

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE
Treasury Portfolio
Additional Estimates
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Department/Agency: Australian Securities and Investment Commission

Question: AET 77

Topic: Maximum penalties

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Senator: Dastyari, Sam

Question:

Senator DASTYARI: Secondly, LIBOR and the like cases, internationally, as I am sure you are well aware, resulted in fines in the billions. What is the maximum fine or penalty available to you should a court choose to go your way?

Mr Medcraft: I will let Cathie comment on that. It is a maximum—it depends what the charges are, and there are a number of charges. Is that a fair comment?

Ms Armour: Yes, we should probably take that on notice so we can easily give you that information.

Mr Price: It is a little complicated, the way it is—

Ms Armour: It depends on—

Mr Medcraft: It depends on the charges, and the number of charges.

Senator DASTYARI: So it becomes a multiply-out effect?

Ms Armour: Yes, but ASIC does not have a fine power. Unlike those other regulators, we do not. For equivalent allegations, whether or not they are established would be a matter that would need to go to a court.

Senator DASTYARI: Mr Medcraft, do you have the power to put conditions on the licences of the banks?

Mr Medcraft: Yes.

Senator DASTYARI: Could those conditions you place on the licences of the banks be fines?

Mr Medcraft: You cannot put a fine as a condition on a licence.

Senator DASTYARI: Or a penalty—a financial penalty?

Mr Medcraft: No.

Mr Price: We will take it on notice.

Mr Medcraft: We will take it on notice, but—

Mr Price: I suspect the answer is 'no'. It could be that any condition on a licence needs to be consistent with the overall regulatory framework.

Senator DASTYARI: At a macro level, is it correct to say that your ultimate power is should you feel, in a circumstance, that you need to use this power, you can put licence conditions on a bank?

Mr Medcraft: We can. The solution on all this could be an outcome in a court, a fine as a result of that. It could include, as well, an enforceable undertaking, because that is about improving future behaviour. So it could be a package of a solution.

Answer:**Penalties**

Where a court finds that a person has contravened the *Corporations Act 2001* (Cth) (**Corporations Act**) or the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**), the maximum penalty that may be imposed will depend upon the following factors:

- (a) the relevant section found to have been contravened;
- (b) whether criminal or civil action is taken;
- (c) the 'persons' status i.e. whether the person is a body corporate or an individual;
- (d) the number of contraventions.

For example, contraventions of the unconscionable conduct provisions of the ASIC Act (sections 12CA and 12CB and predecessor provisions) give rise to civil pecuniary penalties, the maximum amount for each contravention, as set out in section 12GBA of the ASIC Act, being:

- (a) for a body corporate, 10,000 penalty units; or
- (b) if the person is not a body corporate, 2,000 penalty units.

The value of a penalty unit is determined at the time of the contravention and is set out in section 4AA of the *Crimes Act 1914* (Cth) as follows:

- from 1997 up until 28 December 2012 - \$110 per penalty unit (a maximum penalty for a body corporate of \$1.1 million per contravention);
- after 28 December 2012 but before 31 July 2015 - \$170 per penalty unit (a maximum penalty for a body corporate of \$1.7 million per contravention);
- after 31 July 2015 - \$180 per penalty unit (a maximum penalty for a body corporate of \$1.8 million per contravention).

Under section 12GBA(4) of the ASIC Act a person will not be liable to more than one pecuniary penalty in respect to the same conduct where that conduct is the subject of proceedings brought under both sections 12CA and 12CB of the ASIC Act.

The maximum pecuniary penalty available in a civil penalty action that ASIC may pursue against a bank in relation to BBSW will depend upon the relevant section ASIC alleges to have been contravened and the number of contraventions.

On 4 March 2016, ASIC commenced proceeding against the Australia and New Zealand Banking Group Limited in relation to alleged contraventions, on 44 Trading Days, of the following sections:

- sections 12CA and/or 12CB (including previous section 12CC) of the ASIC Act; and
- section 1041A of the Corporations Act which relates to market manipulation.

Section 1317G(1B) of the Corporations Act provides that the maximum penalty for a civil contravention of section 1041A is:

- (a) for a body corporate, \$1 million; and
- (b) for an individual, \$200,000.

ASIC's investigations into conduct of the other banks continues.

Licence conditions

ASIC is able to impose a licence condition: see section 914A(1) of the Corporations Act. A fine or penalty is not however able to be imposed through a licence condition.

When ASIC is granting a licence, it must impose a condition that specifies the financial services covered by it: section 914A(6). In addition, ASIC may impose licence conditions at any time on its own initiative; or if the licensee applies to ASIC to do so: section 914A(2). ASIC must offer the licensee a hearing before imposing a condition on its own initiative after the license has been granted: section 914A(3).

As a practical matter, ASIC will impose standardised conditions on licences at the time the licence is granted. Additional (often bespoke) conditions are imposed on an ad hoc basis to deal with compliance issues.

Licensees are required to comply with the conditions on their licence: section 912A(1)(b).

A fine or penalty is not able to be imposed through a licence condition. Statutory powers may only be exercised for the purposes for which they are conferred. Relevantly ASIC's power to impose conditions on financial services licences under section 914A(1) may be exercised to regulate the provision of financial services, for example, as noted above, to specify the financial services that may be provided by the relevant licensee; or specify the controls that the licensee has to have in place in providing those services. Consistent with constitutional limitations, the power to impose fines and other penalties on licensees is conferred on the courts.

ASIC cannot impose or vary a condition on a bank's licence if this would have the effect of preventing the bank from carrying out any of its normal activities: section 914A(5). In such a case, ASIC's power to impose or vary the condition becomes the Minister's power.

ASIC can otherwise impose conditions on a bank's licence in the normal way, subject only to notifying APRA within a week: section 914A(5)(c).