

ASIC responses to Questions on Notice

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Question

Thank you for that comprehensive answer, Mr Shipton. As you touched on: obviously ASIC has taken a higher profile and a more aggressive approach, clearly demonstrated through the tone approach of your answer just now on enforcement. To what extent is ASIC engaging and how is it rating its own performance on pursuing individuals rather than institutions?

**Mr Shipton:** Certainly I'll answer that question. But if I could ask your indulgence, I would take this opportunity, given the presence of the delegation from the Indian parliament, to highlight our close working relationship with the Securities and Exchange Board of India, SEBI, who we work very closely with as partners in IOSCO both at a global and also at a regional level. We very much value our working relationship with SEBI and also with the Reserve Bank of India and other important financial services agencies in India.

Going back to your important question, Chair, about individuals, the answer is absolutely yes. My colleagues can speak to a number of examples where we're pursuing actual actions against directors and officers. There are a number of investigations underway where there has been a failure to meet the standards that are required of them.

I would also highlight the important policy decision, which is currently being worked through with Treasury and the government, which is extending the BEAR from the prudential sense through to a conduct sense. There is a proposal being worked through at the moment which we're constructively engaged on. This is a really important proposal to extend the BEAR from a requirement of having regard to the prudential status of a financial services firm to the good conduct and responsibilities, because personal responsibility is absolutely key to the decisions being made inside financial services firms and absolutely key to the culture and the conduct and the fair deal that is required for consumers. We believe that this extension of this accountability regime, so that leaders of financial institutions, particularly large ones—but as many financial institutions as possible—have a requirement under law to be responsible and accountable for the good conduct of their financial institutions, is absolutely key.

Whilst I don't want this conversation or the answer to this question to give the impression that we are solely relying on enforcement, because we're not, but to have regulatory structures in place whereby individuals, particularly individual leaders of financial institutions, are clearly aware of their responsibilities and their accountabilities will go a very long way to ensuring the behavioural change that I mentioned was so important in my response to the last question. Because it's not just about enforcing against individuals; it's making individuals aware of their responsibilities and their accountabilities. And, in my experience of having mapped out a similar regime during my time working with the Hong Kong regulator, what we found, when I was applying this and doing this in Hong Kong, was the exercise of mapping out who was responsible and who was accountable was actually a tremendous part of achieving the outcome of getting behavioural change, because many

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financial institutions, up until these exercises of mapping accountability, hadn't actually done that, actually hadn't mapped out just as a matter of good governance who was responsible for what.

Therefore, in response to your question, I see this as two pronged. Yes, we need to enforce the law as regards to directors' and officers' duties. We need to make sure that there is denunciation of wrongdoing. We have to have a deterrence impact, but equally there are new tools coming our way that will have, I believe, an immediate behavioural change just because of the way they work by mapping out and articulating responsibilities and accountabilities.

**CHAIR:** Presumably, as part of enforcement proceedings, you have a number of measures at your disposal, including fines. Yesterday there was a story in a newspaper raised by one of my Senate colleagues Andrew Bragg around disclosure of ASIC fines, particularly related to the fact they're not disclosed around industry super. **I was wondering if there is a public registrar and/or information you can give to us or take on notice about the accumulated total of ASIC fines on industry super?**

**Mr Shipton:** I can certainly take that on notice. I would make an observation though, that a penalty, a fine, is at the power of the courts and that we would be seeking that penalty, that fine, via the courts. I'd have to take that particular question on notice. I'd be happy to do that, but of course we would point to the fact that the courts are the ultimate arbiter in the imposition of the fine.

**CHAIR:** Mr Crennan, did you have a remark on that?

**Mr Crennan:** Yes I might just elaborate on that, just so it's perfectly clear. In our jurisdiction, we're entitled to issue infringement notices. That's a voluntary response. The consequence of not responding and paying that infringement notice amount is court action.

Unlike England, the Netherlands and other countries, we don't have the power to issue fines directly; we have to rely on the curial system—that is, go to court, issue proceedings and, if we are successful in liability proceedings, then we go to the next phase, which is the penalty phase, and ask the court to accept a penalty that we propose, the penalties that are proposed by the opposition or somewhere in-between. That is a system that we share, more or less, with the US Securities and Exchange Commission in America.

In terms of criminal matters, unsurprisingly, we can only seek custodial sentences through the court, and we also rely on an external prosecutorial agency. So in terms of international regulatory peers we are probably closest—certainly not in size, but in terms of the modelling—to America. We're quite unlike England, for example, where very large fines, such as multimillion pound fines, are issued directly by the agency. Obviously, those can be appealed but they're appealed through a particular court structure which is very closely linked with the regulator itself. We operate in a very different paradigm.

**CHAIR:** Thank you very much. Apparently, we're going to have further divisions, which I'm sure will bring you all unending joy in terms of the break-up within this hearing!

### **Answer**

As noted in the Hansard by ASIC Deputy Chair, Daniel Crennan QC, ASIC does not have power to issue fines directly; in Australia, Commonwealth fines can only be levied by courts. However, entities may pay money as a result of ASIC action in other ways.

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For example, ASIC can issue infringement notices in relation to alleged contraventions of some provisions, as an alternative to issuing judicial proceedings, if it has reasonable grounds to believe that a person has contravened a relevant provision.

An infringement notice is not the same as a fine because there is no requirement to pay the amount stated in the infringement notice and, if the relevant entity does not pay the infringement notice, ASIC cannot enforce the infringement notice. The consequence of not responding and paying the infringement notice amount is the prospect of court action in relation to the conduct the infringement notice was originally trying to address.

ASIC maintains a register of all infringement notices issued and paid on the ASIC website ([infringement notice register](#)), some of which involve superannuation trustees. The only recent action regarding an Industry Super fund was against Host-Plus Pty Ltd. Host-Plus Pty Ltd paid a \$12,600 Infringement Notice penalty issued by ASIC. The Infringement Notice related to alleged misleading claims about offering '*independent advice*' in a recorded telephone message on Host-Plus' main consumer telephone number: see ASIC Media Release date 9 May 2019: *19-106MR Super fund removes 'independent' financial advice message and pays penalty*.

Previously, in 2014, Media Super Limited was the subject of infringement notice action for statements comparing the costs and benefits of self-managed superannuation funds with Media Super: see *14-001MR Media Super pay infringement notice in relation to superannuation advertising*.

Monetary penalties imposed by courts include fines imposed following a criminal conviction, civil pecuniary penalties, compensation orders and (post March 2019), disgorgement orders.