



ASIC
Australian Securities &
Investments Commission

Committee	House of Representatives Standing Committee on Economics
Inquiry	Review of the ASIC Annual Report 2021
Question No.	ASIC01QON
Date	11 October 2022
Topic	ASIC's most litigated provisions
Reference	Spoken, 11 October 2022, Hansard page 11
Committee member	Mr WOLAHAN

Question

Mr WOLAHAN: Thank you, everyone, for making the time to appear before us; we really appreciate it. My first question is to the General Counsel. **My question is about the acts that ASIC is responsible for and whether you've been tracking what the most litigated provisions are, from two perspectives—the first are those that are on appeal which may point to ambiguity in provisions that we need to look at, and the second are those that are constantly appearing before the courts and are creating a cost on business that, again, we may need to look at. Do you just have a general view on those two areas?**

Mr Savundra: I'd like to take the question on notice so I can come back to you with a complete answer to your question because I don't have all of the data to hand. We do obviously track very closely the enforcement work that we do. We've recently collected some of that data for the purposes of the financial services review work that the Australian Law Reform Commission is doing.

I probably don't have the time today to go through that data in detail. In terms of the Corporations Act, I think the most litigated provisions are around the need for people who are selling financial services or products to have an Australian financial services licence, failure to comply with the general obligation that financial services licensees hold, and there are then the director duties provisions. There are also a significant number of actions in relation to the operation of managed investment schemes which are not registered, and then I think the fifth most common is the continuous disclosure provisions.

Under the ASIC Act, the top three are false and misleading representations, unconscionable conduct in relation to financial services, and certain misleading conduct under section 12DF of the ASIC Act. The top three for the credit act are prohibition on engaging in credit activities without a licence, general obligations of a credit licensee and then credit guides of credit assistance providers. Those are the most litigated from a civil penalty perspective, and that's based off the data we've recently provided to the ALRC that covers, I think, the financial years 2015-16 through to the financial year ending 2021.

In terms of ambiguity, I'd want to take that on notice and your question around ambiguity leading to increased costs on business, but what I would say is that those are issues that the ALRC are looking carefully as part of their review of the financial services laws.

Mr WOLAHAN: That was a very good answer on no notice....

Answer

You have asked us to consider the information that ASIC holds on the most litigated provisions in the laws we administer, including in appeals, and whether that information points to ambiguity in provisions or provisions that are creating a cost on business that may need to be considered.

Generally, we consider that the information that we hold on the most commonly litigated provisions and on appeals does not point to ambiguity in those provisions. We explain the reasons for our view below.

Appeals

We have focussed in our response below on civil litigation appeals which may indicate ambiguity in the relevant provisions. We note that ASIC's most common appellate cases are other types of cases that are less relevant to the question, as they do not generally point to ambiguity in the law. For example:

- many appeals which relate to criminal prosecutions relate to the penalty or sentence imposed, rather than to liability for the offence, and
- the term 'appeal' is often used to describe applications to the Administrative Appeals Tribunal for review of ASIC administrative decisions, including banning actions. These actions are generally de novo merits review proceedings.

Recent appeals

In the period 1 July 2020 to 30 June 2022 there were 13 matters in which an appeal or appeals were commenced and/or determined (totalling 16 appeals). We note the following in relation to those appeals:

- Four were appeals to a single judge of the Federal Court of Australia from a decision of the Administrative Appeals Tribunal.
- One appeal related to enforcement of a compulsory notice.
- The most appealed provisions were ss180 (directors' duties), 1041H (misleading or deceptive conduct in relation to financial service) and 1101B (Court's power to make orders) of the Corporations Act (each only twice appealed).
- 12 of the 16 appeals were brought by the defendants/respondents.

Most litigated provisions

As outlined in Mr Savundra's verbal response, ASIC recently collected data on provisions relied upon in litigation to assist the Australian Law Reform Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation. That data was collected for the financial years 2015-16 to 2020-21 and inform our responses below. We focus our response on civil penalty proceedings completed during that period.

Corporations Act

In relation to the Corporations Act, the most common civil penalty provisions relied upon during the period were (in order from most to least common):

- director's and officer's duties (ss 180, 181, 182 and 183)
- obligation to obtain a financial services license (s911A(5B))
- general obligations of a financial services licensee (s912A)
- obligation to be registered if offering certain managed investment schemes (s601ED(8))
- offering securities without a current disclosure document (727(6))

ASIC Act

In relation to the ASIC Act, the most common civil penalty provisions relied upon during the period were (in order from most to least common):

- false or misleading representations (s12DB and 12DC)

- unconscionable conduct in connection with financial services (s12CB)
- certain misleading conduct (financial services) (s12DF)

National Credit Act and Code

In relation to the National Credit Act and Code, the most common civil penalty provisions relied upon during the period were (in order from most to least common):

- prohibition on engaging in credit activities without a license (s29)
- failure to make reasonable enquiries about the consumer (s130)
- general obligations of credit licensees (s47)

ASIC's observations on the most litigated provisions

We make the following observations in relation to using litigated provisions to identify possible ambiguity in the law:

- Generally, ASIC litigation will be contested on the basis of the facts of the particular case. These proceedings speak less to the ambiguity or otherwise of the law and are instead focussed on a contest of the facts or the strength of the evidence that ASIC is able to present to make out a contravention of the law.

