

## Financial Services Insights

### ASIC's regulatory approach to enforcement post-Hayne - What to do if you receive an ASIC Notice

Following on from our preliminary analysis of the **Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry** we predicted that one of the outcomes of the Recommendations of the Hayne Commission Final Report would be a likely increase in regulatory activity, more rigorous surveillance by regulators and potential prosecutorial action across target sectors such as banking, insurance and superannuation, particularly given the referrals by the Commission for misconduct by a number of institutions.

We are noticing that there is already a shift in ASIC's regulatory approach to enforcement and ASIC has recently publicly acknowledged that ASIC's 'change agenda' includes the adoption of a 'why not litigate?' enforcement stance, the initiation of its Internal Enforcement Review and the enhancement of its governance structures.

The Final Report identifies that ASIC recognises:

*“that it must alter its enforcement priorities and practices within the financial sector and particularly for larger financial institutions so as to be more agile in initiating prosecuting court action, and in many instances even commencing with it.”*

*“that its enforcement priorities must change to emphasise deterrence and public denunciation more strongly in its use of various regulatory tools (inside and, where applicable, outside court) as mechanisms by which to change behaviours”.*

We anticipate that this will necessarily result in a stricter approach to enforcement and ultimately a focus on public enforcement tools such as prosecution and litigation in circumstances where appropriate deterrence is needed.

#### **ASIC update on implementation of Royal Commission recommendations**

On 19 February ASIC released an update on its planned actions in relation to the recommendations of the Final Report which foreshadows a more extensive and stricter regulatory regime and approach to enforcement including:

- (i) the recent passage of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018* penalty provisions will be of greater deterrence value

- (ii) as a result of the recommendations in the Final Report and current reforms, there will be over 60 additional penalty provisions that ASIC will be able to action
- (iii) the Royal Commission made 11 specific referrals to ASIC in relation to eight entities and ASIC's enforcement teams are undertaking investigations into 12 matters that were case studies before the Royal Commission and have commenced proceedings in relation to two other case studies
- (iv) ASIC has determined to establish a separate Office of Enforcement within ASIC
- (v) there is a long pipeline involved in fully investigating and successfully prosecuting misconduct and the impact of these changes will only become fully visible over time.

As a consequence, we anticipate:

- (i) a tectonic shift as ASIC realigns its enforcement and regulatory priorities
- (ii) increased public visibility as ASIC 'flexes its muscles' under its strengthened regulatory and enforcement powers
- (iii) more pervasive action by ASIC to demonstrate the deterrence value of those powers to stem future misconduct.

In preparation for these changes and the likely increase in ASIC's use of its coercive powers, in this 'Insight' we have provided guidance on ASIC's information-gathering powers in association with surveillance and investigations and how to respond if you receive an ASIC Notice to produce documents or to attend an examination.

### **What can ASIC do?**

We have outlined below a general explanation of the Notices which ASIC may issue in order to seize and secure documents and to oblige the attendance of directors and executives to give evidence at an examination, together with a simple set of guidelines to assist in the management of your response to an ASIC.

ASIC regulates Australian companies, financial markets, and financial services organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit.

ASIC has a range of compulsory information-gathering powers to require a person or entity to:

- (i) provide documents and information
- (ii) attend an examination to answer questions and/or provide reasonable assistance.

ASIC's coercive powers under the *Australian Securities and Investments Commission Act* ('ASIC Act') include:

- (i) to require the appearance of a witness for examination on oath [section 19]
- (ii) to inspect documents without warrant [section 29]

- (iii) to require production of documents [sections 30 to 34]
- (iv) to apply for search warrants [section 35]

These information-gathering powers can be used in association with surveillance and investigations, however the range of powers which ASIC are able to use, and the purpose for which the information is gathered, differs in each instance and is summarised in the table below:

Inquiry type	Nature of Conduct	Scope of Powers
Formal investigation	Suspected or actual contravention of a law	All powers to conduct an examination and to request reasonable assistance and search warrants on or after a formal investigation begins
Surveillance	To test and ensure compliance with the law	ASIC may only use powers to inspect documents and compel the production of documents or the disclosure of information

### What to do if you receive an ASIC Notice – 10 Steps to Consider

We have outlined a simple guidance framework to assist directors, executives and companies to respond to an ASIC Notice to produce documents or to attend an examination in connection with circumstances under inquiry by ASIC.

