

FINANCIAL SERVICES MISCONDUCT AND THE CORPORATIONS ACT 2001

WORKING PAPER NO. 2

31 July 2015

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ABSTRACT

This working paper is the second published output of an eighteen-month (December 2014 – June 2016) research project conducted by staff at the Melbourne Law School that examines enforcement and penalties regimes under legislation administered by the Australian Securities and Investments Commission (ASIC). The paper follows Working Paper 1's scoping of penalties under ASIC administered legislation by discussing enforcement under the Corporations Act² through the lens of a study of court-based enforcement by ASIC of financial services misconduct. The paper is in three parts. Part I considers current debates about penalties regimes available to ASIC. Part II discusses the provisions and penalties presently operating under the Corporations Act for financial services misconduct. Part III examines the actual penalties handed down for corporate wrongdoing for financial services misconduct in Australian Courts by way of a small case study of ASIC court based enforcement cases from 2011-2013. Part IV concludes.

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² *Corporations Act 2001* (Cth) ("Corporations Act").

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I INTRODUCTION

The financial and insurance sector is of national strategic importance in Australia. For example, 2015 data published by the Australian Trade Commission reveals the scale and contribution of the Australian finance and insurance sector as it:

- contributes 9.0% of Australia’s real gross value added by industry;
- employs 3.6% of Australia’s total workforce;
- has an annual average growth rate of 6.0% between 1991 and 2014;
- holds assets of Aus\$6,386 billion (more than four times Australia’s nominal GDP);
- has US\$2.4 trillion pools of funds under management (the largest in Asia and 3rd largest in the world);
- has stock market capitalization of US\$1,123 billion (the 8th largest in the world); and
- has financial markets turnover annually of A\$125 trillion (79 times the size of Australia’s nominal GDP).³

Consequently protecting the integrity of Australia’s financial and insurance sector is of crucial importance to the well-being of Australia’s economy and its population. Current levels of regulation for financial services⁴ in Australia are dictated by 753 sections making up Chapter 7 of the Corporations Act. Of that number, 308 sections (41% of Chapter 7) have explicit enforcement consequences in the form of criminal, civil penalty or financial service civil penalty consequences if they are contravened.⁵ ASIC estimates that it spends \$108 million per year in carrying out its Chapter 7 remit.⁶ The recent Senate review of ASIC’s performance has in effect raised the issue of whether this represents an appropriate level of regulatory resource with attendant enforcement powers and possible use of sanctions given the dramatic growth of financial services as a share of the economy.⁷

³ Australia Trade Commission, *Why Australia Benchmark Report 2015*, January 2015, <http://www.austrade.gov.au/Invest/Reports-Resources/Benchmark-Report>.

⁴ Financial services excludes securities (Corporations Act, Chapter 6D) and credit products falling under the Uniform Consumer Credit Code. See *National Consumer Credit Protection Act 2009* (Cth).

⁵ See Part II below.

⁶ Senate Economic References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (June 2014) 410 [25.42], http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/.

⁷ Ibid 3-8.

ASIC has indirectly declared its position on this issue by calling for a review of penalty regimes applying to, inter alia, financial services regulated by Chapter 7.⁸ ASIC thus advocates for more regulation, not less. Not new substantive obligations it must be said but, rather, a more severe penalty regime for responding to contraventions of substantive obligations. Calls for penalty reform reflect ASIC's determination to impact more effectively on organisational culture and drive normative change within the financial services sector. Recent appearances before parliamentary committees and public speeches by ASIC chair, Mr Greg Medcraft, as well as reports released by ASIC,⁹ indicate that ASIC views normative change from within the industry itself as critical to its regulatory legitimacy and authority. Penalties are seen as a driver of that change, signalling to the regulated what will and will not be tolerated by the regulator.

For example, in an address at the National Press Club in Canberra on 3 December 2014 Mr Medcraft argued that existing penalties regimes available to ASIC are insufficient: 'Breaking the law in the financial sector seems to be a trade-off between fear and greed. So, Australia needs penalties that amplify the fear and suppress the greed. Australia needs penalties that will scare the pants off people.'¹⁰ Mr Medcraft is stressing both individual and general deterrence as regulatory strategies. The core widely applied rationales for punishment are: deterrence (including both general and individual deterrence); incapacitation; rehabilitation; restoration; and retribution.¹¹ All of these rationales permeate the enforcement strategy of ASIC which it discusses in *Information Sheet 151 ASIC's approach to enforcement*.¹² The central goals that shape ASIC's enforcement practices are: i) strategic significance (e.g. extent of the harm or loss?); ii)

⁸ Australian Securities and Investments Commission, Submission No 45 to Senate Economic References Committee, Parliament of Australia, *Inquiry into the performance of the Australian Securities and Investments Commission*, 31 October 2013, 172 [651]-[652], <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2013-releases/13-300mr-asic-lodges-major-senate-inquiry-submission>.

⁹ See ASIC, *Review of retail life insurance advice*, Report 413 (October 2014), <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2014-releases/14-263mr-higher-standards-needed-for-life-insurance-industry/>. Report 413 reveals many problems in Australia's life insurance industry, especially surrounding high policy lapse rates, inappropriate incentive structures and quality of financial advice given to consumers. For example, of the 202 advice files reviewed for the report, ASIC found that 37% of consumers received advice that failed to meet the relevant legal standard that applied when the advice was given. This is a disturbingly high figure pointing to deep-seated cultural and structural problems in the industry.

¹⁰ G. Medcraft, *ASIC explained: Who is the corporate watchdog, what does it do and why should Australians care?* Speech delivered at the National Press Club of Australia, Canberra, 3 December 2014, <http://asic.gov.au/about-asic/media-centre/speeches/asic-explained-who-is-the-corporate-watchdog-what-does-it-do-and-why-should-australians-care>.

¹¹ There is an enormous literature on the theory and practice of punishment. See for example: A. Ashworth, *Sentencing and Criminal Justice* (Weidenfeld and Nicolson, 1992); C. Beccaria, *On Crimes and Punishments* (Bobbs-Merrill, 1963, first published 1764); D. Garland, *Punishment and Modern Society, A Study in Social Theory* (Clarendon, 1991); and N. Lacey, *State Punishment* (Routledge, 1988).

¹² Australian Securities and Investments Commission, *ASIC's approach to enforcement*, Information Sheet 151 (September 2013), <http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement>.

benefits of pursuing misconduct (e.g. cost-effectiveness?); iii) features of the matter (e.g. available evidence?); and iv) non-investigative alternatives?¹³ Some of the more punitive approaches that ASIC can follow include: civil financial penalties; criminal financial penalties; and prison terms and court orders.¹⁴ ASIC also has the flexibility to adopt enforcement strategies that may be: compensatory; corrective; preservative (e.g. ensuring assets remain within jurisdictional authority); protective (e.g. disqualification orders); or aiming for a negotiated resolution (e.g. enforceable undertakings).¹⁵ Information Sheet 151 details specific examples of how ASIC constructs its enforcement approach in matters utilising these rationales and available enforcement tools.

So when Mr Medcraft was making his public comments in December 2014 he was drawing on clearly stated public positions of ASIC stated in key documents such as Information Sheet 151. Other key documents that discuss penalties include ASIC's October 2013 submission to the Senate Inquiry into the performance of ASIC.¹⁶ In that submission, ASIC stressed the importance of penalties to its regulatory mission and the need for review in the area:

'ASIC suggests a broad review of penalties across the corporations legislation, which, among other things, could consider:

(a) the consistency of criminal penalties, and whether some comparable offences currently attract inconsistent penalties;(b) the range of civil penalty provisions that would promote consistency with other civil penalties for corporations; (c) the level of civil penalty amounts, and whether the legislation should provide for the removal of any financial benefit in the civil penalty regime; and (d) infringement notices, and whether they should be available for a broader range of breaches and their amounts adjusted to increase their deterrent effect.'¹⁷

ASIC has built on its comments in its submission to the Senate Economics References Committee with its April 2014 Report 387 *Penalties for corporate wrongdoing* (Report).¹⁸ ASIC believes that its regulatory capacities to achieve higher levels of individual and general deterrence to counter corporate wrongdoing, (in comparison to the comparable jurisdictions examined in the report), are inhibited by this reduced flexibility to impose higher non-criminal penalties and limited scope to use non-criminal penalties against a wider range of wrongdoing. For example, the report notes that civil penalties are available for a range of corporate wrongdoing in Australia, but they are not available for some serious contraventions of the Corporations Act, including: (a) carrying on a financial services business without a licence (s911A); (b) failing to comply with the

¹³ Ibid 3-4.

¹⁴ Ibid.

¹⁵ Ibid 6-7.

¹⁶ ASIC, above n 8.

¹⁷ Ibid 172.

¹⁸ Australian Securities and Investments Commission, *Penalties for corporate wrongdoing*, Report 387 (20 March 2014), <http://www.asic.gov.au/asic/asic.nsf/byHeadline/14-055MR%20ASIC%20reports%20on%20penalties%20for%20corporate%20wrongdoing?opendocument>.

general obligations of financial services licensees (s912A); and (c) making false or misleading statements that would induce a person to buy or sell a financial product, or could have an effect on the market (s1041E).¹⁹ Thus it is clear that ASIC is lobbying strongly for change in terms of its capabilities to seek and impose penalties.

ASIC has since received a sympathetic ear from the wide-ranging Financial System Inquiry (FSI), chaired by former chairman of both the Commonwealth Bank of Australia and the Future Fund Mr David Murray AM. The FSI's final report (released on 7 December 2014), not only recommended that the Commonwealth Government should provide ASIC with banning powers, but also stated that: 'The maximum civil and criminal penalties for contravening ASIC legislation should be substantially increased to act as a credible deterrent for large firms. ASIC should also be able to seek disgorgement of profits earned as a result of contravening conduct.'²⁰ These recommendations add to the perception that change may occur regarding ASIC's available powers and penalties. Consequently it is appropriate at this point to consider what the current provisions are under the Corporations Act and we do so by focusing on one area, that of financial services misconduct.

