

On September 6, 2018, the Australian Securities and Investments Commission [launched proceedings](#) against two arms of the National Australia Bank alleging a widespread and long standing practice of charging fees for no service.

An intriguing aspect of the action is that the claim acknowledges that the two firms have already agreed to pay back around A\$87 million to the affected customers. So ASIC isn't seeking compensation.

Instead, it wants declarations that the NAB subsidiaries breached the law and engaged in "misleading or deceptive" conduct under the ASIC Act and "false or misleading" conduct under the Corporations Act.

More than compensation

It is seeking penalties in respect of those breaches.

Declarations and penalties are important because they can inflict reputational damage.

This can send a powerful message to the rest of corporate Australia about the need to observe and respect the law, something that appears to have been missing in the financial sector to date.

Also, the greater the penalties imposed, the less financially attractive the behaviour becomes to other corporations, who, after all, are chiefly motivated by profit.

Penalties are typically low

However, to date it is arguable that the level of penalties sought by ASIC and imposed by the courts have been too low to act as an effective deterrent.

Fees for no service: how ASIC is trying to make corporate misconduct hurt

Written by Elise Bant, Professor of Law, University of Melbourne

ASIC's latest claim is a significant step forward.

It is seeking penalties that are likely to hurt, and as a result more likely to make a difference to corporate behaviour.

Its [Concise Statement of Claim](#) points to the purpose of its legislation which is to protect consumers and promote fair and efficient market economies.

Read more: [How courts and costs are undermining ASIC and the ACCC's efforts to police misbehaving banks and businesses](#)

In essence, it is asking the Federal Court to make orders directed at changing corporate practices that undermine that purpose.

Its challenge will be to persuade the court to take seriously the need for deterrence and for punitive penalties in addition to compensation.

Interestingly, it isn't alleging that the NAB subsidiaries made misrepresentations dishonestly, knowingly or recklessly. Its focus is on "misleading" rather than "deceptive" conduct.

Dishonesty is hard to prove

This is likely to be because personal dishonesty is notoriously difficult to prove against corporations, whose human agents (employees, managers and the like) are often engaged in independent activities and are not be able to "connect the dots" about broader corporate dishonesty.

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It might be time for the law to move away from questions of personal dishonesty and instead look at the objective nature of corporate behaviour. Longstanding practices and systems that are designed to and are inherently likely to mislead fall below the standards Australians expect, whether or not any of the individuals involved act dishonestly.

The case against the subsidiaries of NAB might provide the perfect opportunity for ASIC and the courts to take an important step in the right direction.

Elise Bant receives funding from the Australian Research Council to conduct research with Associate Professor Jeannie Paterson (University of Melbourne) into the regulation of misleading conduct at common law, in equity and under statute.

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Read more <http://theconversation.com/fees-for-no-service-how-asic-is-trying-to-make-corporate-misconduct-hurt-103089>