



ASIC
Australian Securities &
Investments Commission



ASIC Enforcement Update

July to December 2020

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About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents: consultation papers, regulatory guides, information sheets and reports.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations. Examples in this report are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

Overview

This report provides an update on ASIC's enforcement work undertaken between 1 July and 31 December 2020, a period in which we continued to take action to support our enforcement priorities and pursue a fair, strong and efficient financial system for all Australians.

Record penalties send strong messages of deterrence

The period saw civil penalties totalling \$159.8 million imposed by the courts. This included ASIC's two largest ever civil penalty outcomes – penalties totalling \$57.5 million were imposed on two NAB subsidiaries for fees-for-no-service misconduct, and penalties totalling \$75 million were imposed on OTC derivatives provider AGM Markets Pty Ltd and two of its authorised representatives for systemic unconscionable conduct.

The outcomes of these cases send a clear message to all industries – consumers must be treated fairly and misconduct that results in significant consumer harm will be strongly punished.

More information about these cases, as well as other key actions we have taken to enforce the law and support our priorities, can be found later in this report.

Increase in court proceedings

In this period we continued to use our increased resourcing to build our capability to pursue court outcomes. Comparing the 2018 and 2020 calendar years, ASIC has recorded a 64% increase in civil penalty proceedings as well as a 36% increase in the number of criminal proceedings commenced.

Notably, we launched five court proceedings between 1 July and 31 December in pursuit of our COVID-19 interim enforcement priorities.

Royal Commission matters

Finalising referrals and case studies from the Financial Services Royal Commission remained a priority for ASIC in the second half of 2020. We also used our increased resourcing to fast-track the completion of investigations into Royal Commission case studies and referrals, and of the 45 total investigations from the Royal Commission, only 11 remained on foot as at 31 December 2020.

The finalised investigations and court outcomes have so far resulted in a total of \$77.65 million in imposed penalties.

What's next?

ASIC will continue to act against misconduct that threatens the integrity of Australia's financial system and markets. This includes pursuing matters that attempt to exploit the pandemic environment or that hinder recovery from it.













We will continue to encourage entities and individuals who are under investigation to cooperate with ASIC as fully and quickly as reasonably possible. This approach is aimed at ensuring that only factual and legal issues that are genuinely in dispute will become the subject of prospective proceedings. This may in turn lead to reductions in costs and delays for the parties.

New priorities for our enforcement work are currently being developed for the 2021–22 financial year to ensure that our enforcement resources are used to address the most significant areas of need, including new or emerging issues.

Summary of enforcement results

Figure 1 summarises all enforcement results recorded between 1 July and 31 December 2020, including those that have not been reported in public announcements. For example, results arising from summary prosecutions for strict liability offences are not generally announced in ASIC media releases.

Figure 1: Summary of enforcement results (July to December 2020)

PROSECUTIONS		
27	individuals charged in criminal proceedings	
194	criminal charges laid	
5	custodial sentences (4 people imprisoned), including fully suspended sentences	
14	non-custodial sentences	
90	defendants prosecuted for strict liability offences	
185	criminal charges laid in summary prosecutions for strict liability offences	
CIVIL PENALTIES		
\$159.8m	in civil penalties imposed by the courts	
14	civil penalty cases commenced	
18	civil penalty cases currently before courts	
BANNINGS		
22	individuals removed or restricted from providing financial services or credit	
28	individuals disqualified or removed from directing companies	
INFRINGEMENT NOTICES AND COURT ENFORCEABLE UNDERTAKINGS		
2	court enforceable undertakings	
INVESTIGATIONS		
107	investigations commenced	
211	investigations ongoing	

ASIC's enforcement work and priorities

ASIC is Australia's corporate, markets, financial services and consumer credit regulator. Our vision is for a fair, strong and efficient financial system for all Australians.

To realise our vision, we use all our regulatory tools to:

- › change behaviours to improve outcomes for consumers and investors
- › act against misconduct to maintain trust and integrity in the financial system
- › promote strong and innovative development of the financial system
- › help Australians to be in control of their financial lives.
- › misconduct that is serious either by its nature or extent of harm, or that involves a large market participant or licensed entity
- › misconduct that involves a high risk of significant consumer harm, particularly involving vulnerable consumers
- › misconduct by individuals, particularly criminal conduct or governance failures, at board or executive level.

Our enforcement priorities

In the second half of 2020 we continued to prioritise the following types of matters:

- › Financial Services Royal Commission referrals and case studies
- › misconduct related to superannuation and insurance
- › cases that engage ASIC's new powers or provisions that now carry penalties or higher penalties
- › illegal phoenix activity
- › auditor misconduct
- › new types of misconduct (e.g. those carried out online or using emerging technologies).