II CURRENT PROVISIONS GOVERNING FINANCIAL SERVICES MISCONDUCT

A Overview

1 Financial Services Misconduct

Financial services misconduct is, of course, a catch-all term for conduct that fails to observe the requirements of Chapter 7 of the Corporations Act. A quick overview of Chapter 7 brings into focus the enormity of the regulation project that it contemplates and the enforcement activity that it anticipates. Chapter 7 provides the legal framework for the uniform regulation of financial service providers, financial product markets and clearing and settlement facilities in Australia. It covers most financial services and products: superannuation; the investment components of life insurance; risk insurance; bank deposits, foreign exchange derivatives and credit products other than those falling under the Uniform Consumer Credit Code.²¹ Chapter 7 has three core components: licensing; conduct obligations and prohibitions for licensees and disclosure obligations for those in the financial services industry. The regulation sounds simple enough in abstract but descends into complexity and technicality on application. ASIC frequently cites as the most common examples of financial services misconduct inappropriate

¹⁹ Ibid 18.

²⁰ Commonwealth of Australia, *Financial System Inquiry Final Report* (November 2014), 250, <http://fsi.gov.au/publications/final-report>.

²¹ Uniform Consumer Credit Code, above n 4.

financial advice, unlicensed (financial market or service) conduct, and fraud or misleading representations.²²

2 Current Penalty Regimes

The Corporations Act arms ASIC with two penalty regimes²³ for responding to financial services misconduct: criminal penalties and civil penalties. Criminal penalties are governed by Part 9.4 (Offences) and civil penalties, by Part 9.4B (Civil Consequences of Contravening Civil Penalty Provisions). Criminal penalties are imposed by Courts, following their determination that offences have been committed. A list of criminal penalties that may be imposed in connection with Chapter 7 offences is set out in Schedule 3 to the Act. Civil penalties require a determination by Courts that civil penalty provisions, as defined in the Corporations Act, have been contravened. There are two types of civil penalty. Pecuniary (financial) civil penalties for financial service civil penalty contraventions are made pursuant to s 1317G. Management disqualification civil penalty orders are made pursuant to s 206C, but these do not apply to financial services misconduct.

3 Criminal versus Civil Penalties

There are many provisions in Chapter 7 that enliven the criminal penalty regime more than the civil penalty regime. This is because the civil penalty regime has a restricted application throughout the Corporations Act. It applies only to misconduct that also contravenes a “civil penalty provision” as prescribed by s 1317E(1). Section 1317E(1) lists the civil penalty provisions in the Corporations Act. There are currently only 63 civil penalty provisions in the Corporations Act.²⁴ The interesting feature is that the majority of them are found in Chapter 7.²⁵ The two penalty regimes are not, in theory, mutually exclusive in their application.²⁶ It is possible for ASIC to take action against misconduct through the pursuit of civil penalties first, for breach of a financial service civil penalty provision, then subsequently bring criminal penalty proceedings in relation to the same misconduct.²⁷ However, there are significant evidentiary hurdles to overcome.²⁸ The

²² See for e.g. ASIC, *ASIC enforcement outcomes: July to December 2014*, Report 421 (30 January 2015), <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-421-asic-enforcement-outcomes-july-to-december-2014/>.

²³ The Corporations Act also arms ASIC with administrative and civil remedies, which are not considered in this paper.

²⁴ Compared to the approximately 1546 provisions in the Corporations Act as a whole. See Corporations Act s 1317E(1). Sub-section references were included in the count of civil penalty provisions.

²⁵ 39 civil penalty provisions (sub-section references counted) (62% of all civil penalty provisions) are found in Chapter 7.

²⁶ The evidentiary difficulties that arise in relation to civil penalties and subsequent prosecution of criminal penalties suggest that ASIC must make a de-facto, if not de-jure, choice between the two regimes when taking enforcement action. See: Peta Spender, “Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation” (2008) 26 *Company and Securities Law Journal* 249.

²⁷ Corporations Act s 1317P. If the civil penalty proceedings are in progress and not completed, the commencement of criminal proceedings operates to stay the civil penalty proceedings until such time

opposite course, from criminal proceedings to civil proceedings, is *not* permitted where the prior criminal proceedings resulted in that person being convicted of an offence in relation to the same conduct.²⁹

B *Financial Services Misconduct and Criminal Penalties*

Criminal penalties apply to financial services misconduct that constitutes an offence under the Corporations Act. Three types of offences can be committed under Chapter 7: specific; general; and continuing offences.

1 *Specific Offences*

(a) *Key Provisions*

Specific offences are offences committed directly under legislative provisions in Chapter 7. These are the sections in Chapter 7 that expressly provide that the doing, or not doing, of an act or thing forbidden or required by those sections is an offence. In other words, contravening the requirements of these sections is declared to be an offence by the section itself. They include the offences for defective financial services disclosure (Part 7.7A, ss 952C-952M), offences of improper conduct (Part 7, Division 9: ss 993B-993D); and offences for defective financial product disclosure (Part 7.9, Division 7, ss 1021C-1021P).

(b) *Penalties Attaching*

A person found guilty of a specific offence under Chapter 7 is punishable by a court-imposed penalty, up to the maximum penalty amount prescribed for the particular offence in Schedule 3 to the Act.³⁰ There are 65 specific offences in Chapter 7 for which Schedule 3 prescribes a maximum penalty. Of these, 9 offences (14%) are punishable only by fines measured by a specified number of penalty units.³¹ No fine in this category is larger than 50 penalty units. The current value of a penalty unit is \$170³², so the maximum penalty is therefore \$8,500. The other 56 specific offences (86%) are punishable by either a fine or imprisonment term or both. The number of penalty units and the length of the imprisonment terms for these offences vary. The lowest fine is 25 penalty units (currently \$ 4,250) and the highest is 200 penalty units (currently \$34,000).

as the criminal proceedings are determined: s 1317N. As to what happens following the determination of criminal proceedings, see s 1317M and s 1317Q.

²⁸ Corporations Act s 1317Q provides that evidence given in proceedings for civil penalties are not admissible in criminal penalties.

²⁹ Corporations Act s 1317M.

³⁰ Corporations Act ss 1311(2)-(3).

³¹ Corporations Act s 952C(1) (Schedule 3, item 273B), s 952I(1) (Schedule 3, item 277C), s 952I(2) (Schedule 3, item 278A), s 952I(3) (Schedule 3, item 278B), s 952I(4) (Schedule 3, item 278C), s 952J(1) (Schedule 3, item 279A), s 993B(3) (Schedule 3, item 289A), s 993C(1) (Schedule 3, item 289C), s 993D(1) (Schedule 3, item 290C), s 1021C(1) (Schedule 3, item 302C), s 1021H(1) (Schedule 3, item 305B) and s 1021M(3) (Schedule 3, item 308A).

³² *Crimes Act 1914* (Cth) s 4AA(1).

The smallest imprisonment term is 6 months and the longest is 5 years. Obviously, the specific offences that attract a fine and/or an imprisonment term are taken to be more serious in nature than those that attract fines only.

(c) Contraventions by a Body Corporate

Where specific offences are committed by a body corporate, rather than by an individual person, the Act ratchets up the size of the financial penalty (fine) payable. The maximum fine payable is 5 times the maximum provided for those offences in Schedule 3.³³ There are some exclusions, but they do not include the specific offences in Chapter 7.³⁴

2 General Offences

(a) Key Provisions

General offences for financial services misconduct are governed by Corporations Act s 1311. Section 1311(1) provides that a person who either (a) does an act or thing that is forbidden by a provision of the Act; (b) does not do an act or thing that the person is required to do by a provision of the Act; or otherwise contravenes a provision of the Act, is guilty of an offence. The ambit of s 1311(1) is obviously intended to be very wide but it does not apply to the specific offence provisions discussed above. That would be unnecessary duplication. The core obligations in Chapter 7 concern licensing, proper conduct and disclosure. The sheer volume of provisions involved makes it an unrealistic exercise to describe in any detail how they fall within the ambit of the first and second limbs of s 1311(1). The following discussion therefore illustrates, rather than comprehensively establishes, the interaction between Chapter 7 and s 1311.

(b) Required Conduct under Chapter 7 and s 1311(1)(b)

The second limb of s 1311(1) is the easier starting point for classifying Chapter 7 obligations. It interacts with the provisions of Chapter 7, other than the specific offence provisions already discussed, that require regulated persons “to do an act or thing”. The primary act/thing required of persons subject to regulation by Chapter 7 is that they obtain the requisite licence(s) to legally carry on their business, albeit a market licence³⁵, a clearing and settlement facility licence³⁶; a derivative trade depository licence³⁷, and/or a financial services licence.³⁸ Licence holders then become subject to further conduct obligations, operating rules and procedures (where applicable) and conditions on their licence(s).³⁹ The second core obligation in Chapter 7 is disclosure.

³³ Corporations Act s 1312(1).

³⁴ Corporations Act s 1312(2).

³⁵ Corporations Act s 791A.

³⁶ Corporations Act s 820A.

³⁷ Corporations Act s 904A.

³⁸ Corporations Act s 911A.

³⁹ For financial markets licences, see generally Corporations Act Part 7.2 – Licensing of Financial Markets, for clearing and settlement facility licences, see generally Corporations Act Part 7.3, for derivative

Disclosure obligations arise in in the course of providing financial services (Part 7.7), when issuing financial products, (Part 7.9) and incidentally, in connection with financial service licences and financial products (Part 7.8). The common characteristic of these two sets of core obligations, from a penalty point of view, is that they require persons subject to their regulation to do “acts” or “things”, as contemplated by s 1311(1)(b). The jurisdiction of s 1311(1)(b) is enlivened when a person does *not* do the acts or things required by Chapter 7. A failure to carry out these obligations then constitutes an offence under s 1311(1).

(c) Prohibited Conduct under Chapter 7 and s 1311(1)(a)

The third core obligation in Chapter 7 concerns improper conduct. Improper conduct is principally governed by the provisions dealing with market misconduct and other prohibited conduct in Part 7.10. These obligations are expressed in negative language by reference to conduct that is forbidden or prohibited. For example, market manipulation, dishonest conduct and insider trading.⁴⁰ Apart from Part 9.10, there are other prohibited conduct obligations scattered throughout Chapter 7. The best known of these are the alter-ego of the licensing obligations discussed above. Persons carrying on a business in the financial services industry are prohibited from holding themselves out as licensed or authorised by a market licence⁴¹, a clearing and settlement facility licence⁴²; a derivative trade depository licence⁴³, or as having a financial services licence⁴⁴ if they do not have that/those licence(s). All of these obligations require persons *not* to do certain forbidden “acts” or “things”, as contemplated by s 1311(1)(a). Section s 1311(1), enlivened by a person doing an act or thing prohibited by Chapter 7, then provides that the wrongdoer is guilty of an offence.

