals in March 2014 to amend certain provisions of the 2013 Future of Financial Advice (FoFA) reforms,\textsuperscript{73} ASIC stated that it would ‘not take enforcement action’ until mid-2014 (unless a deliberate contravention likely to cause serious harm occurred).\textsuperscript{74} According to ASIC’s Deputy Chairman, it would not be ‘sensible’ to spend resources enforcing a law that could soon be repealed.\textsuperscript{75} However, any contravention of Chapter 7 can adversely affect economic efficiency and market performance.\textsuperscript{76} Moreover, ASIC has a duty to promote investor confidence and enforce the law at it stands – not to preempt any future amendments.\textsuperscript{77} As it turned out, in November 2014 the Government disallowed the proposed amendments, leaving the 2013 FoFA reforms intact, meaning that some contraventions may have gone unnoticed and unenforced.

Furthermore, there is a perception that ASIC does not investigate high-risk insider trading and misleading conduct cases, but rather pursues lower-risk cases with high media profiles.\textsuperscript{78} ASIC reacted slowly to the massive Storm Financial loss, and the rogue Commonwealth Bank of Australia (CBA) Financial Planning scheme, for example, yet jumped on a prank press release by anti-mining activist, Jonathan Moylan, in relation to funding withdrawal for a Whitehaven Coal development.\textsuperscript{79} It was comparatively easy for ASIC to prove Moylan’s misconduct and point to the brief market movement following the press release to make a successful case. While ASIC hope to send ‘an important message to the community’, Moylan’s case had a much smaller impact on investor funds than the Storm Financial and CBA cases.\textsuperscript{80} 


\textsuperscript{73} See Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (Cth).

\textsuperscript{74} Australian Securities and Investments Commission, ASIC Update on FOFA, above n 69.


\textsuperscript{76} The Treasury, above n 4.

\textsuperscript{77} See Australian Securities and Investments Commissions Act 2001 (Cth), s 1(2)[a] and (g); Sally Patten and Shaun Drummond, ‘ASIC May Apply Rules Despite Possible Changes: FOFA Further Uncertainty for Wealth Industry’, The Australian Financial Review, 26 March 2014, 10.


\textsuperscript{79} Economics References Committee, above n 29, 262, 264-5, 298.

\textsuperscript{80} Michelle Welsh, ‘Eleven years on- An examination of ASIC’s use of an expanding civil penalty regime’ (2004) 17 Australian Journal of Corporate Law 175, 188.
A. The Ill-advised Rise of Enforceable Undertakings

Due to the time and resources required to bring civil and criminal proceedings, ASIC has recently demonstrated a ‘penchant’ for negotiating settlements and enforceable undertakings with corporate wrongdoers.\(^81\) Negotiated outcomes have the appeal of being more flexible and cost-effective than judicial proceedings.\(^82\) They are not governed by court procedure, do not always require external legal advisers, and specific costs incurred (such as independent review or expert reports) can be dealt with in the terms of the undertakings.\(^83\)

However, enforceable undertakings have been criticised for being more lenient than civil or criminal penalties, and therefore may undermine public confidence in the market.\(^84\) Moreover, undertakings do not always require an independent expert to supervise the wrongdoer and report to ASIC, leading to a lack of transparency and accountability.\(^85\) Even with sufficient monitoring within a particular organisation, it can be difficult to prove non-compliance with an undertaking. Where a court has a wide range of orders to deal with a contravention of the CA,\(^86\) a court has recourse to a limited range of sanctions to enforce the undertaking. Therefore, undertakings generally do not yield the regulatory benefits associated with judicial proceedings in deterring industry-wide misconduct.\(^87\)

Consequently, ‘there is little evidence to suggest that large entities fear the threat of litigation brought by ASIC’.\(^88\) Nonetheless, recommendations to enhance ASIC’s civil penalty powers will make little difference if ASIC fails to implement them in a ‘sufficiently aggressive and satisfactory way’.\(^89\) If ASIC’s resources are insufficient to enable it to enforce contraventions, ASIC should prioritise enforcement action against high-risk contraventions most likely to cause harm – not necessarily those that receive the most media attention.\(^90\)

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\(^{81}\) Economics References Committee, above n 29, 276, 278.

\(^{82}\) Australian Securities and Investments Commission, Main Submission to Senate Economic References Committee, above n 1, 23.

\(^{83}\) Ibid, 133.

\(^{84}\) Suzanne Le Mire et al, ‘The performance of the Australian Securities and Investments Commission’ (Submission to 152 Senate Economic References Committee, October 2013), 2.

\(^{85}\) Cf Australian Securities and Investments Commission, Main Submission to Senate Economic References Committee, above n 1, 24.

\(^{86}\) See, eg, Corporations Act 2001 (Cth), ss 1317E, 1317G, 1317H-1317HB.

\(^{87}\) See Economics References Committee, above n 29, 267-9, 271; Mire et al, The performance of the Australian Securities and Investments Commission, above n, 4.

\(^{88}\) Economics References Committee, above n 29, 278.

\(^{89}\) Bob Baxt, Proof Committee Hansard (21 February 2014), 11, 17 cited in ibid, 367.

\(^{90}\) See ibid, 262, 278, 298; John H.C. Colvin, ‘The performance of the Australian Securities and Investments Commission’ (Submission No 122 to Senate Economic References Committee, Australian Institute of Company
B  Addressing ASIC’s Lack of Funding

To address funding shortages, ASIC has advocated for a ‘user-pays’ funding model. Such a model, featuring fees for services and levies on regulated industries, has recently been announced in a Government consultation paper in response to the Murray Inquiry. This model has proven successful for other financial regulators (such as the UK’s FCA), and may assist ASIC to effectively enforce the CA.

IV  Conclusion

ASIC’s civil penalty regime under the CA requires a comprehensive reform in order to effectively deter and punish wrongdoing that adversely impacts financial markets. Recent domestic and international corporate scandals have revealed that there is increasing public expectation that corporate misconduct will be punished strictly. Accordingly, the range and level of civil penalty provisions for Chapter 7 contraventions should be increased. This will promote consistency with other regulators’ powers, and enable courts to tailor penalties to the seriousness of the wrongdoing. Inserting a disgorgement power would also enhance deterrence of market misconduct without overly broadening ASIC’s administrative powers. Additionally, rules governing procedure and evidence requirements for civil penalty proceedings should be clarified to uphold the envisaged role of civil penalty powers within the enforcement pyramid. A stronger civil penalty regime would allow ASIC to deliver better market outcomes by improving the cost-effectiveness of enforcement actions, and maximise their impact and deterrent effect on market participants. Importantly, ASIC must have the resources and be willing to enforce the law as it stands to promote public confidence and compliance with the law.

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