A significant number of cases will be resolved without the need for a contested trial. We make the following observations in relation to the most common provisions outlined above:

- The provisions apply to a wide range of entities that ASIC regulates: The general obligations in s912A of the Corporations Act and s47 of the National Credit Act apply to all Australian Financial Services Licensees (AFS Licensees) and Credit Licensees respectively and are fundamental obligations. Similarly, the prohibitions contained in the ASIC Act (ss12CB, 12DB, 12DC, 12DF) apply to an even broader range of entities as they apply to all conduct in connection with financial services, including unlicensed conduct. Therefore, the volume of cases is partially reflective of the large number of entities to which these obligations apply.
- The provisions reflect the role of the various licensing regimes ASIC administers as 'gatekeepers' to operating financial services businesses: The AFS and Credit licensing regimes apply important obligations on providers of financial and credit products and services and attach important consumer protections. ASIC has a number of administrative tools in relation to our licensing functions that enable us to take action to exclude entities from offering financial products or services where they are unfit to do so (for example, we may take action to ban persons or cancel licenses). ASIC is also focussed on ensuring that entities that operate without appropriate licensing are disrupted or are required to comply with these important obligations. This explains the focus on unlicensed conduct in the provisions (ss911A(5B) and 601ED(8) of the Corporations Act, s29 of the National Credit Act).
- The provisions are principles-based by design: A number of the provisions are principles-based by design. For example, the general obligations in s912A require a financial services licensee to do all things necessary to ensure that the financial services covered by the license are provided efficiently, honestly and fairly. Whilst s912A contains some specific obligations, for example the requirement to have adequate resources, or maintain competence to provide the services, the principles-based nature of the obligation generally means that judgement is required in their application to the circumstances. This is a desirable outcome, as it is generally not possible nor desirable to attempt to comprehensively prescribe all of the different aspects of the obligation across such a broad range of activities and entities. The obligations are generally well understood. Similarly, the prohibitions on misleading or deceptive conduct are also a combination of principles-based obligations and prescriptive prohibitions, as it is not generally possible nor desirable to prescribe all of the differing types of conduct they are intended to prevent.



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Committee	House of Representatives Standing Committee on Economics
Inquiry	Review of the ASIC Annual Report 2021
Question No.	ASIC02QON
Date	11 October 2022
Topic	Capital raising
Reference	Spoken, 11 October 2022, Hansard page 11
Committee member	Mr WOLAHAN

Question

Mr WOLAHAN: The next question relates to capital raising and the system that's available for public companies for institutional investors, as opposed to mum-and-dad investors. Many comment that the scales are tipped in favour of institutional investors. Do you have a view on the discounts available in capital raising for institutional investors compared to mum-and-dad investors?

Mr WOLAHAN: It was particularly in regard to equity offers, on which many have commented that the better offers are made to institutional investors earlier than to them.

Answer

In regards to companies seeking to raise funds from institutions via discounted placements, ASIC made public statements that companies should consider fairness to all shareholders when considering the structure of capital raisings – see: [Market Integrity Update - COVID-19 Special Issue - 31 March 2020 | ASIC](#). ASIC reminded directors of the importance of issuers to consider fairness between shareholders – both institutional and retail – in capital raisings. We noted that where circumstances allow, pro rata rights offers and share purchase plans (SPPs) can help achieve fairness between investors.

We also worked closely with the ASX to build in safeguards to the temporary relaxation of the 15% capital raising limit in the ASX Listing Rules, such as requiring that placements were followed by an entitlement offer or a share purchase plan so that retail investors had an opportunity to participate.



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Committee	House of Representatives Standing Committee on Economics
Inquiry	Review of the ASIC Annual Report 2021
Question No.	ASIC04QW
Date	24 October 2022
Topic	ASIC's response times to complaints
Reference	Written
Committee member	Mr Bert VAN MANEN MP

Question

Please explain why ASIC's response times to complaints are so slow and/or non-existent.

Answer

ASIC responds effectively to reports of misconduct. The ASIC Service Charter states that ASIC aims to respond to reports of misconduct (ROMs) within 28 days of receiving all relevant information, with a target of 70%. This financial year (2022-23) up to the end of September 2022, ASIC has finalised and responded to 76% of ROMs within 28 days.

ASIC has met or exceeded the target of 70% in almost every year since 2006 when the Service Charter first commenced.

Under some circumstances, ASIC may choose not to continue to correspond with a person in relation to the same issues when the contact is deemed excessive/threatening towards ASIC staff. Those people are informed of ASIC's position and advised to escalate their concerns to the Commonwealth Ombudsman.