(d) Otherwise Contravenes Chapter 7 and Falls Within 1311(1)(c)

The third limb of s 1311(1) covers all other contraventions that do not fall within ss 1311(a) or (b). Further research on the interaction of this provision with Chapter 7 is needed but, on first reading, this section would appear to apply to situations where offences are committed by employees, agents and/or authorised representatives of financial product or services provider and that provider is deemed simultaneously to have committed the identical offence. The main provision is s 769B, which attributes legal responsibility for contraventions of Chapter 7 provisions to body corporates (assumed licensed holders) in a variety of circumstances. There are other provisions in Part 7.7, dealing with the specific responsibilities of principals for the conduct of

transactions, see Part 7.5A – Regulation of Derivative Transactions and Derivative Trade Repositories and for financial services licences, see generally Part 7.6 – Licensing of Providers of Financial Services.

⁴⁰ Corporations Act s 1041A (market manipulation), s 1041E (misleading and deceptive conduct), s 1041G (dishonest conduct) and s 1043A (insider trading).

⁴¹ Corporations Act s 791B.

⁴² Corporations Act s 820B.

⁴³ Corporations Act s 907A.

⁴⁴ Corporations Act s 911C.

authorised representatives and Part 7.9, dealing with when a regulated person is responsible for the conduct of another. If a principal/regulated person is determined to have contravened a provision in Chapter 7 because they are legally responsible for the misconduct of another person, section 1311(1) would appear to apply. It provides that a person who commits a contravention of this kind is also guilty of an offence.

(e) Penalties

As with specific offences, a person convicted of a general offence under s 1311(1) is punishable by a penalty not exceeding the maximum penalty prescribed for the offence in Schedule 3 of the Act. 175 general offences in Chapter 7 have penalties set out in Schedule 3. 43 of these (30%) are punishable by a fine only. The size of that fine varies between 10 penalty units (currently, \$1,700) and 1000 penalty units (currently, \$170,000). There are several provisions where a per diem penalty between 10 and 100 penalty units (currently, between \$1,700 and \$17,000) is imposed for each day that the conduct constituting the offence in question continues.⁴⁵ The remaining 132 general offences (70%) are punishable by a fine or an imprisonment term or both. The size of the fines and length of imprisonment terms vary. Fines vary between 25 penalty units (currently, \$4,250) and 4500 penalty units (currently \$765,000). Imprisonment terms vary from 6 months to 10 years, with two provisions providing different penalty rates and imprisonment terms for first-time versus repeat offenders.⁴⁶

A fine of 4500 penalty units and/or an imprisonment term of up to 10 years is only available in relation to a narrow set of offences, those committed under s 1041A - s 1043A in Chapter 7. They are the inappropriate conduct provisions discussed earlier, such as market manipulation, false and misleading statements, dishonest conduct and insider trading. Schedule 3 also provides an alternative method for assessing the pecuniary penalty in those provisions. The penalty can be up to 4500 penalty units or three times the total value of the benefits that were obtained and are reasonably attributable to the offence.⁴⁷ Outside of these offences, the maximum fine is more typically 500 penalty units (currently, \$85,000) or less. The maximum imprisonment term is 5 years or less. Broadly speaking, what is evident from this analysis is that general offences arising in connection with Chapter 7 give rise to more severe penalties than those applying to specific offences in Chapter 7.

3 Continuing Offences Provision

For the sake of completeness, continuing offences under s 1314 are briefly considered. Continuing offences arise in connection with the provisions in the Act that require an

⁴⁵ Corporations Act s 794D(3) (Schedule 3, item 251C), s 794E(2) (Schedule 3, item 252A), s 904G(5) (Schedule 3, item 262BE), s 904K(4) (Schedule 3, item 262BG), s 823D(5) (Schedule 3, item 257C), s 823E(3) (Schedule 3, item 257D), s 923A(1) (Schedule 3, item 268C), and s 923B(1) (Schedule 3, item 269A).

⁴⁶ Corporations Act s 948B(1) (Schedule 3, item 282B), s 1020B(2) (Schedule 3, item 300C).

⁴⁷ Corporations Act, Schedule 3, item 310.

action to be taken within a specific time frame and the action is not taken. Section 1314(1) confirms that the offence committed in these cases, and the potential penalty attaching to the offence, continue until such time as the required action is taken. Further, failure to take the required action can itself become grounds for a further offence under s 1314(3). The penalty attaching to the further offence is calculated at a per diem rate, being half a penalty unit multiplied by the number of days in the period for which action was not taken. There appear to be no time-based provisions in Chapter 7 itself, however there may be these provisions in the various operating rules that licensees must comply with pursuant to Chapter 7. The contents of these operating rules are outside the scope of the current paper.

(a) Not All Contraventions are Offences

Potentially a person who contravenes either a specific or general penalty provision in Chapter 7 commits an offence unless the provision in question states otherwise.⁴⁸ However, all offences under the Corporations Act are subject to the requirements of the Criminal Code Act 1995 (Cth).⁴⁹ Chapter 2 of that Code provides that an offence is only committed when the offending conduct is accompanied by fault elements. That is, evidence of intention, knowledge, recklessness or negligence.⁵⁰ The result of this requirement is that only a small subset of all contraventions committed in Chapter 7 or elsewhere in the Corporations Act satisfy the requirements to be dealt with as offences, subject to criminal penalties. For the purposes of determining corporate criminal responsibility for offences committed, Chapter 7 specifically excludes the operation of the Criminal Code (Cth).⁵¹ This appears to have the effect of removing the stricter requirements of fault for the purpose of determining whether a company has committed an offence and shifting that determination instead towards notions of vicarious responsibility, discussed above.⁵²

C Financial Service Misconduct and Civil Penalties

1 Operation of Regime

Civil penalties apply to financial services misconduct that constitutes a contravention of a civil penalty provision in the Corporations Act. Section 1317E(1) lists what those provisions are. Thirty-nine sections in Chapter 7 (financial services) are listed as civil

⁴⁸ For example, Corporations Act s 1041H, which provides only civil liability for contraventions of this prohibition against misleading and deceptive conduct. Chapter 7 also allows ASIC to entertain applications to modify and exempt the operation of Chapter 7 law. These powers are not considered here.

⁴⁹ Corporations Act s 1308A provides that Chapter 2 of the Criminal Code Act 1995 (Cth) applies to all offences under the Corporations Act. Chapter 2 codifies the general principles of criminal responsibility under the laws of the Commonwealth.

⁵⁰ *Criminal Code Act 1995* (Cth) Divisions 3.1 and 5.1.

⁵¹ Corporations Act s 769A.

⁵² See “Otherwise contravenes Chapter 7 and falls within s 1311(1(c))” above.

penalty provisions.⁵³ They cover topics such as the need to comply with market rules, the requirement for financial advisors to act in the best interests of the client and accepting conflicted remuneration. Some of these are umbrella provisions, which provide a further list of additional sections in Chapter 7 that are also civil penalty provisions.⁵⁴ Perhaps, as already noted, what is more significant is the number of core provisions in Chapter 7 that are *not* civil penalty provisions. These include the prohibition against carrying on financial services without a licence;⁵⁵ and false and misleading conduct that would induce a person to buy/sell a financial product or have that effect on the market.⁵⁶

Civil penalty orders can only be made where a court first makes a declaration that a contravention of a civil penalty provision has occurred under s 1317E(1). Once made, ASIC is then empowered to seek a pecuniary penalty order under s 1317G. For civil penalty contraventions *outside* Chapter 7 of the Corporations Act, ASIC may also seek a management disqualification order as a form of civil penalty pursuant to s 206C. However, no equivalent civil penalty remedy is available in relation to financial services misconduct under Chapter 7.⁵⁷

2 Range of Penalties Available

The range of pecuniary civil penalties available for financial services misconduct are set out in ss 1317G (1A) to (1G). A special category of “financial services civil penalty provisions” was created for this purpose in s 1317DA. Curiously, this category incorporates the continuous disclosure provisions found outside Chapter 7,⁵⁸ yet does not include all civil penalty provisions in Chapter 7.⁵⁹ Presumably then, no civil penalties are applicable for contraventions of the provisions excluded from the definition of financial services civil penalty provisions.

The maximum penalty available for contravening a financial service civil penalty provision is \$200,000 in the case of an individual and \$1 million in the case of a body corporate.⁶⁰ Different mechanisms apply for determining the amount of the penalty

⁵³ Corporations Act s 1317E(1): ss 798H(1); 901E; 903D; 961K(1); 961K(2); 961L; 961Q(1); 962P; 962S(1); 963E(1); 963E(2); 963F; 963G(1); 963J; 963K; 964D(1); 964D(2); 965; 985E(1); 985H(1); 985J(1); 985J(2); 985J(4); 985K(1); 985L; 985M(1); 985M(2); 1041A; 1041B(1); 1041C(1); 1041D; 1043A(1); and 1043A(2).

⁵⁴ See for example Corporations Act ss 961K and 961Q.

⁵⁵ Corporations Act s 911A.

⁵⁶ Corporations Act s 1041E.

⁵⁷ Corporations Act s1101B empowers the court to banning orders (eg from giving financial advice) in relation to financial services misconduct. However, it is not a civil penalty provision. The *Financial Systems Inquiry Report*, above n 21, recommended that ASIC be provided with these banning powers.

⁵⁸ Corporations Act s 1317DA, referring to item 14 from s 1317E(1). Item 14 is Corporations Act ss 674(2), 674(2A); 675(2); and 675(2A).

⁵⁹ Corporations Act s 1317DA, referring to item 23-45 in s 1317E(1). Excluded from the definition are ss 798H(1), 901E, 903D, 961K(1), 961K(2), 961L, 961Q(1), 962P and 962S(1).