New priorities for our enforcement work are currently being developed for the 2021–22 financial year.

We will always prioritise the following types of misconduct:

- › significant market misconduct

COVID-19 response

In response to the impact of the COVID-19 pandemic on the financial system and the potential for harm that this has created, we have continued to pursue matters to address the following issues:

- › conduct that seeks to exploit the pandemic environment, including predatory lending, mis-selling and poor claims handling
- › opportunistic conduct, including scams
- › failures to disclose materially negative information
- › opportunistic and misleading market announcements
- › egregious governance failures within corporations, schemes and superannuation funds.

Between 1 July and 31 December 2020, we commenced five court proceedings and administratively prevented two companies from relying on reduced disclosure rules in the course of pursuing these priorities.

Royal Commission work

Since the completion of the Financial Services Royal Commission, we have applied our increased resourcing to fast-track the completion of our investigations of all Royal Commission referrals and case studies.

From a total of 45 investigations, as at 31 December 2020:

- › 7 had resulted in litigation that has been completed, resulting in total penalties of \$77.65 million being imposed
- › 11 had resulted in litigation that remained on foot
- › 11 investigations remained on foot.

Note: The remaining 16 cases required no further action.

In September 2020, the Federal Court ordered two entities in NAB's wealth management division – NULIS Nominees (Australia) Limited (NULIS) and MLC Nominees Pty Ltd (MLC Nominees) – to pay a total of \$57.5 million in penalties for making false and misleading representations to superannuation members about plan service fees. This is the largest penalty imposed in a matter referred to ASIC by the Financial Services Royal Commission: see case study on page 9.

Increase in court proceedings

Comparing the 2018 and 2020 calendar years, there has been:

- › a 64% increase in the number of civil penalty proceedings commenced
- › a 27% increase in the number of briefs referred to the Commonwealth Director of Public Prosecutions (CDPP)
- › a 36% increase in the number of criminal proceedings commenced.

Financial services

ASIC regulates the conduct of financial services and credit providers. Our work in financial services is focused on improving consumer outcomes. We do this by addressing practices that result in consumer harm or create a risk of harm, particularly for vulnerable consumers.

This includes ensuring that:

- › financial services and credit providers act in the best interests of consumers and investors
- › financial services company directors and their officers are held to account as important gatekeepers who have a duty to ensure the company acts lawfully.

Financial services enforcement results

In the six months between 1 July and 31 December 2020, ASIC recorded 37 financial services-related results (see Table 1).

As at 1 January 2021, ASIC had 16 criminal and 61 civil financial services-related matters still before the courts (see Table 2).

Table 1: Financial services enforcement results (number of respondents by misconduct and remedy type) 1 July to 31 December 2020

Misconduct type	Criminal	Civil	Administrative	Court enforceable undertaking	Total
Credit misconduct	3	3	3	2	11
Financial advice misconduct	3	3	7	0	13
Insurance misconduct	0	2	0	0	2
Investment management misconduct	0	5	1	0	6
Superannuation misconduct	1	2	0	0	3
Other financial services misconduct	0	1	1	0	2
Total	7	16	12	2	37

Note: The results in this table have been reported in ASIC media releases and include court determinations (criminal and civil), administrative remedies and acceptance of court enforceable undertakings.

Table 2: Financial services enforcement litigation in progress (number of respondents as at 1 Jan 2021)

Misconduct type	Criminal	Civil
Credit misconduct	6	11
Financial advice misconduct	3	21
Insurance misconduct	1	8
Investment management misconduct	2	7
Superannuation misconduct	4	14
Total	16	61



Case study: ASIC holds gatekeepers to account for defective Product Disclosure Statements

Responsible entities and their directors must ensure that Product Disclosure Statements issued under their supervision are accurate. Theta Asset Management and its managing director failed to do so, resulting in significant penalties and a four-year disqualification.

In November 2020, the Federal Court found that Theta Asset Management Ltd (In Liquidation) (Theta) and its managing director Mr Robert Marie contravened their duties under the Corporations Act on multiple occasions in relation to the issue of five defective Product Disclosure Statements (PDSs) for the Sterling Income Trust.

'The Federal Court outcome sends an important deterrent message to other responsible entities, as well as to those entrusted to act as gatekeepers, to ensure they comply with their legal obligations.' – Commissioner Cathie Armour

ASIC obtained court orders for Theta to pay a penalty of \$2,000,000 for its contraventions and Mr Marie to pay a penalty of \$100,000. Mr Marie was also disqualified for four years from managing corporations.

