The Australian Securities and Investments Commission (ASIC) has come under heavy fire for taking the lighter option of securing undertakings from businesses in breach of the law, rather than tougher penalties.

Former Australian Competition and Consumer Commission (ACCC) chairman Allan Fels described ASIC’s operations as:

> When something goes wrong, they call in the offender and they have an agreement with them, instead of going to court and getting fines and sanctions.

But ASIC and the ACCC are soft targets. ASIC is under-resourced to pursue litigation of significant scale and duration, so it’s no surprise that it seeks agreed outcomes with offenders and cherry-picks the cases it will litigate with a view to getting most bang for its buck.

Even when ASIC has pursued litigation, the approach taken by Australian courts to penalties has contributed to an environment where contravening behaviour remains a rewarding option.

Misleading conduct, courts and penalties

Both regulators have been active in pursuing contravening conduct, taking on prominent players in the market who have misled consumers. The ACCC has pursued action against various telcos and supermarkets, while ASIC has pursued Comminsure and Volkswagen to name a few.

Both ASIC and the ACCC have the power to seek penalties from corporations who break the law. However, courts have typically been very cautious in handing down heavy penalties. The courts have adopted approaches that emphasise proportionality and fairness to the particular defendant, over deterrence and punishment.

The consequence is that, however high the level of penalties are set under the legislation (and there are moves to increase these), in practice it continues to make good financial sense for banks and other businesses to engage in egregious and widespread patterns of misleading and unconscionable conduct.

A stunning example of this conundrum is the case of ACCC versus Reckitt Benckiser . The case concerned labelling on product packaging and two webpages about a range of four supposedly different Nurofen pain medications.

The labelling claimed to “target” four types of pain: migraines, tension headaches, period pain and back pain. In reality, there was no difference between the active ingredient in any of the four products.

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The products were sold at about double the price of standard Nurofen, which contained precisely the same active ingredient. Further, the active ingredient, Ibuprofen, does not “target” any kind of pain but rather treats all types of pain in the same way.

Over the five year period of the campaign there were 5.9 million sales of the four products yielding revenue to Reckitt Benckiser of about A$45 million . In theory, the maximum penalties that were able to be awarded for these contraventions of the law was in the trillions of dollars .

But in the first instance, a penalty of A$1.7 million was awarded. This award was then overturned by the Federal Court which increased the penalty to A$6 million.

The court commented that it might have awarded a higher penalty but had not been requested by the ACCC to do so. But this is somewhat ironic.

The ACCC based its claim on advice by the courts that the penalty should reflect the number of “courses of conduct” involved , rather than the number of times a misleading statement had been repeated. This approach keeps penalties low.

What needs to change

Courts have it well within their power to adjust their interpretations of penalties. One option is to ensure that any penalty strips the offender of the profit they obtained through the wrongdoing. While some courts have recognised this possibility , a more concerted and coordinated shift will be required to ensure that penalties for contravening the law are not merely another cost of doing business.

The other line of attack is to shift some of the enforcement load from the over-burdened and under-resourced regulator, to the victims of misleading and other unlawful conduct. The law provides victims with the power to seek private redress through the courts, like seeking compensation for loss caused by misleading conduct.

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However, the reality is that for many this is financially impossible . The costs of litigation will far outweigh the relatively small sums that may be recovered for individual breaches of the law.

In cases of very serious misconduct, it might be possible to bolster the rights of banking customers and other consumers. The law could include a bigger range of powers for victims to seek profit-stripping, exemplary (also known as punitive) or additional damages.

For example, victims could be given the right to claim punitive damages over and above compensation for the loss they have suffered, plus their full costs of litigation, in cases of serious misconduct. This combination would both deter and punish wrongdoers, and make it worthwhile for consumers to go to the courts to enforce their rights.

For victims of misleading conduct in trade or commerce in Australia, it might be time really to give effect to the old adage that no man, woman or for that matter bank should benefit from their wrongdoing.

Elise Bant receives funding from the Australian Research Council.

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