⁶⁰ Corporations Act s 1317G(1B).

payable where the contravention concerns a failure to comply with market integrity rules, derivative transaction rules and best interest and conflicted remuneration obligations in Chapter 7. The maximum amount payable for non-compliance with market integrity or derivative transaction rules is set out in the rules themselves.⁶¹ The maximum amount payable for contravening the best interest and conflicted remuneration obligations is \$200,000 for an individual and \$1 million for a body corporate.⁶²

3 Not all Contraventions of Civil Penalty Provisions Caught

As was the case in relation to criminal sanctions, a person who contravenes a civil penalty provision in Chapter 7 of the Corporations Act runs the risk of a pecuniary penalty order being made against them. However, only certain civil penalty contraventions are caught by the regime. With a few exceptions, financial services civil penalties can only be made where a declaration of contravention has been made, the contravention materially prejudices the interests of the parties affected by the contravention and is serious.⁶³ The result is that not every contravention of a civil penalty provision results in a civil penalty proceeding being brought by ASIC and/or the imposition of a pecuniary civil penalty by a Court. However, as the evidential requirements for pecuniary civil penalties are less onerous than those applying in criminal penalty cases, it might be supposed that there would be more pecuniary civil penalty cases brought under Chapter 7 than criminal penalty proceedings. However, recall that the ratio of criminal penalty provisions to civil penalty provisions in Chapter 7 is 3.7: 1. There are almost four times as many criminal offence provisions as civil penalty provisions. Secondly, the core obligations in Chapter 7 (licensing, disclosure and improper conduct) are not civil penalty provisions. This suggests that there are more opportunities for ASIC to institute criminal prosecutions than bring civil penalty proceedings in relation to misconduct under Chapter 7.

D Summary

As this discussion has shown, the enormity of the enforcement project in Chapter 7 is sobering. The sheer volume of provisions, the long list of criminal penalties in Schedule 3 applied to those provisions and the curious arrangement of civil penalties in Chapter 7, all combine to reinforce the general impression of Chapter 7 as a complex and technical regulatory mechanism. Criminal penalties dominate the penalty landscape. For all the

⁶¹ Corporations Act s 1317G(1C) s 1317G(1DA) and s 1317G(1DB).

⁶² Corporations Act s 1317G(IG) limits the maximum amount of the penalty for contravening s 962P (charging an ongoing fee after termination of arrangement) and s 962S(1) (fee recipient must give disclosure statement) to \$50,000 for an individual and \$250,000 for a body corporate.

⁶³ Corporations Act s 1317G(1A): acquirers or disposers or the issue of the relevant financial products. Requirements differ for contraventions of market integrity civil penalty provisions (s 1317G(1C)), derivative transaction and trade repository civil penalty provisions (s 1317G(1D)), and for best interest obligations and remuneration civil penalty provisions (s.1317G(1E)). Importantly, none of these provisions have a requirement that the contravention be either materially prejudicial or serious.

Careful specification of specific, general and continuing penalties, there are really just two classes of offences in Chapter 7. The first set, for apparently less serious offences, attract a fine only. The second set lead to either a fine or an imprisonment term or both. Fines are defined in terms of penalty units, enabling them to increase over time as the value of a penalty unit increases. Imprisonment terms have fixed maximum lengths, generally less than five years in length. Only pecuniary civil penalties are available to a restricted range of provisions in Chapter 7, the maximum amounts for which are fixed, unlike the fines that apply to offences in Chapter 7.

III CASE STUDY OF COURT IMPOSED PENALTIES IN FINANCIAL SERVICES MISCONDUCT CASES

A Context

If public interest goals and higher standards of regulatory compliance are to be achieved in the business sector, then individuals and organisations whose interests and ambitions are largely commercial have to be sufficiently motivated to mount meaningful regulatory compliance and crime prevention strategies. Instrumental deterrence will play a significant part in these processes, hence current efforts by ASIC to extend their penalties regimes. However, before taking the significant step of extending the ambit of penalties regimes it is important to evaluate existing regimes. As a contribution to this debate we discuss below a small case study of penalties for financial services misconduct imposed by Australian courts from 1 July 2011 to 30 June 2014. Specifically, to the types and size of penalties currently being made by the Courts in these cases and then to the question of how those penalties compare with the maximum penalties currently possible under the Corporations Act. The study and its findings are reported on here.

B Research Methodology and Data Description

1 Overview

The empirical study involved the generation of a dataset comprising information on court proceedings in Australian Courts during the period 1 July 2011 to 30 June 2014 (three years) at which either a criminal sanction or a pecuniary civil penalty was imposed against a person or corporation for contravening Chapter 7 (the financial services provisions) of the Corporations Act. The dataset was drawn from information publicly available from the two government agencies involved in the prosecution of these matters, ASIC and the Commonwealth Director of Public Prosecutions (CDPP). Where possible, this information was verified by reference to legal case reports and newspaper articles published at or about the same time as these court proceedings were determined. A more detailed description of the relevant court proceedings and the source information relied on now follows.

2 Proceedings in Study

Two types of completed proceedings were captured by this study: criminal penalty sentencing proceedings and pecuniary civil penalty determinations. The study was *not*

concerned with the legal process by which conviction for an offence and/or liability for contravening a civil penalty provision under the Corporations Act was established, other than as a preparatory step towards the Court exercising its power under the Act to impose penalties. These criminal and civil penalty sentencing proceedings are a small subset of the mechanisms available to ASIC for responding to contraventions. As noted in Part I, ASIC's enforcement toolkit includes punitive, protective, preservative, corrective, compensatory and negotiated resolution mechanisms.⁶⁴ Criminal and civil penalties are punitive mechanisms, sought by ASIC in serious contravention cases. This empirical study provided a snapshot of regulatory enforcement taking place at the apex of ASIC's pyramid of enforcement pyramid response.

3 *Criminal Penalty Cases*

As also noted in Part II, criminal offences dominate the penalty landscape in Chapter 7. There are 65 specific and 175 general offences that provide the opportunity for ASIC and the CDPP to pursue criminal penalties for financial misconduct. In the empirical study, there were 37 such cases for financial services misconduct between 1 July 2011 and 30 June 2014.

4 *Civil Penalty Cases*

The civil penalty regime applying to Chapter 7 has a very specific scope. As noted earlier, there are 39 provisions that are prescribed as civil penalty provisions in Chapter 7. Of these, only the provisions defined as financial services civil penalties attract the application of civil penalties under s 1317G. This excludes 9 of the current 39 provisions (23%) from the imposition of civil penalties. A curious phenomenon in the empirical study was the scarcity of civil penalty cases in relation to financial services. Whether because of the length and timing of the empirical study or for other reasons outside the scope of the study, there were only 4 pecuniary civil penalty cases for financial services misconduct between 1 July 2011 and 30 June 2014.

5 *Comparison with Working Paper No. 1*

The criminal penalty and civil penalty outcomes in this empirical study are a subset of the data on ASIC enforcement outcomes for financial service misconduct reported in Working Paper No 1.⁶⁵ Working Paper No 1 was a summary of all enforcement outcomes in relation to financial services misconduct, not just court based penalties. A comparison of findings between the two sets of data is undertaken later in this Part.⁶⁶

⁶⁴ ASIC, *above* n 12.

⁶⁵ G. Gilligan, P. Ali, A. Godwin, J. Hedges and I. Ramsay, *An analysis of penalties under ASIC administered legislation: scoping the issues*, Working Paper No. 1, 2015, 18-25, <http://www.law.unimelb.edu.au/cclsr/centre-activities/research/major-research-projects/asic-penalties-project-an-analysis-of-penalties-under-asic-administered-legislation/asic-penalties-project-an-analysis-of-penalties-under-asic-administered-legislation/flushcache/1/showdraft/1>.

⁶⁶ See "Comparison with data in Working Paper No 1" below.

C Source Information

1 Overview

The dataset of information in the empirical study was generated from ASIC Enforcement Outcome reports and media releases publicly available from the regulator's website.⁶⁷ Where possible, this information was corroborated, by reference to case reports, media releases by the CDPP on its website and to case law reports (reported and unreported).

2 Enforcement Outcome Reports

(a) Purpose

ASIC enforcement outcome reports are six-monthly reports on all enforcement outcomes achieved by ASIC during the relevant period. They are part of ASIC's avowed commitment to transparency about how it identifies and deals with those who break the law it administers.⁶⁸ Reported enforcement outcomes included, but were not limited to, court ordered penalties. Six reports were used as source information in the empirical study, covering the period from 1 July 2011 to 30 June 2014 (three years).⁶⁹

(b) Appendix 1

Each report contained an Appendix 1 with tabular summaries of enforcement outcomes during the relevant period. Table 1 contained a summary of enforcement outcomes achieved (i.e. completed) during the relevant period. Table 2 was a summary of pending matters. These were matters commenced during the relevant period but for which no formal outcome has yet resulted. Table 3 provided an aggregate summary of enforcement outcomes for the past two years up to and including the relevant period of the report.

(c) Areas of Regulation

Each table was divided into three areas of regulation under the Corporations Act: market integrity, corporate governance and financial services. Market integrity covered insider trading, market manipulation, continuous disclosure, market integrity rules and

⁶⁷ For ASIC Enforcement Outcome Reports see: <http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/>. For ASIC media releases, see <http://asic.gov.au/about-asic/media-centre/>.

⁶⁸ ASIC, *ASIC enforcement outcomes: January to June 2014*, Report 402 (July 2014) 7 [9]. <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-402-asic-enforcement-outcomes-january-to-june-2014/>.

⁶⁹ ASIC, *ASIC enforcement outcomes: July to December 2011*, Report 281 (January 2012), ASIC, *ASIC enforcement outcomes: January to June 2012*, Report 229 (July 2012), ASIC, *ASIC enforcement outcomes: July to December 2012*, Report 336 (January 2013), ASIC, *ASIC enforcement outcomes: January to June 2013*, Report 360 (July 2013), ASIC, *ASIC enforcement outcomes: July to December 2013*, Report 383 (January 2014), and ASIC, *ASIC enforcement outcomes: January to June 2014*, Report 402 (July 2014).

other market misconduct. Corporate governance covered action against directors, insolvency, action against liquidators, action against auditors and other corporate governance misconduct. Financial services covered unlicensed conduct, dishonest conduct, misleading statements, unconscionable conduct, misappropriation, theft and fraud. This definition of financial services was adopted for the purposes of the empirical study. References to financial services misconduct are therefore to misconduct occurring in the regulatory areas of financial services as described by the Enforcement Outcome reports.

