

Fines that'll hurt. ASIC's powerful, if ill-fitting, teeth

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At last, our corporate watchdog has a strong set of teeth with which to fight crime and serious misconduct in the financial sector.

The Treasury Laws Amendment ([Strengthening Corporate and Financial Sector Penalties](#)) Bill finally made it through parliament last week.

In cases of serious misconduct it will empower the Australian Securities and Investments Commission to seek new, hefty fines. For example, in cases of unconscionable conduct, ASIC can seek A\$10.5 million (up from the previous A\$1 million), to get back three times the proceeds of (or expense saved from) the misconduct, or fine a corporation 10% of its annual turnover up to a maximum of A\$210 million, whichever is the greatest.

The enhanced fines were recommended by the Treasury's [ASIC Enforcement Review Taskforce](#) which predated the financial services royal commission.

The legislation (and the speed with which it was finally passed) makes it clear that parliament wants to stop fines and penalties being viewed simply as a cost of doing business.

This has been made even clearer by courts being given power to make “relinquishment orders” that aim to strip any remaining profits from wrongdoers over and above the penalties.

Also important is the bill's change to the definition of the word “dishonest”.

The new definition requires courts simply to focus on whether the conduct was dishonest “according to the standards of ordinary people”.

Read more: [**Banking Royal Commission: no commissions, no exemptions, no fees without permission. Hayne gets the government to do a U-turn**](#)

Previously courts were required to use an “eye of the beholder” definition that required plaintiffs to prove that the wrongdoer also understood the conduct was dishonest according to those standards.

As [the royal commissioner Kenneth Hayne noted](#) , under the previous definition it was all too easy for directors and senior managers to blame misconduct on “processing and administrative errors” – in effect saying wrongdoers didn’t realise they were being dishonest even if ordinary people would have thought they were.

Strong, yet imperfect

While there is much to be applauded in this legislation, there are serious remaining problems raised in [submissions](#) to the Treasury that have been left unaddressed.

That might in part be due to the speed with which the bill was prepared and passed, but it is also the result of a wider systemic problem.

The pieces of legislation expressly changed by the bill were the major ones dealing with corporations, financial service providers, consumer credit providers, and insurance.

That meant that other statutes that also prohibit misconduct in trade and commerce remain unchanged, and were apparently not taken into account in drafting the bill. It has made the treatment of similar misconduct inconsistent.

An example illustrates the problem.

The pieces of legislation changed provide a defence to a civil pecuniary penalty order only where a defendant made a “mistake of fact”, established by considering whether the defendant “considered whether or not facts existed” and “was under a mistaken but reasonable belief about those facts”.

But an unchanged part of the law, Section 226 of the Australian Consumer Law, allows the court to show leniency where it establishes that “the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused”. So rather than having its hands tied, the court can consider all the circumstances, including whether the seriousness of the breach (for example, causing physical harm to consumers) demands a large penalty, notwithstanding that the defendant made an honest and reasonable mistake.

The second approach is arguably better, but the discrepancy between the two is likely to lead to “regulatory arbitrage” as both sides tie up the legal system trying to establish which part of the law should apply.

Anything but a complete redesign

This government, like many before it, has responded to deficiencies in the law by attempting to patch it up. It said it couldn't respond to the royal commission's recommendations before parliament closed because it would need to amend more than 40 pieces of legislation.

But that's indicative of the problem. Patching up legislation, rather than replacing it with something simple, runs the risk of making it worse. Hayne spoke about enforcing core principles. We're not there yet.

Read more: [Understanding Hayne. Why less is more](#)

With Professor Paterson, Elise Bant receives funding from the Australian Research Council to support research on DP180100932 'Developing a Rational Law of Misleading Conduct'.

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