The court heard that, between 20 May 2016 and 30 April 2018, a total of \$16.7 million was raised from retail investors under the defective PDSs. Justice McKerracher noted in his judgment that investors in the scheme sustained 'catastrophic' losses.

This case demonstrates that ASIC will hold responsible entities and their directors to account for not complying with their legal duties to ensure that accurate PDSs are issued.

Notably, this proceeding took less than a year to be finalised, having commenced in December 2019.

For more information, see [ASIC media release 20-292MR](#).



Case study: \$57.5 million in penalties for egregious fees-for-no-service misconduct

Last year the Federal Court strongly denounced the conduct of two NAB subsidiaries that deducted fees from the accounts of thousands of unsuspecting consumers that they were not entitled to charge. The court's decision sends a clear warning that fees-for-no-service misconduct will be treated extremely seriously.

In September 2020, the Federal Court ordered two entities in NAB's wealth management division – NULIS Nominees (Australia) Limited (NULIS) and MLC Nominees Pty Ltd (MLC Nominees) – to pay a total of \$57.5 million in penalties for making false and misleading representations to superannuation members about plan service fees. Justice Yates also made declarations that NULIS and MLC Nominees failed to ensure that their financial services were provided efficiently, honestly and fairly.

Justice Yates ordered MLC Nominees to pay a total penalty of \$49.5 million for its contraventions – much higher than the penalty of \$10 million proposed by MLC Nominees. A penalty of \$8 million was imposed on NULIS.

'I do not think that the pecuniary penalty which MLC Nominees has proposed (\$10 million) fully recognises the seriousness of its conduct or will achieve the objectives of deterrence, particularly general deterrence.'

– Justice Yates

Between 8 September 2012 and 30 June 2016, MLC Nominees deducted approximately \$33.6 million in plan service fees from approximately 220,000 members of MasterKey Business Super and MasterKey Personal Super even though those members did not have a plan adviser.

Between 8 September 2012 and 30 September 2018, MLC Nominees and NULIS deducted approximately \$71.9 million in plan service fees from approximately 457,000 members of MasterKey Personal Super, where plan advisers were not required to provide services and members did not receive any services of value.

This was the first enforcement action brought by ASIC concerning fee-for-no-service activity. ASIC commenced investigative work on fees for no service in 2015 and undertook a major industry-wide review into failures by six of the largest financial institutions to deliver advice services to customers where fees had been charged.

Fee-for-no-service misconduct is a systemic failure that often takes advantage of disengaged consumers. It results in consumers being charged for services they never received.

This case aligns with our enforcement priority to address Royal Commission referrals and case studies. It is the largest penalty imposed in a matter referred to ASIC by the Financial Services Royal Commission.

Markets

ASIC investigates market misconduct and acts to ensure Australia’s financial markets are fair and efficient. This includes addressing issues relating to:

- › *insider trading* – this damages trust in market fairness and transparency,
- › *market manipulation* – this undermines fair, orderly and transparent markets, and can have the effect of creating an artificial price for trading in financial products on a financial market, and
- › *continuous disclosure* – compliance with continuous disclosure obligations ensure that markets are fully informed

Markets enforcement results

In the six months between 1 July and 31 December 2020, ASIC recorded 12 market-related results (see Table 3).

As at 1 January 2021, ASIC had 10 criminal and five civil market-related matters still before the courts (see Table 4).

Table 3: Markets enforcement results (number of respondents by misconduct and remedy type) 1 July to 31 December 2020

Misconduct type	Criminal	Civil	Administrative	Court enforceable undertaking	Total
Continuous disclosure	0	3	2	0	5
Insider trading	1	0	0	0	1
Emerging misconduct (cyber, crypto)	0	0	1	0	1
Other market misconduct	3	1	1	0	5
Total	4	4	4	0	12

Note: The results in this table have been reported in ASIC media releases and include court determinations (criminal and civil) and administrative remedies.

Table 4: Markets enforcement litigation in progress (number of respondents as at 1 January 2021)

Misconduct type	Criminal	Civil
Continuous disclosure	0	4
Insider trading	5	0
Market manipulation	3	0
Emerging misconduct (cyber, crypto)	2	1
Total	10	5



Case study: \$75 million penalty puts OTC providers on notice

Some of the largest civil penalties ever imposed on financial service providers in Australia sent a clear message to providers of complex financial products that they cannot exploit vulnerable investors and must properly supervise the conduct of authorised representatives.

In October 2020, the Federal Court ordered that AGM Markets Pty Ltd and two of its authorised representatives, OT Markets Pty Ltd and Ozifin Tech Pty Ltd, pay a total of \$75 million in penalties for systemic unconscionable conduct while providing OTC derivative products to retail investors.