(d) Types of Enforcement Outcomes

Each area of regulation in the tables in Appendix 1 was divided into five types of enforcement: criminal; civil; administrative remedies; enforceable undertakings/negotiated outcomes; and public warning notices. None of these terms were defined, but reflect the classifications of enforcement activity in ASIC's enforcement policy.⁷⁰ What is clear is that particular stages in an enforcement case are treated as enforcement outcomes in their own right. For example, in a criminal proceeding, a stand-alone outcome is the situation where a defendant pleads guilty to charges, but has yet to be sentenced. The subsequent sentencing and imposition of a criminal penalty, presumably at a later date, was treated as a separate, additional enforcement outcome. Defining enforcement outcomes in this way inflates the number of outcomes in any given year, but limits the utility of the data in Appendix 1 for the purposes of the empirical study. It was not possible to extract data on sentencing decisions and pecuniary civil penalty determinations from the other enforcement outcomes reported. The only publicly available recourse was to rely on the ASIC media releases which corresponded to the enforcement outcomes in the Appendix 1 tables. A list of relevant media releases was set out in Appendix 2 to each Enforcement Outcomes report.

3 ASIC Media Releases

Pursuant to ASIC's policy on public comment,⁷¹ ASIC has a discretionary policy of issuing a media release announcing the commencement of criminal and civil penalty enforcement matters. In the case of criminal matters, it is usually at the time of a person's first appearance in court. For civil matters, it is when originating documents are filed and served. Once the proceedings are announced, ASIC will usually issue further media releases to announce specific enforcement outcomes in the prosecution or litigation process including the withdrawal of charges, acquittal, successful prosecutions, sentencing outcomes and the outcome of litigation.

ASIC issued 299 media releases in relation to enforcement outcomes in financial misconduct cases during the study period 1 July 2011 to 30 June 2014. Of these, 51

⁷⁰ ASIC, above n 12.

⁷¹ ASIC, *Public Comment*, Information Sheet 152 (May, 2014), http://download.asic.gov.au/media/1339124/INFO_152_Public_Comment.pdf.

were from the period 1 July to 31 December 2011, 53 from 1 January 2012 to 30 June 2012, 52 from 1 July to 31 December 2012, 50 from 1 January 2013 to 30 June 2013, 69 from 1 July to 31 December 2013, and 24 from 1 January 2014 to 30 June 2014. Of the 299 media releases, 34 media releases concerned criminal penalty sentencing in financial misconduct cases and 7 media releases concerned the imposition of pecuniary civil penalties for misconduct. The other 258 media releases were removed from the empirical study because they did not concern criminal or pecuniary penalty sentencing outcomes. The dataset in this empirical study was generated from the remaining 41 media releases.

4 *Supplementary Information Sources*

Three secondary sources of data were relied on to supplement and, where possible, corroborate the information supplied by ASIC media releases. They were: case reports and media releases on criminal prosecutions prosecuted by the CDPP;⁷² case law reports and unreported decisions about criminal and civil pecuniary penalty sentencing; and newspaper reports of court sentencing decisions, principally from the *Age*, *Sydney Morning Herald* and *Australian Financial Review* websites. Case reports and media releases by the CDPP serve a similar purpose to those issued by ASIC. However, there were only a few relevant to the empirical study. They appear to be less commonly issued than ASIC media releases and in relation to a smaller range of matters.

Case law reports, both reported and unreported, are a court-approved record of the outcome of court decisions and the legal reasons for those decisions. However, they were generally only available in relation to proceedings heard and determined in the Supreme Courts of each Australian state. Many of the cases examined in this empirical study were conducted in lower State courts including the District, County and Magistrates Courts, for which there are fewer or no records available to corroborate the outcomes announced in ASIC media releases. Some assistance was provided by law reports of decisions appealed by defendants. However, there were only three relevant appeals during the study period. Finally, relevant newspaper articles, written at or about the time of ASIC media releases on relevant matters, were used to source additional data about the age of the defendant-regulatees in the empirical study, not available from ASIC, CDPP or law report sources described here.

⁷² For CDPP case reports, see <http://www.cdpp.gov.au/case-reports/>. For CDPP media releases, see http://www.cdpp.gov.au/news/?news_category=media-releases.

D *Limitations in Source Data*

1 *Overview*

The construction of the dataset was affected by ASIC's discretionary approach to media releases, ASIC's descriptions of enforcement matters and legislative provisions in media releases, the limited sample period and the absence of consideration of the wider enforcement context of ASIC's enforcement work.

2 *ASIC's Discretionary Approach to Media Releases*

As noted earlier, ASIC has a discretionary approach to public comment on its enforcement work.⁷³ It is under no specific obligation to make public comment, yet is committed to transparency in its enforcement work. The issue of 299 media releases on enforcement during the study period suggest ASIC takes this commitment very seriously. Yet, the discretionary nature of media releases means that there is an inherent risk that the database relied on in the study is incomplete. Some enforcement cases, which otherwise would have been the subject of the study, may have been missed because no media releases were issued about them by ASIC. Secondly, for the same reason, there is a risk that the list of media releases listed in Appendix 2 to the various ASIC Enforcement Outcome reports may not be exhaustive of all relevant enforcement matters. Some media releases may also be missing from those lists due simply to inadvertence or oversight. The database was generated from media releases listed in Appendix 2. Case law searches were used to locate other relevant enforcement outcomes that were not included in the Appendix 2 lists. A small number of such cases were found. Their corresponding ASIC media releases were located via the ASIC website and added to the database. The upshot of these limitations is that the database cannot be viewed as either an exhaustive or complete guide to criminal and pecuniary civil penalties imposed in financial misconduct cases during the study period. It is, at best, a comprehensive guide, based on the information made publicly available by ASIC.

3 *ASIC's Descriptions of Enforcement Matters*

The dataset draws from descriptive information contained in ASIC media releases, corroborated independently where possible. An assumption was made that the information contained in the media releases and enforcement outcome reports was accurate. The information was provided by ASIC enforcement officers, managing the relevant matters, to ASIC's media centre. There are variations in the amount of information provided, with some media releases providing more detail and specificity of information than others. The media releases reflect the interpretation and priorities of the officers involved in drafting them. There is a consequent risk of inconsistency in the media releases, which has the potential to undermine the accuracy of the database itself. It is for this reason that an assumption of accuracy was made.

⁷³ ASIC, above n 71.

4 ASIC's Recording of Legislation Sections

The dataset was reliant on ASIC's recording of the legislation sections that were the basis of contravention and sentencing in each case considered. The recording of legislative provisions was found lacking on three levels. First, ASIC media releases were inconsistent in their approach to specifying legislative sections. Some media releases did, some did not. Some specified provisions to the specific sub-section, others to the head provision only. For the sake of consistency, only the head sections have been included in the dataset. Where a specific number was not provided, a description of the contravention was instead provided. Some of these descriptions were clearly referable to recognisable sections of the Corporations Act. Some were not. Some were capable of referring to multiple provisions in the Corporations Act and/or the Crimes Act/Code of the state in which the proceeding was brought. Thirdly, it was not always clear whether the provisions mentioned in media releases at the start of an enforcement action were the same as those relied on by courts at the time of sentencing or imposing civil penalties.

These difficulties were partially offset by reference to publications of the CDPP and case law reports on sentencing decisions. However, even after this, there remained a small number of cases for which no independent verification was possible in the time available. In those cases, it was necessary to infer the intended legislative provisions based on the provisions specified in other media releases for similar matters.

5 Multiple Legislative Provisions

A further limitation concerned the media releases that nominated more than one legislative provision as the basis for a reported enforcement outcome. For the purposes of the empirical study, this affected the media releases about Court imposed penalties (criminal or civil) which referred to contraventions of multiple provisions of the Corporations Act and/or supporting legislation, such as the various state Crimes Acts. Media releases of this kind concerned eighteen (18) of the 41 defendant-regulatees in the study cohort (42%). In relation to these releases, it was not possible to allocate information about penalties made to one specific legislative provision. These penalties had to be disclosed as applying to each of the legislative provisions specified. This phenomenon limited one of the core outcomes of the empirical study, namely the ability to compare and contrast the penalties made with the maximum penalties provided for by specific legislative provisions in the Corporations Act.

6 Limited Sample Period

The inferences that can be drawn from the empirical study are limited by the fact that the study period was only a three-year period, from 1 July 2011 to 30 June 2014. The ability to postulate from such a small amount of data is therefore limited.

7 Wider Enforcement Context

Inferences from the empirical study are also limited by the narrow scope of the study. The study is focused entirely on sentencing decisions in financial misconduct cases

giving rise to criminal penalties or pecuniary civil penalties. No account has been taken of the wider enforcement context within which these penalties operate as part of ASIC's enforcement toolkit. In particular, no account has been taken of any significant targeted enforcement campaigns, budgetary or resource allocation decisions and/or to changes in ASIC's structure, strategy and regulatory priorities during the period.

E Empirical Study and Analysis of Data

1 Overview of Discussion

After a general description of the dataset, the empirical research is presented in three categories: characteristics of the defendant-regulatees; the enforcement process; and the enforcement (penalty) decisions resulting from that process. Each of these divisions includes an analysis of the relevant data, followed by a separate section reflecting on the trends and implications arising from the analysis undertaken.

2 General Description of the Dataset

Data was collected in relation to 41 defendants or regulatees that were the subject of criminal sanctions and pecuniary civil penalties imposed by courts for financial services misconduct during the period 1 July 2011 to 30 June 2014. The penalties were distributed across the sample period as shown in Table 1.

Table 1: Court imposed penalties for financial services misconduct by financial year

Year	Number of penalties
2011/12	12
2012/13	12
3013/14	17

Table 2: Criminal and civil enforcement outcomes for financial services by financial year as reported by ASIC

Year	Number of criminal and civil outcomes
2011/12	38
2012/13	46
3013/14	24

The number of criminal and civil outcomes reported by ASIC for each financial year in its Enforcement Outcomes Reports is presented in Table 2. The data in Table 1 is a subset of the data in Table 2. As noted earlier, ASIC adopts a very broad definition of what constitutes an enforcement outcome. Criminal and pecuniary civil penalty orders made by Courts comprised 38% of the criminal and civil penalty outcomes in financial misconduct cases acknowledged by ASIC during the study period.

3 Criminal versus Pecuniary Civil Penalties

Table 3 provides a breakdown of the data in Table 1 into criminal penalties and pecuniary civil penalty orders made by Courts during the sample period.

Table 3: Court imposed criminal and pecuniary civil penalties for financial services misconduct by financial year

Year	Number of criminal penalties	Number of pecuniary civil penalties
2011/12	12	-
2012/13	12	-
3013/14	13	4

Table 3 reveals that *no* pecuniary civil penalties were made against defendant-regulatees in relation to financial services misconduct during the first two years of the study period. Only four such penalties were made in the study period as a whole. This is a curious phenomenon, requiring further investigation. As Part II noted, there are many more criminal penalty provisions than civil penalty provisions in Chapter 7 but the requirements for successful criminal prosecutions are more onerous than those for pecuniary civil penalties. The ratio of criminal penalties to pecuniary civil penalties in the study was 9.25:1.

