

Chapter 5

Banning orders and infringement notices

5.1 A number of inquiry participants raised with the committee the use and duration of banning orders and disqualification orders in relation to white-collar crime and misconduct.

5.2 While inquiry participants broadly agreed on the value of banning orders as part of wider penalty framework, some participants suggested reforms that would enhance their effectiveness in combating white-collar crime and misconduct. This chapter summarises the views expressed by inquiry participants in this regard.

5.3 This chapter also considers the current arrangements for the use of infringement notices, and whether ASIC is effectively and appropriately employing this particular part of the enforcement toolkit to combat financial and corporate misconduct.

Importance of banning and disqualification orders

5.4 ASIC is responsible for regulating persons who carry on a financial services business in Australia, including licensing those persons and monitoring their ongoing compliance with licence and other legal obligations.¹ As noted in chapter 2 (Table 1), ASIC can take administrative action to protect consumers and financial investors, including: disqualifying a person from managing a corporation; banning a person from providing financial services or engaging in credit activities; or revoking, suspending or varying the conditions of a licence (with or without a hearing).² This part of the report summarises those powers, and considers whether they are appropriate and adequate in combating white-collar crime and misconduct.

Banning orders

5.5 ASIC's power to make a banning order is contained in s920A of the Corporations Act. As ASIC explains in *Regulatory Guide 98: Licensing: Administrative action against financial service providers*, a banning order is:

...a written order by us that prohibits the banned person from providing financial services, whether as an AFS licensee or as a representative of such a licensee. We can make an order that either prevents a person from providing all financial services, or from providing specified financial

1 ASIC, *Regulatory Guide 98 – Licensing: Administrative action against financial services providers* [hereafter 'RG98'] (July 2013), p. 4. It might be noted here that AFS licensees may be a natural person, a partnership, a body corporate or a trustee. ASIC, RG98, p. 7.

2 For more detail on ASIC's administrative powers, see ASIC, RG98, pp. 7–11.

services, in specified circumstances. A banning order may be permanent or for a specified period.³

5.6 On the whole, inquiry participants were agreed as to the importance of banning orders as part of the enforcement toolkit.

5.7 HNAB-AG suggested that banning orders issued on a zero tolerance basis for offenders in a given industry would help prevent illegal phoenix activity and 'avert people [offenders] being moved around within an institution or onto another'.⁴

5.8 The LCA told the committee that the use of banning orders had been effective in the approximately 20 years they had been in use:

We believe that when you look at the sorts of banning orders courts have imposed in the area of white-collar crime generally you see a range from zero to 20 years, depending on the nature of the offence. We believe that that has worked well and does not require any tinkering.⁵

5.9 The LCA also noted that the imposition of a banning order could have serious reputational consequences in Australia, which added to their efficacy.⁶

Disqualification orders

5.10 ASIC also has a power to disqualify a person for managing a corporation for up to 5 years under s206F of the Corporations Act. On application by ASIC, a court may also disqualify a person from managing corporations for a period under s206C of the Act. A person is automatically disqualified from managing corporations they are convicted of certain offences, are an undischarged bankrupt, or in certain other situations set out in s206B of the Act, although ASIC or a court can allow the person to manage a company under s203B of the Act. As noted below, disqualification orders can also be issued under other legislative instruments, including under competition law.

5.11 Several inquiry participants highlighted the importance of disqualification orders. Noting that disqualification orders can be issued by a court for breaches of the Competition and Consumer Act or the Australian Consumer Law, the ACCC submitted:

The ACCC considers the imposition of a disqualification order to be an important remedy, as it restricts a person from managing a company and

3 ASIC, RG98, p. 9.

4 HNAB Action Group, *Submission 41*, p. 9.

5 Mr Greg Golding, Chair, Foreign Corrupt Practices Working Group, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 6 December 2016, p. 15.

6 Mr Greg Golding, Chair, Foreign Corrupt Practices Working Group, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 6 December 2016, p. 16.

sends a strong message to other potential offenders that there are consequences for misconduct.⁷

5.12 Appearing before the committee, Mr Bezzi from the ACCC emphasised the power disqualification orders could have:

We have also had disqualification orders in competition cases. They are quite common. And I can tell you that they are a very powerful sanction. I have sat across the table from people who have said to me: 'I'll pay more fine. I'll give you another \$100,000. Just reduce the disqualification period.' I think they work very well.⁸

5.13 ARITA argued that non-monetary penalties should be given greater prominence in insolvency cases. For instance, directors would be more likely to meet their obligations to a liquidator when confronted with the possibility of an order that prevented them from acting as a director of another company, as opposed to paying a relatively small monetary penalty.⁹

5.14 ARITA noted that a streamlined director disqualification regime had been proposed in the exposure draft of the Insolvency Law Reform Bill 2013. According to ARITA, this streamlined approach would have applied in instances where directors failed to comply with demands by external administrators to deliver the company's books and records and to provide a report as to affairs (RATA). ASIC would have been able to use this new process as either an alternative to, or addition to, criminal prosecution. ARITA explained:

ASIC would provide a warning and then formally demand compliance by the director. If the director did not comply and did not provide a reasonable excuse, the director would automatically become disqualified from managing corporations until one of a range of factors occurred, including compliance with the notice.¹⁰

5.15 However, as ARITA notes, this reform was subsequently removed from subsequent drafts of the bill.¹¹

5.16 A different matter was raised by Dr Overland, who expressed concern about the practice of courts granting leave from automatic disqualification orders. Referring to persons convicted of insider trading in criminal proceedings, Dr Overland noted

7 Australian Competition and Consumer Commission, *Submission 40*, p. 4.

8 Mr Marcus Bezzi, Executive General Manager, Competition Enforcement, Australian Competition and Consumer Commission, p. 68.

9 Australian Restructuring Insolvency and Turnaround Association (ARITA), *Submission 32*, p. 8.

10 Australian Restructuring Insolvency and Turnaround Association (ARITA), *Submission 32*, p. 9.

11 Australian Restructuring Insolvency and Turnaround Association (ARITA), *Submission 32*, p. 9.

that such persons are subject to an automatic disqualification from managing a corporation. However, a court can grant leave to allow the person to manage a corporation. For example, despite his conviction for insider trading, former director and chairman of Gunns Limited, Mr John Gay, was granted leave to manage two family companies, despite ASIC opposing his application to do so.¹² In order to prevent this happening, Dr Overland recommended legislative reform so that 'a court may only grant such leave if satisfied that the offender is otherwise subject to a penalty of appropriate personal and general deterrence'.¹³

5.17 Appearing before the committee, Dr Overland reiterated her concerns in this regard:

In addition to that, the issue of disqualification, particularly automatic disqualifications that apply when a person is convicted of a crime that has a maximum sentence under the Corporations Act of more than 12 months, I do find it concerning that leave can be granted and people committed to manage corporations when they would otherwise be automatically disqualified and that particular consideration should be given as to whether limitations should be imposed on that.¹⁴

5.18 Dr Overland also noted that there is currently no automatic disqualification from managing corporations for persons found liable for insider trading in civil proceedings. Dr Overland recommended that the same form of disqualification apply where a person is found liable for insider trading in civil penalty proceedings as applied when they were convicted of insider trading in criminal proceedings—that is, that they be subject to automatic disqualification.¹⁵

ASIC's banned and disqualified register

5.19 ASIC maintains a register of people and organisations who have been subject to banning orders or disqualification orders, using information drawn from a number of other registers. It includes information on persons who have been:

- disqualified from involvement in the management of a corporation;
- disqualified from auditing self-managed superannuation funds (SMSFs); or
- banned from practicing in the financial services or credit industry.¹⁶

12 Dr Juliette Overland, *Submission 9*, p. 8.

13 Dr Juliette Overland, *Submission 9*, pp. 2.

14 Dr Juliette Overland, Private capacity, *Proof Committee Hansard*, 6 December 2016, p. 19.

15 Dr Juliette Overland, *Submission 9*, p. 8.

16 ASIC, webpage, 'Banned and disqualified', <http://asic.gov.au/online-services/search-asics-registers/banned-and-disqualified/#whatinformation>, accessed 10 March 2017.

5.20 Some of the information on the register can be viewed for free—for instance, the name of the person, type of banning or disqualification, date of commencement and (if temporary) cessation. Further information from the register can be purchased.¹⁷

5.21 The Centre for Corporate Law and Securities Regulation (CCLSR) suggested that while banning orders constituted one of ASIC's most coercive powers, there was little public information available regarding their use or duration. The CCLSR noted, for example, that while the ASIC website does allow the user to search for banned and disqualified persons (that is, via the register), they can only do so if they already know the name of the individual for whom they are searching. As such, the CCLSR recommended that ASIC:

...should establish an online and free-of-charge public register of banning orders imposed by ASIC that can be both browsed and searched using key terms, similar to ASIC's enforceable undertakings register'.¹⁸

5.22 According to the CCLSR, the establishment of a register of this sort would help improve fairness and accountability in relation to ASIC's use of its power. Moreover, it would help promote general deterrence by sending 'a stronger signal to the market that ASIC is taking administrative enforcement action seriously, both in terms of [the] frequency and magnitude of bans'.¹⁹

Committee view

5.23 The committee notes the issues raised by CCLSR in relation to the banned and disqualified register maintained by ASIC. While the committee did not consider the matter at any length in the inquiry, it considers that there would be merit in further considering enhancing the access to and usability of the register. This would likely help improve transparency regarding the use of disqualification and banning orders in Australia, and also better enable consumers and other interested parties to access information about people and organisations that have engaged in misconduct serious enough to warrant a banning or disqualification order.

Recommendation 2

5.24 The committee recommends that the Australian Securities and Investments Commission consider ways in which the accessibility and usability of the banned and disqualified register might be enhanced, in order to create greater transparency regarding banning and disqualification orders.