'The serious nature of the contraventions and the need to send a clear message to the limited number of licensees who are dealing in OTC derivatives justifies high penalties' – Justice Beach

Justice Beach imposed a higher penalty on AGM Markets Pty Ltd than on its two representatives, reflecting its failure to properly supervise the conduct of its authorised representatives.

Justice Beach also ordered that refunds be paid to approximately 10,000 former clients.

The court heard that account managers engaged on behalf of OT Markets Pty Ltd were told to 'kill your customers', a reference to encouraging their clients – often vulnerable investors whose trust the account managers had sought to win – to make deposits and trades.

These deposits and trades resulted in trading losses totalling approximately \$32 million, which the court found had translated to revenue earned by the three providers.

This case aligns with our enforcement priority to address misconduct that involves a high risk of significant consumer harm, particularly to vulnerable consumers. It demonstrates that OTC providers must have proper systems in place to ensure that they, and their representatives, comply with the law when dealing with customers – in particular, they must ensure that customers understand the complex products they are dealing with as well as the risks involved.



Case study: Insider trader sentenced to three years imprisonment for trading in Big Un shares

A three-year sentence for insider trading has demonstrated that ASIC will take strong action to ensure that Australia's financial markets remain robust, fair and efficient.

In September 2020, ASIC's insider trading case against Mr Michael Ming Jinn Ho, prosecuted by the CDPP, came to a close, with the NSW District Court sentencing Mr Ho to three years imprisonment. The result aligns with our enforcement priority to address serious market misconduct.

Mr Ho pleaded guilty to five counts of insider trading and one count of communicating inside information in respect of Big Un Limited (Big Un) shares and options between 18 July 2016 and 10 February 2018.

Mr Ho, a former investment analyst, invested approximately \$1.6 million in Big Un securities while in possession of inside information communicated to him by Big Un's CEO Richard Evertz.

Judge Michael King SC ordered Mr Ho serve his sentence via an intensive correction order, taking into account Mr Ho's cooperation with ASIC through the course of its investigation. The case highlights that reductions in punishment are available to those who cooperate with ASIC.

Significant discounts may apply where individuals cooperate with ASIC. ASIC will assess the level of cooperation it receives, and where appropriate, provide information about the nature, extent and timeliness of that cooperation to the court.

ASIC's investigation concerning Big Un Limited and its officers and executives continues. For more information about the case against Mr Ho, see [ASIC media release 20-209MR](#).

Corporate governance

ASIC is responsible for regulating behaviour that influences company performance. We work to ensure that public companies are properly accountable to their investors by regulating the conduct of companies, their officers and their auditors in Australia.

This includes ensuring public companies understand their obligations to:

- › treat investors and consumers fairly
- › be accountable to investors through accurate, timely and clear disclosure
- › adopt sound corporate governance practices.

Corporate governance enforcement results

In the six months between 1 July and 31 December 2020, ASIC recorded one corporate governance-related result (see Table 5).

ASIC had 12 criminal and three civil corporate governance-related matters still before the courts as at 1 January 2021 (see Table 6).

Table 5: Corporate governance enforcement results (number of respondents by misconduct and remedy type) 1 July to 31 December 2020

Misconduct type	Criminal	Civil	Administrative	Court enforceable undertaking	Total
Directors' duties and governance failures	0	1	0	0	1
Total	0	1	0	0	1

Note: The results in this table have been reported in ASIC media releases.

Table 6: Corporate governance enforcement litigation in progress (number of respondents as at 1 Jan 2021)

Misconduct type	Criminal	Civil
Directors' duties and governance failures	12	3
Total	12	3



Case study: Tennis Australia director penalised for failing to properly discharge his directors' duties

In November 2020, Harold Mitchell was ordered to pay a penalty of \$90,000 for contravening his directors' duties. The case demonstrated ASIC's preparedness to enforce directors' duties laws when the conduct of company officers gives rise to reasonably foreseeable harm.

The Federal Court ordered Mr Mitchell, a former Vice President of Tennis Australia Limited, to pay a \$90,000 penalty for three contraventions of his directors' duties. The court found that Mr Mitchell contravened s180(1) of the Corporations Act on three occasions in December 2012 when he sent emails to the Seven Network's commercial director that disclosed, among other things, Tennis Australia's internal deliberations about the sale of the rights.

The contraventions were in connection with a 2013 decision by Tennis Australia's board to award domestic television broadcast rights for the Australian Open to the Seven Network.