An examination of ASIC media releases reveals that pecuniary civil penalties were imposed by Courts for other civil penalty contraventions of the Corporations Act during this same period, just not in relation to financial services misconduct. Specifically, these were against 9 defendant regulatees in relation to contraventions of their director/officer duties in Corporations Act ss 180, 181 and 182⁷⁴. Civil penalty disqualification orders under Corporations Act s 206C were also made against 10 defendant-regulatees, again primarily in relation to the contravention of their director/officer duties. There is no civil penalty equivalent provision to s 206C for financial services misconduct.

4 Characteristics of the Defendant-Regulatees in the Dataset

The defendant-regulatees in the dataset were individuals. No penalties were imposed against companies during the study period.⁷⁵ The dataset included information on age, gender and occupation at the time that the financial misconduct took place. Given the very small number of pecuniary civil penalty cases, this data has not been separated into criminal and pecuniary civil penalties.

5 Age of Defendant Regulatees

The distribution of defendant-regulatee ages in the empirical study is shown in Table 4. Table 4 shows that the most common cohort was aged between 41-50 (15 regulatees) and the next most common was those aged between 31-50 years (6 regulatees).

Table 4: Defendant regulatee ages

Age Range	Count
Up to 20	-
21-30	1
31-40	6
41-50	15
51-60	5
61-70	3

⁷⁴ Most civil penalty contravention cases reported in ASIC media releases involved contravention of multiple civil penalty provisions. Contravention of *Corporations Act* ss 180, 181 and/or 182 was mentioned in every civil penalty case reported.

⁷⁵ A pecuniary civil penalty was made against Newcrest Mining on 2 July 2014. However, this enforcement outcome fell just outside the study period. See *ASIC v Newcrest Mining Ltd* (2014) 101 ACSR 46.

Over 70	1
Unknown	10

The specified age of a defendant-regulatee was his/her age at the time that the Court made penalty orders against him/her. Age details were obtained from ASIC media releases and/or court reports when available. When the birth details were missing, the age was obtained from searches of newspaper articles published at the time that the penalty orders were made. After collecting data from the various sources described, there were 10 instances in which the date of birth of the subject person was not available.

6 Gender of Defendant Regulatees

Gender of defendant-regulatees was inferred from their given names. Table 5 shows the results for gender in the empirical study. The data shows that male regulatees overwhelm the dataset. The ratio of male to female is 19.2: 1.

Table 5: Gender statistics, penalty cases for financial misconduct

Gender	Count
Male	39
Female	2

7 Occupation of Defendant-Regulatees

The occupation of the defendant-regulatees made subject to criminal and civil penalties for financial misconduct during the study period is shown in Table 6. Occupation refers to the occupation of the defendant at the time of contravening the Corporations Act and in respect of which the court imposed penalties against him/her. Details of this occupation formed part of the dataset. The dataset did not name the corporate entity or business structure for which they worked. The dataset shows that court based penalties in misconduct cases were mainly pursued against individuals who were financial advisers and CEO/directors.

Table 6: Occupation of defendant-regulatees in dataset

Occupation	Count
Investment manager	3
Financial adviser	15
Stockbroker	3
Finance/mortgage broker	5
Insurance broker	2
CEO/director	11
Other	2

8 Reflections on Data

Information on age, gender and occupation of defendant-regulatees inform analysis of the relationships between ASIC and the regulatees in the dataset. However, caution should be exercised in drawing conclusions about this issue because of the narrow focus of this study, the small size of the data set and the heavy skewing towards criminal penalties in the data set discussed earlier. Those limitations noted, the dataset reveals that ASIC was more likely to pursue criminal penalties for financial services misconduct during the study period against male regulatees, aged between 41 and 50 years, who were financial advisers.

9 Enforcement Activities in the Dataset

(a) Overview

The dataset has already been separated into 37 defendant-regulatees against whom criminal penalty orders were made and 4 defendant-regulatees against whom pecuniary penalty orders were made during the study period.⁷⁶ The dataset included useful information on the three other aspects of the penalty sentencing proceedings: the States and Courts within which the penalty proceedings were determined; the legislation applied in those proceedings; and the defendant-regulatees who pleaded guilty and/or admitted contravention of laws, before penalty orders were made against them.

⁷⁶ See “Criminal v pecuniary civil penalties” in Part III above.

(b) States and Courts where Proceedings Brought and Penalty Orders Made

Table 7 provides a breakdown of the states in which the proceedings against the defendant-regulatees in the dataset were determined. State-based courts were used exclusively with proceedings in NSW dominating the study and Victoria second. This is perhaps not surprising given that the focus of the case study is financial services misconduct and Sydney and Melbourne not only have the largest urban populations but also are the major finance centres in Australia. Table 8 shows the distribution of penalty proceedings between the various State Courts, including the Supreme Court, the District/ County Courts and the Magistrates/Local Courts. Most penalty decisions were determined and made in the Magistrates' or Local Courts. There were three appeals from sentencing decisions to the Supreme Court during the study period.⁷⁷

Table 7: States where penalty proceedings brought

State	Number
NSW	23
Qld	2
SA	3
Tas	2
Vic	10
WA	1

Table 8: State courts where penalty proceedings brought

Court	Number
Supreme Court	11
District/County Court	26
Magistrates'/Local Court	41

⁷⁷ See *Koch v R* [2011] VSCA 435; *Finnigan v The Queen* [2013] 233 A Crim R 381; *R v Lawson Donald* [2013] NSWCCA 238.

(c) Legislation Applied in Dataset

Data on the legislative provisions relied on in the penalty proceedings included in the empirical study is presented in the following three tables. Table 9 shows the most commonly specified sections from Chapter 7 (financial services) of the Corporations Act. Table 10 shows the most commonly specified sections of the Corporations Act, outside of Chapter 7. Table 11 shows the most commonly specified sections from other legislation, such as the State Crimes Acts. The phenomenon of relying on multiple legislative provisions as the basis for criminal and civil penalties was discussed earlier.⁷⁸ Where multiple provisions were specified, each section was counted specifically as one instance. Legislative sub-sections were aggregated and counted under the parent section.

Table 9: Most commonly specified sections in Chapter 7 of the Corporations Act

Section	Title	Count
911A	Need for an Australian financial services licence	6
1041E	False or misleading statements	10
1041G	Dishonest conduct	8

These provisions set out core obligations for regulatees under Chapter 7. Section 911A(1) requires persons engaged in the provision of financial services and/or financial products to obtain a financial services licence. Section 1041E prohibits a person from making false and misleading statements in the provision of financial services and products. Section 1041G prohibits a person from engaging in dishonest conduct in relation to financial services or products. Contravention of all three provisions is an offence under Corporations Act s 1311. Chapter 7 provisions were the most commonly specified sections of the Corporations Act in the database. However, other provisions outside Chapter 7 were also commonly mentioned as Table 9 demonstrates.

⁷⁸ See discussion under heading “Multiple legislative provisions” in Part III above.

Table 10: Most commonly specified sections of the Corporations Act, outside of Chapter 7 (financial services)

Section	Title	Count
180	Care and diligence – civil obligation only	3
181	Good faith – civil obligation only	3
182	Use of position – civil obligations	4
184	Good faith, use of position and information – criminal offences	7
601ED	Applying for registration of a managed investment scheme	3

The interesting fact revealed here is the reliance on sections from Chapter 2D (officers and employers) of the Corporations Act. Notably, ss 180, 181 and 182 (general duties) are civil obligations. As their contravention cannot result in criminal proceedings, it is clear that these provisions were relied on in connection with three of the four pecuniary civil penalty orders in the dataset.

Table 11: Most commonly specified sections in other legislation

Legislation	Section	Title	Count
Crimes Act 1900 (NSW)	178A (now repealed)	Obtaining money by deception	2
Crimes Act 1900 (NSW)	192E(replaced old s 178A)	Fraud, obtaining property by financial deception	2
Crimes Act 1958 (Vic)	74	Theft	4
Crimes Act 1958 (Vic)	81	Obtaining property by deception	2
Crimes Act 1958 (Vic)	82	Obtaining financial advantage by deception	6
Crimes Act 1958 (Vic)	83	False accounting	2

State Crimes legislation featured significantly in the database. The offence of obtaining a financial advantage by deception is a significant feature in CDPP prosecutions generally, not just those included in this empirical study.⁷⁹ Provisions under both the Corporations Act and State Crimes Acts featured together in media releases about 25% of the defendant-regulatees in the dataset. The offence of obtaining property by financial deception was typically coupled with the offence of carrying on a financial services business without a licence (s911A in Corporations Act, Chapter 7) and/or false and misleading statements (s1041G in Corporations Act, Chapter 7).

(d) Defendants Pleaded Guilty or Admitting Contravention

The database also disclosed some information about the extent of co-operation between defendant-regulatees, ASIC and the CDPP in the enforcement process. As part of reporting on court-imposed penalties, ASIC media releases revealed whether the defendant-regulatee had pleaded guilty, in the case of criminal proceedings, or admitted contraventions, in the case of civil penalty proceedings. Table 12 reveals that the over whelming majority of defendant-regulatees sentenced for criminal offences (31 out of 37 regulatees or 86% of the cohort) pleaded guilty. However, none of the four defendant-regulatees subject to pecuniary civil penalty proceedings admitted contravening the law as a precursor to pecuniary penalties being made against them.

Table 12: Defendant regulatees who pleaded guilty or admitted contravention

Pleas/admissions	Count
Guilty	31
Not guilty – convicted	6
Admitted contravention	-
No admission – declaration of contravention made by court	4

(e) Reflections on the Data

Information on States, Courts, legislation used and co-operation in penal outcomes by defendant-regulatees informs analysis and understanding of how ASIC goes about its

⁷⁹ The offence of obtaining financial advantage by deception makes up 1.7% of all CDPP prosecutions in Victoria. See Sentencing Advisory Council, *Sentencing Snapshot – Obtaining a financial advantage by deception*, Report 138, March 2013), <https://www.sentencingcouncil.vic.gov.au/publications/sentencing-snapshots/138-obtaining-financial-advantage-deception-higher-courts>.

higher order enforcement work in conjunction with the CDPP. The dataset reveals that ASIC was more likely to pursue court-based penalties through the NSW Courts, particularly in the Local Court. ASIC, in conjunction with the CDPP, would typically rely on a combination of state and federal legislative provisions including Chapter 7 of the Corporations Act. Finally, defendant-regulatees in the dataset were overwhelmingly disposed to plead guilty to the charges made against them. However, the reasons for their disposition were not evident from the data relied on in this case study.