17 ASIC, webpage, <https://connectonline.asic.gov.au/HLP/SearchRegisters/sch-using-this-service/sch-whatyoucansearch/banned-and-disqualified/index.htm>, accessed 10 March 2017.

18 Dr George Gilligan, *Submission 35*, pp. 2–3.

19 Dr George Gilligan, *Submission 35*, p. 3.

Infringement notices

5.25 Another administrative action that ASIC can take against financial service providers is the issuance of an infringement notice.

5.26 Infringement notices, as explained in *Information Sheet 151: ASIC's approach to enforcement*, are administrative actions administered by ASIC or, with ASIC's authority, the Markets Disciplinary Panel.²⁰ There are a number of different infringement notice regimes with differing levels of potential penalty, as set out below in Table 5.1.

Table 5.1: Types of infringement notice

For contraventions of:	Features	Issued by
ASIC Act (unconscionable conduct and consumer protection provisions)	These notices are intended to facilitate payment of relatively small financial penalties in relation to relatively minor contraventions.	ASIC
National Credit Act		ASIC
Market integrity rules	These notices can impose higher financial penalties, reflecting the potentially greater impact on the market of the conduct involved. They can only be issued after a formal opportunity to present their case is offered to the recipient. Notices for breaches of the market integrity rules can extend to compliance and conduct direction.	MDD
Corporations Act (continuous disclosure obligations)		ASIC

Source: Australian Securities and Investments Commission, *Information Sheet 151: ASIC's approach to enforcement*, p. 7.

5.27 Where an infringement notice is complied with (for example, where the penalty is paid) no further regulatory action can be taken in relation to the breach. However, if the infringement notice is not complied with, ASIC is able to bring a civil penalty action against the notice recipient.²¹

5.28 In its submission, ASIC notes that infringement notices provide 'a prompt and proportionate means of enforcing the law', particularly when the more serious action for suspending or cancelling an AFS license appears disproportionate to the breach in question.²²

5.29 However, ASIC also advised that while infringement notices are part of ASIC's enforcement toolkit in relation to breaches of the market integrity rules and

20 Australian Securities and Investments Commission, *Information Sheet 151: ASIC's approach to enforcement* [hereafter *Information Sheet 151*], p. 7.

21 Australian Securities and Investments Commission, *Information Sheet 151*, p. 7.

22 Australian Securities and Investments Commission, *Submission 49*, pp. 15–16.

continuous disclosure obligations, 'they are not currently available to us for breaches of the financial services and managed investments provisions of the Corporations Act, among others'.²³ ASIC suggested that introducing a broader infringement notice regime alongside existing remedies would provide a useful enforcement tool to respond to misconduct at the lower end of the scale where:

- a) a higher volume of cases is expected, relative to instances of more serious misconduct;
- b) an assessment of whether misconduct has occurred depends on relatively straightforward and objective criteria; and
- c) a penalty must be imposed as soon as possible in order to be effective.²⁴

5.30 ASIC explained that in many cases, when an AFS licensee does not comply with its obligations, the only enforcement remedy available to ASIC is to suspend or cancel on AFS licence, even though an infringement notice would be a more proportionate and appropriate response. Banning orders, ASIC explained:

...is not appropriate for the vast majority of cases where misconduct is of low to medium severity, and where suspending or cancelling a licence would have significant adverse consequences for the licensee, its clients, employees and other representatives, and would be disproportionate with the nature of the breach. This means that we do not have the means to respond effectively and in a timely manner to less serious misconduct, which could escalate into more serious breaches.²⁵

5.31 In contrast to ASIC's arguments regarding the value and utility of infringement notices, the LCA told the committee that it did not support the use of infringement notices in relation to white-collar crime, and noted that its concerns were shared in this regard by the Australian Law Reform Commission:

Infringement notices in the area of white-collar crime have been a contentious issue. We as a body have always opposed the use of infringement notices. We believe it is lazy regulation. It does not involve a finding of culpability. It does not provide guidance to the community as to what conduct should be proscribed or not. We note that the Australian Law Reform Commission does not support infringement notices in areas such as this, and we would continue our opposition to infringement notices and our opposition to a broadening of the application of infringement notices in the corporations context.²⁶

23 Australian Securities and Investments Commission, *Submission 49*, pp. 15–16.

24 Australian Securities and Investments Commission, *Submission 49*, p. 16.

25 Australian Securities and Investments Commission, *Submission 49*, p. 15.

26 Mr Greg Golding, Chair, Foreign Corrupt Practices Working Group, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 6 December 2016, p. 15.

Committee view

5.32 While noting the Law Council of Australia's views regarding infringement notices, the committee agrees with ASIC that infringement notices provide a valuable enforcement tool for responding to less serious instances of corporate and financial misconduct.

5.33 The committee agrees with ASIC that there may be value in making infringement notices available for breaches of the financial services and managed investments provisions of the Corporations Act.

Recommendation 3

5.34 The committee recommends that the government consider making infringement notices available to the Australian Securities and Investments Commission to respond to breaches of the financial services and managed investments provisions of the Corporations Act.