In his judgment, Justice Beach was satisfied that each of the three contraventions by Mr Mitchell was 'serious' within the meaning of the Corporations Act. His Honour observed, '*[Mr Mitchell's] conduct generally was undisciplined and fell well short of what was expected of a director in his position given the centrality and significance to [Tennis Australia] of the negotiations with Seven.*'

His Honour found that while no actual harm was caused to Tennis Australia by Mr Mitchell's conduct – and it was not his intention to cause harm – the emails gave rise to reasonably foreseeable harm and, accordingly, Mr Mitchell was found to have failed to meet his duties as a director and had breached s180(1). The case aligns with our enforcement priority to address misconduct by individuals, particularly criminal conduct or governance failures, at board or executive level.

Further allegations against Mr Mitchell, which comprised the majority of ASIC's case against him, were dismissed by the court. ASIC's case against Stephen Healy, another director and the President of Tennis Australia at the relevant time, was also dismissed in full.

ASIC undertakes litigation where it is in the public interest to do so, and in accordance with our obligations as a model litigant. Where, as in this instance, a court finds either partially or wholly against ASIC, we will review the conduct of the investigation and the litigation, as well as the court's reasoning, both to identify and share lessons to enhance the prospects for other existing and future enforcement actions.

For more information, see [ASIC media release 20-269MR](#).

Small business

ASIC focuses on helping small businesses understand and comply with their legal obligations under the Corporations Act, and conducts surveillance, enforcement and policy work.

When necessary, ASIC takes administrative, civil or criminal action against companies, directors and other officeholders who fail in their duties. By doing so, ASIC helps to ensure that all market participants can benefit from a level playing field.

Small business enforcement results

In the six months between 1 July and 31 December 2020, ASIC recorded 129 small business-related results (see Table 7).

Additionally, as at 1 January 2021, ASIC had 149 small business-related criminal matters still before the courts (see Table 8).

Table 7: Small business enforcement results (number of respondents by misconduct and remedy type) 1 July to 31 December 2020

Misconduct type	Criminal	Administrative	Total
Action against persons or companies	98	31	129
Total	98	31	129

Note: The results from our Small Business Engagement and Compliance team are not generally announced in ASIC media releases.

Table 8: Small business criminal prosecutions in progress (number of respondents as at 1 January 2021)

Misconduct type	Criminal
Action against persons or companies	149
Misconduct related to registration and licensing	0
Total	149



Case study: ASIC bans company officer for failing to assist liquidators

The disqualification of former company director Daniel Flynn demonstrates that officers of failed companies must assist liquidators, including by providing books and records, and that there will be consequences for not doing so.

In November 2020, ASIC disqualified Daniel Adin Flynn, of ACT, from managing corporations for three years and six months.

Mr Flynn had been involved in six failed companies, all of which failed during the 2019 calendar year. ASIC found Mr Flynn failed to assist the liquidators by not producing books and records on the failed companies and in one case not lodging a report to the liquidator as required under law.

Liquidators to five of Mr Flynn's failed companies requested assistance from ASIC under the External Administrator Assistance Program (EAP).

The EAP helps external administrators obtain books and records which they can use to conduct their investigations, recover assets and detect and report misconduct to ASIC.

ASIC will continue to work with liquidators for the benefit of creditors and to ensure that misconduct when reporting to liquidators is addressed. We will take action against directors of companies who fail to assist liquidators appointed to those companies.

For more information, see [ASIC media release 20-298MR](#).



Case study: Criminal conviction sends a warning to officers of failing companies not to engage in illegal phoenix activity

In December 2020, ASIC's prosecution of Andrew Kunz, a former director of Total Hoarding Supplies Pty Ltd (THS), was finalised when Kunz was sentenced to a two-year community corrections order, ordered to perform 200 hours of community service and pay a fine of \$2000 for engaging in illegal phoenix activity.

ASIC's investigation found Mr Kunz dishonestly transferred more than \$2 million of assets belonging to THS to Sybab Pty Ltd, of which Mr Kunz was also a director. The consideration for the asset transfer was a 20-year loan with Sybab at 8% interest per annum. THS was subsequently unable to continue to trade and generate cash flow to be able to meet its liabilities, leading to the company's insolvency. At the time of the asset transfer, THS was being pursued by the Bendigo and Adelaide Bank for loans of over \$1.6 million.

As a consequence of the conviction, Mr Kunz is automatically disqualified from managing corporations for five years.

The sentence and disqualification should act as a warning to other directors looking to move assets to facilitate illegal phoenix activity. ASIC can take both criminal and administrative legal action where this misconduct has occurred.

For more information, see [ASIC media release 20-340MR](#).