10 Penalty Outcomes in the Dataset

(a) Overview

Statistics on the penalties made against defendant-regulatees in the dataset are now presented. A goal of this empirical study was to compare and contrast the penalty determinations made by courts in financial misconduct cases during the sample period with the maximum penalty prescribed by their enabling legislation. The object was to form an impression as to whether penalties were cautiously applied by Courts during the sample period with maximum penalties rarely, if ever, made or imposed by courts.

(b) Snapshot of Criminal Penalties in the Dataset

Table 13 begins with a snapshot of all penalty orders included in the dataset.

Table 13: Type and number of penalties made in relation to financial misconduct during the financial years 2011/12 to 2013/14.

Sentence/Penalty ordered	Count
Imprisonment	21
Wholly suspended prison sentence	9
Intensive correction order	1
Fine	1
Good behaviour bond	3
Combination of criminal penalties	2
Pecuniary civil penalty	3
No penalty order made	1

Table 13 indicates the 7 different types of penalties and the category of no penalty order included in the dataset. The penalties include imprisonment, wholly suspended prison sentences, intensive correction orders, fines, good behaviour bonds and pecuniary civil penalties. A combination of criminal penalties was ordered on two occasions. No pecuniary penalty order was made in one of the four civil penalty proceedings.⁸⁰

Imprisonment is the harshest sanction available under both the Corporations Act and the various state Crimes Acts. ASIC enforcement policy suggests that imprisonment terms are only sought in relation to the most egregious breaches of the law.⁸¹ It is therefore interesting to observe that imprisonment terms were made against just over half (21) of the defendant-regulatee cohort. Of those 21 defendant-regulatees, 17 had a fixed non-parole period and 4 did not. A non-parole period refers to the period of imprisonment that a defendant-regulatee had to serve in prison before becoming eligible for parole.

(c) Length of Imprisonment of Defendant Regulatees during Study Period

The 21 imprisonment orders in Table 13I are broken down by sentence length in Table 14. They are arranged into year bands. The last band is 9-10 years. Ten years imprisonment is the current maximum sentence possible for offences committed in relation to s1041E (false and misleading statements) and s1041G (dishonest conduct) in Chapter 7 of the Corporations Act.⁸² Ten years is also the maximum imprisonment term possible for fraud and financial deception cases under the various State Crimes legislation. One complication in breaking imprisonment orders down into time periods was the presence of four cases in the cohort where the defendant-regulatee had multiple charges and/or was found to have committed multiple contraventions of one or more legislative sections. In each of the four cases, the court ordered “a total effective sentence”. The total effective sentence was made after ordering that individual sentences for each charge/contravention be served concurrently (at the same time) or cumulatively (one after the other). The total effective sentence was used from the four mentioned cases to determine imprisonment length for the purposes of Table 14. Depending on the circumstances, the total effective sentence imposed in a particular case could be longer than the maximum penalty specified in any one specified legislative provision. However, total effective sentences are not evidence that the Courts made use of the maximum prescribed penalties in the Corporations Act or other contravened legislation.

⁸⁰ Civil penalty proceedings against Huimin Wu. See ASIC, “Ponzi scheme ‘mastermind’ handed record penalty” (Media Release, 13-031MR, 21 February 2013).

⁸¹ ASIC, above n 12.

⁸² Corporations Act 2001 Schedule 3 (item 310). The maximum imprisonment term was increased from 5 years to 10 years in November 2010 pursuant to the *Corporations Amendment (No 1) Act 2010* (Cth).

Table 14: The number of defendants sentenced to imprisonment for financial misconduct by length of prison term

Imprisonment length	Count
Less than 1 year	-
1 year to less than 2 years	1
2 years to less than 3 years	4
3 years to less than 4 years	5
4 years to less than 5 years	4
5 years to less than 6 years	2
6 years to less than 7 years	2
7 years to less than 8 years	1
8 years to less than 9 years	-
9 years to up to 10 years	2

Table 14 reveals that the most common length of imprisonment imposed was 3-4 years, although this band of sentence length was not significantly larger than the bands either side of it. A spread of imprisonment sentences were a feature in the database with most sentences concentrated in the middle of all possible sentencing length possibilities. There were no imprisonment terms of less than 1 year. Such sentences were typically converted into wholly suspended sentences or good behaviour bonds. Imprisonment terms longer than 8 years were instances of total effective sentences, rather than principal sentences. The two instances mentioned in the table were subsequently appealed by their defendant-regulatees and revised downward on appeal.⁸³

(d) Comparison of Imprisonment Terms in Data Sample with the Maximum Prescribed

As noted earlier, the most commonly specified financial services sections in the database were s1014E (false and misleading statements) and s141G (dishonest conduct).⁸⁴ Since November 2010, offences committed in connection with these provisions attract a maximum penalty of imprisonment for 10 years or a fine. The fine is calculated as the greater of 4,500 penalty units or, if the court can determine the total

⁸³ *Koch v R* [2011] VSCA 435; *Finnigan v The Queen* [2013] 233 A Crim R 381.

⁸⁴ See Table 9 above.

value of the benefits that have been obtained by one or more persons and are reasonably attributable to the commission of the offence, 3 times that total value. A current penalty unit is \$170, so a fine of 4500 units translates to a fine of \$765,000.

(e) Penalties under s 1041E

Section 1041E was mentioned in the dataset in connection with eight (8) criminal penalty orders. Of these, six (6) were for imprisonment terms. The two other penalties were: a combination of wholly suspended sentence and good behaviour bond; and a fine of \$5000.⁸⁵ Table 15 presents data on the length of imprisonment term in the six s. 1041E cases, arranged in the same year bands as were used in Table 14.

Table 15: Imprisonment terms for defendant-regulatees convicted of offences under s 1041E during the study period

Imprisonment length	Count
Less than 1 year	-
1 year to less than 2 years	-
2 years to less than 3 years	2
3 years to less than 4 years	2
4 years to less than 5 years	1
5 years to less than 6 years	-
6 years to less than 7 years	1
7 years to less than 8 years	-
8 years to less than 9 years	-
9 years to up to 10 years	-

(i) Observations

Table 15 reveals a concentration of imprisonment sentences between two and four years in connection with s 1041E offences. A sentence within these bands would be between 20% and 40% of the maximum imprisonment length currently prescribed for s 1041G offences under the Corporations Act, as noted above.

⁸⁵ ASIC, “Accountant involved in Dollarforce collapse sentenced” (Media Release, 13-271MR, 6 September 2013) and ASIC, “Former financial adviser convicted and ordered to pay back money” (Media Release, 13-321MR, 28 November 2013).

(ii) Qualifications

Three qualifications limit the inferences that can be drawn from these observations. First, the dataset is very small. Secondly, there is a strong possibility that the penalties discussed here relate to conduct committed by the defendant-regulatees prior to November 2010. As noted earlier, imprisonment terms under the Corporations Act for offences under s1041E were increased from five to ten years imprisonment in November 2010. The increased regime would only apply to conduct committed after the enactment of that regime. If the old regime of penalties applied to these cases, then a sentence length between 2 and 4 years would in fact be between 40% and 80% of the maximum sentence possible for those offences. Finally, four of the six penalties (66%) were in cases where the Courts determined there to be offences committed under multiple legislative provisions, such that the imprisonment sentences awarded were not exclusively in respect of Corporations Act s. 1041E alone. There was no evidence in the dataset as to what percentage of those sentences related to s.1041E.

(f) Penalties under s 1041G

Section 1041G was mentioned in the dataset in connection with eight (8) criminal penalty orders. Of these, six (6) were for imprisonment terms. The other two penalties were for a combination of wholly suspended sentence and good behaviour bond.⁸⁶ Table 16 presents data on the length of imprisonment term in the six s. 1014G cases, arranged in the same year bands as above.

Table 16: Imprisonment terms for defendant-regulatees convicted of offences under s 1041G during the study period

Imprisonment length	Count
Less than 1 year	-
1 year to less than 2 years	-
2 years to less than 3 years	1
3 years to less than 4 years	3
4 years to less than 5 years	-
5 years to less than 6 years	-
6 years to less than 7 years	-
7 years to less than 8 years	-
8 years to less than 9 years	-
9 years to up to 10 years	2

⁸⁶ ASIC, "Former financial adviser sentenced" (Media Release, 12-273MR, 12 November 2012).

(i) Observations

Table 16 reveals that the most common length of imprisonment in connection with s 1041G offences was 3-4 years. This is approximately 1/3rd (or 30-40%) of the maximum imprisonment length currently prescribed for s 1041G offences under the Corporations Act, as noted above. However, there were also two imprisonment terms for 10 years, which apparently correspond with the current maximum prison length.

(ii) Qualifications

Four qualifications limit the inferences that can be drawn from these observations. First, the dataset is very small. Secondly, as discussed above in relation to s 1041E penalties, there is a possibility that the old regime of penalties applied to these cases, so that the common sentence length of 3-4 years in the dataset would in fact be between 60% and 80% of the maximum sentence possible for those offences. Thirdly, four of the six penalties (66%) were in cases where the Courts determined there to be offences committed under multiple legislative provisions. Two of these were in the imprisonment length band of 9-10 years. Finally, the two largest penalties in the table related to the same defendant-regulatee and were in respect of the same offences. This situation arose because the defendant-regulatee in question, Simon Finnigan, was first sentenced in 2011-12 and then resentenced on appeal in 2013-4.⁸⁷ His imprisonment penalty therefore appears twice in the dataset. This was an unusual occurrence.⁸⁸

(g) The Case of Simon Finnigan

Finnigan was first sentenced to 10 years jail after pleading guilty to nine counts (contraventions) of s 1041G in 2011. At the time of his sentencing, the maximum imprisonment term for s 1041G offences was 5 years. However, Finnigan was sentenced in respect of multiple (9) offences under s 1041G. Ten years was Finnigan's total estimated sentence for those offences. On appeal to the NSW Court of Criminal Appeal in 2013, Finnigan's original total estimated sentence was reduced from 10 years to 9 years.

