

08.06.2021

## NEWS

# ASIC sharpens its focus on enforcement

The reality of ASIC's post Royal Commission 'why not litigate' philosophy has been brought into sharp focus by its almost daily media releases detailing action taken by the corporate regulator, as well as the publication of its enforcement update for July to December 2020.

In this article, partner Selina Nutley provides a quick summary highlighting ASIC's actions and some notable outcomes and sends a timely reminder to seek advice promptly if you find yourself involved in an ASIC investigation.

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## SUMMARY OF ASIC'S ACTIONS

ASIC reports its actions led to the imposition of civil penalties by the courts totalling \$159.8 million and heralded a 64 percent increase in civil penalty proceedings and a 36 percent increase in criminal proceedings. Additionally, it banned 22 people from providing financial services or credit, disqualified 28 people from directing a company, and has more than 300 investigations on foot.

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## NOTABLE OUTCOMES

Some notable enforcement actions include:

- Imposing—
  - a \$57.5 million penalty by the Federal Court on two National Australia Bank subsidiaries for making false and misleading representations to superannuation members about plan service fees
  - a \$2 million penalty on Theta Asset Management for issuing five defective PDSs which lead to investors in the scheme sustaining 'catastrophic' losses
  - a \$75 million penalty on AGM Markets Pty Ltd and two of its authorised representatives for systemic unconscionable conduct while providing over-the-counter derivative products to retail investors, and failure to properly supervise the conduct of its authorised representatives.
- Banning a former company director from managing corporations for a period of three-and-a-half years for failing to assist liquidators of six failed companies.
- Banning Mayfair 101 director James Mawhinney from promoting and raising funds through financial products for a period of 20 years. The lengthy period reflects the court's view not only of the gravity of Mr Mawhinney's conduct, but his 'propensity for conduct in disregard of the requirements of the financial services laws'.
- Instituting proceedings against La Trobe Financial Asset Management Ltd seeking declarations and pecuniary penalties

arising from advertising ASIC asserts was misleading or deceptive.

- Commencing proceedings against a credit licensee for failing to comply with two determinations issued by the Australian Financial Complaints Authority (AFCA). It is worth noting failure to cooperate with AFCA is a civil penalty offence which attracts maximum penalties of \$10.5 million for companies and \$1.05 million for individuals.

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## **NEW AND EMERGING PRIORITIES**

ASIC is presently developing its enforcement priorities for the 2021-22 financial year with the aim of directing enforcement resources to significant areas of need, including new or emerging issues. Its report says it will continue to encourage those under investigation to cooperate with ASIC as fully and quickly as possible, to ensure only those issues genuinely in dispute will become the subject of possible proceedings.

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## **IMPLICATIONS FOR THE INDUSTRY**

Whatever its enforcement priorities for the upcoming financial year may be, the implications of ASIC's new litigation philosophy are already being felt keenly across the industry. We have had reports of clients being declined renewal of their insurance policies, with insurers citing risks arising from ASIC's enforcement activism and AFCA's approach to dispute resolution as key reasons.

If you experience difficulties in insurance renewal, or find yourself involved in an ASIC investigation, you should seek advice promptly. Our Funds Management and Litigation lawyers have extensive experience and are best positioned to help you navigate these issues.

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