

Dr Kathleen Dermody
Committee Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600
30 March 2016

Dear Dr Dermody

Submission to Senate Economics References Committee Inquiry into Penalties for Corporate and Financial Misconduct or White-Collar Crime

We welcome the opportunity to make a submission to the Senate Economics References Committee inquiry on the inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct or white-collar crime. It is a topic that is of considerable importance to corporate and financial regulation in Australia.¹

Our submission relates to Term of Reference c: the use and duration of banning orders.

Yours faithfully

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¹ The views expressed in this submission are the authors' own. This submission draws on research undertaken with the support of the Centre for International Finance and Regulation (CIFR) and the University of Melbourne – CIFR Research Project T021, 'An Analysis of Penalties under ASIC Administered Legislation'.

Recommendation – ASIC should establish an online and free-of-charge public register of banning orders imposed by ASIC that can be both browsed and searched using key terms, similar to ASIC’s enforceable undertakings register

1. We are in the process of conducting a quantitative empirical study of banning orders and liaising with ASIC regarding the use and reporting of banning orders.
2. The ASIC website currently provides a mechanism to search for banned and disqualified persons. This search enables the user to discover specific details about banned and disqualified individuals. However, it is hamstrung as a tool by the fact that the user is unable to access this information without the name of the individual for whom they are searching. This limits the user’s capacity to understand the broader context in which banning orders are imposed and so the banned and disqualified search function is problematic. This means that publicly available sources of information on administrative banning orders by ASIC are ASIC media releases, ASIC annual reports and ASIC enforcement reports. ASIC annual reports and ASIC enforcement reports provide very general statistics on the number of bans. ASIC media releases contain more substantive information on the bans, but we have reason to believe that their coverage of administrative banning orders is not comprehensive. For example, our analysis of ASIC’s annual reports combined with primary case law research suggest that ASIC made over 600 orders pursuant to s 206F in the ten years from 2005-06 to 2014-15. Our research and analysis of ASIC’s media releases suggest that less than half of these orders were reported in media releases. This disparity suggests that not all administrative banning orders are reported in ASIC’s media releases and that the true number of administrative banning orders may be much higher than the number reported in ASIC’s media releases.
3. We have reviewed ASIC media releases from 1 January 2005 to 31 December 2014 and our research suggests that administrative banning orders imposed by ASIC accounted for at least 80% of all banning orders imposed by ASIC, the AAT and the courts during that period. We say “at least” because, as noted above, we have reason to believe that ASIC media releases do not cover all administrative banning orders and our primary case law research suggests that ASIC’s rate of media release coverage of court-imposed bans is much higher than administrative bans. Thus, while media releases likely report a relatively accurate number of court-imposed bans, the number of ASIC imposed bans is likely considerably higher than the number reported in media releases. Hence, 80% is a conservative estimate of the proportion of banning orders that are administrative.
4. Subject to the limitation regarding ASIC media releases noted above, our review of ASIC media releases suggests that approximately 25% of administrative banning orders are permanent, while approximately 10% of court imposed bans are permanent. Of those banning orders that are not permanent, our research suggests that the average duration of banning orders imposed by ASIC is between 3 and 4 years.
5. Our recommendation:
 - a. Paragraphs 3 and 4 above show that ASIC is imposing administrative bans of significant magnitude with great frequency.
 - b. Paragraph 2 above shows that there is no readily accessible source of comprehensive and detailed public information on this evidently very significant area of corporate and financial law enforcement.

- c. In light of the high frequency and magnitude of administrative banning orders imposed by ASIC and the lack of publicly available information on such orders, we recommend that ASIC establish an online free-of-charge public register of banning orders that can be both browsed and searched using key terms, in a manner similar to the enforceable undertakings register.
6. The register is important for two main reasons. One is to promote general deterrence – it will send a stronger signal to the market that ASIC is taking administrative enforcement action seriously, both in terms of frequency and magnitude of bans. The other is to promote accountability and fairness – banning orders are one of ASIC’s most coercive powers and there is currently a lack of transparency regarding their use and duration.
7. We are happy to provide further information if required.