(h) Size of Pecuniary Civil Penalty Compared with the Maximum Penalty Prescribed

As noted at the start of the empirical study, the study period captured only four defendant-regulatees who were subject to pecuniary civil penalty proceedings for financial services misconduct. No meaningful observations arise from this data because the sample is too small and all four were defendants in the same proceeding.⁸⁹ The allegations against the four were essentially the same: they had operated and promoted investment in an unauthorised investment scheme contrary to Corporations Act ss 911A

⁸⁷ ASIC, "Sydney company director sentenced to jail" (Media Release, 11-304AD, 16 December 2011), *Finnigan v R* [2013] 233 A Crim R 381.

⁸⁸ There is one other instance of double counting in the data set due to an appeal and resentencing. See *R v Lawson Donald* [2013] NSWCCA 238.

⁸⁹ *Re Idylic Solutions Pty Ltd, ASIC v Hobbs & Ors* (2013) 93 ACSR 421.

(requirement to have a financial services licence); s 601ED (requirement to register investment scheme) and the duties of directors/officers (ss 180, 181 and 182). All four defendants were found to have committed contraventions of civil penalty provisions but only three were ordered to pay pecuniary civil penalties. The amount of those penalties was: David Hobbs - \$500,000; David Collard - \$150,000; and Jacqueline Hobbs - \$20,000. Pecuniary civil penalties are set out in s 1317G. The maximum amount for contraventions of ss 180-182 and s 601ED (s 911A is not a civil penalty provision) is currently \$200,000.

David Hobb's penalty order reflected the fact that he was found to have committed multiple contraventions of the relevant civil penalty provisions. ASIC claims it is the highest pecuniary penalty awarded in ASIC's history.⁹⁰ The penalty was determined by Ward J in the New South Wales Supreme Court.⁹¹ In her deliberations, she noted that the aggregate of the penalties for the separate contraventions by David Hobbs was \$1,000,000. Even allowing for the serious nature of the contraventions committed, Ward J determined that the general objective of deterrence would be met by reducing the penalty payable by 50% to \$500,000.⁹² The smaller size of the pecuniary penalties made against Collard and Jacqueline reflected their lesser involvement in the unauthorised investment scheme and the losses that resulted from it.

(i) Reflections on the Data

The object of this aspect of the empirical study was to make observations about the penalties actually being ordered or made by Courts in financial misconduct cases. What has been revealed by the study is the predominance of imprisonment terms in the dataset and the dearth of fines or pecuniary civil penalty orders. Comparisons with the maximum imprisonment terms for financial misconduct under the Corporations Act suggest that Courts are conservative in their determination of sentence length and the size of the pecuniary penalty. In none of the data examined was there any evidence that Courts had ever imposed the maximum imprisonment sentence or awarded the maximum pecuniary penalty for a single contravention of the financial service provisions of the Corporations Act. The defendant-regulatees who were subjected to lengthy prison terms or large pecuniary penalties were involved in multiple contraventions of the law. Their prison term or pecuniary penalty could not be attributed to a single contravention or even a single financial services provision in the Corporations Act.

F Comparison with Data in Working Paper No. 1

1 Findings from Working Paper No. 1

Working Paper No 1 provides a preliminary analysis of ASIC's enforcement activity based on the data contained in ASIC's six monthly enforcement reports.⁹³ In particular, Table 2

⁹⁰ ASIC, n 80.

⁹¹ *Re Idyllic Solutions Pty Ltd, ASIC v Hobbs & Ors* (2013) 93 ACSR 421.

⁹² *Ibid* 525.

⁹³ Gilligan et al, above n 65, 18-25 and ASIC, above n 69.

summarised ASIC aggregate enforcement activities by area of regulation and enforcement method from 1 July 2011 to 31 December 2014, an almost identical time period to that one used in the current data study. Table 2 indicates that the majority of enforcement outcomes in relation to financial services during the aggregate period were administrative remedies and negotiated outcomes including enforceable undertakings. Figure 7 reinforces that impression by depicting the data in the form of a bar graph. Administrative penalties and/or negotiated outcomes made up 70% of the enforcement outcomes for financial services. Criminal penalties were 14% and civil remedies were 14.6%. Administrative remedies and negotiated outcomes were the preferred enforcement method to civil and criminal penalties in the ratio of 2.4:1. A comparison of the findings from Working Paper 1 with the findings from the current empirical study is briefly now undertaken to draw out the similarities and differences between the two sets of findings.

2 Comparison of Data Findings

Subject to the reservations noted below, the data in the current case study can be viewed as a subset of the data presented in Working Paper No 1. The data in the current study, of criminal and civil penalty outcomes for financial services misconduct, falls into two of the five categories of enforcement analysed in Working Paper No 1: criminal and civil enforcement methods. The other methods included in Working Paper No 1 were administrative remedies, enforceable undertakings and negotiated outcomes, and public warning notices. The current study advances the earlier research by providing insights into the composition of the aggregated totals for criminal and civil enforcement outcomes in the earlier study.

The contrast between the two data sets is interesting. The data analysis in Working Paper No 1 gives an overall enforcement picture for financial services. It reveals ASIC's predominant reliance on administrative methods of enforcement for responding to financial services misconduct. The current study gives a snapshot of one part of the overall enforcement picture, namely, the use of penalties (criminal or civil). It reveals that civil penalties are hardly used. Rather, there is a strong emphasis on criminal enforcement involving custodial and suspended prison sentences. The ratio of criminal penalties to pecuniary civil penalties in the current study was 9.25:1. 90% of the penalty enforcement outcomes were criminal penalties with 51% of those being imprisonment terms and 22% being suspended prison sentences. A reasonable observation, based on both sets of data, is that while ASIC prefers to resolve the majority of financial services misconduct cases using administrative measures, when it does resort to penal enforcement methods, it prefers to use its strongest sanction, criminal penalties involving imprisonment terms. These observations do not take account of the wider enforcement context within which ASIC operates.⁹⁴ Naturally, there may well be other

⁹⁴ See "Wider enforcement context" in Part III above.

variables not discussed presently that offer alternate, but equally plausible, explanations for these patterns.

3 *Limitations on Comparability of Data*

Comparison between the data findings in Working Paper No 1 and the current study must be undertaken cautiously. The sample periods for both studies are very similar but not identical. Working Paper No 1 covers an additional six-month period (1 July 2014 to 31 December 2014). ASIC had not published its six monthly enforcement report for the same period at the time that the current study was conducted.⁹⁵ Secondly, the current study provides data on specific types of penalty proceedings whereas the data in Working Paper No 1 is of an aggregated nature. Each category of enforcement method in Working Paper No 1 encapsulates a variety of different proceedings. The two relevant categories of criminal and civil matters are wide and contemplate many types of enforcement action within their aggregates. Criminal penalty proceedings and civil penalty proceedings considered in this current study form only one part of the criminal and civil enforcement aggregates discussed in Working Paper No 1. Finally, the previously discussed broad definition of what constitutes an enforcement outcome in ASIC enforcement reports also affects the comparability of the two data sets.⁹⁶ The data set in the current empirical study has been prepared with a narrow definition of enforcement outcome. The focus has been exclusively on criminal and civil penalty sentencing proceedings, *not* the legal process that resulted in conviction and/or liability for criminal offences or civil penalties.⁹⁷

IV CONCLUSION

This paper has examined the application and use of criminal and civil penalties by ASIC in financial misconduct cases from 2011-2013. It provides a timely insight into how ASIC performs its remit to enforce the financial service provisions of the Corporations Act. ASIC has recently called for a review of penalties under the Corporations Act as one way of addressing perceived regulatory gaps that have affected its performance in responding to financial misconduct complaints. ASIC maintains that there are gaps in its penal enforcement toolkit and these operate as a barrier against optimal enforcement responses. ASIC seeks a holistic review of the consistency of criminal penalties, the range of civil penalty provisions, and the level of civil penalty amounts payable across the Corporations Act. It is almost 15 years since the enactment of current criminal and civil penalty regimes, and 12 years since the enactment of Chapter 7. Comprehensive reform of financial penalties, civil or criminal, has not been undertaken during the period. As discussed in Working Paper 1,⁹⁸ in recent years there have been few reviews

⁹⁵ ASIC, *ASIC enforcement outcomes: July to December 2014*, Report 421 (30 January 2015), <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-421-asic-enforcement-outcomes-july-to-december-2014/>.

⁹⁶ See "Types of Enforcement Outcomes" in Part III above.

⁹⁷ See "Proceedings in Study" in Part III above.

⁹⁸ Gilligan et al, above n 65, 11-13.

of penalties regimes for corporate wrongdoing in Australia. In 2003, the Australian Law Reform Commission (ALRC) published a review of Commonwealth laws relating to administrative and civil penalties.⁹⁹ The Commonwealth Government did not formally respond to *ALRC Report 95*, although its *Guide to Framing Commonwealth Offences, Civil Penalties And Enforcement Powers* incorporated many of the issues and principles raised by the ALRC in Report 95.¹⁰⁰ However, like *ALRC Report 95*, the Guide does not critically examine whether current penalties are adequate, although it does provide advice on framing and setting penalties.¹⁰¹ In 2007 the Commonwealth Treasury conducted *A Review of Sanctions in Corporate Law* which considered criminal and civil sanctions in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth),¹⁰² but a final report was not published.

This study has shown that from 1 July 2011 – 30 June 2014 there have been few cases where ASIC has sought either pecuniary civil penalty orders or pecuniary criminal penalties (fines) in relation to financial misconduct. ASIC has sought deterrent effect by operating at the higher levels of the regulatory enforcement pyramid typically by seeking the strongest available sanction. However, the empirical study also shows that imprisonment terms applied by Courts are cautiously and conservatively applied. The maximum terms set out in the legislation are only imposed in cases where there are multiple contraventions of the law. Increases in the size and range of penalties available do not guarantee their subsequent application and use by Courts. While the purpose of regulation is both to deter and punish wrongdoing, this study indicates the importance of empirical research on the application of penalties to any future review of penalty regimes under the Corporations Act.

⁹⁹ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95, March 2003, 9-12,

<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC95.pdf>.

¹⁰⁰ Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties And Enforcement Powers*, September 2011,

<https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>.

¹⁰¹ *Ibid* 5.

¹⁰² Commonwealth of Australia, *Review of Sanctions in Corporate Law* (2007),

http://archive.treasury.gov.au/documents/1182/PDF/Review_of_Sanctions.pdf