Importantly, any response will depend upon and should be assessed having regard to the particular circumstances and you should seek specific legal advice in relation to your scenario.

- (i) **Assess the Regulatory Scenario** - assess if the inquiry is routine surveillance or part of a wider investigation, establish what statutory provisions give rise to the Notice and whether it requires the production of documents or an attendance at an examination or both.
- (ii) **Consult your lawyer and/or notify the General Counsel of the entity of which you are a director or an officer** – before attending any examination or producing any documents. Note that sections 63 to 67 of the ASIC Act prescribe criminal offences for failing to produce (for concealing) documents, to attend examination or answer questions, or for giving false information or obstructing investigation. By instructing lawyers to review the issues which are the subject of investigation legal advice and communications will be subject to legal professional privilege.
- (iii) **Undertake a Considered Response** – be cooperative but be vigilant in your response to ASIC, comply within the legal limits of the Notice to produce documents, prepare the relevant information and seek legal advice.

You must attend an examination if the Notice requires and a failure to attend or to answer questions honestly is an offence. It is important that you properly prepare for any examination in consultation with your lawyer.

- (iv) **Determine Scope of Notice** - understand the scope of the Notice to produce documents and the appropriate response, ensure any documents to be submitted to ASIC are reviewed to confirm they are within scope and to identify any possible regulatory risk or other issues.

A Notice to attend an examination will outline the nature and scope of the investigation and at the examination you will be obliged to answer ASIC within that scope.

- (v) **Identification, Collection and Preparation** – identify the documents falling within the scope of the Notice to produce and assess them against the scope of the Notice to ensure that there is full disclosure within its legal limits, that is, disclose no more and no less than is required. Assemble the documents and assess the nature and content from a risk management perspective to identify any problematic regulatory risk or other issues.

- (vi) **Assess any Claim for Privilege** – in consultation with your lawyer, ensure claims of legal privilege are made over any relevant documentation.

At an ASIC examination, you are required to answer a question asked by ASIC even if doing so will expose you to a risk of a penalty being imposed. There is no inherent privilege against self-incrimination, however you are entitled to claim the privilege before you answer a question which would expose you to a risk of a penalty. In this instance your answer cannot later be used against you as evidence against you in a criminal or a penalty proceeding.

- (vii) **Disclosure** – after assessing the documents which are caught by the Notice to produce and isolating and protecting any documents which may be subject to legal privilege, you should ensure that you make a record or copy of all documents produced.

- (viii) **Notify Insurer** – there may be an obligation under your insurance policy to notify insurers of an ASIC investigation and you should seek appropriate legal advice.

- (ix) **Remediation** - instruct a lawyer to undertake a preliminary review to advise on the immediate governance and remediation steps which might be undertaken taken while ASIC's investigation is progressing. Consider the potential ramifications of the investigation and formulate a risk management plan to address regulatory, reputational and other risk .

- (x) **Further Regulatory Action** – assess whether further regulatory action may be undertaken by ASIC including enforcement remedies and discuss risk management strategies with your lawyer. After an examination is complete you will be sent a transcript and will be asked to sign it. You should review the transcript in consultation with your lawyer to check its accuracy as its contents may be used in evidence against you or others in civil or criminal proceedings.

The above framework is a guide only and is not a substitute for specific legal advice. As circumstances and risk relating to an ASIC investigation will vary widely, we recommend that in the event that you receive an ASIC Notice you engage lawyers at an early stage (and/or if appropriate, notify the General Counsel of the entity of which you are a director or officer) to assist in the management of your response.

Meridian has dedicated experience and expertise in the financial services sector, its regulation and dealing with regulators. We can assist you with an ASIC investigation or inquiry into issues raised by ASIC and with your response to a Notice to produce documents or to attend an ASIC examination. It is important to act early

and in our experience the initial management of your response will set the tone for your future engagement with ASIC.

**This article was written by Michael Bracken, Principal - Corporate Advisory and Financial Services. For assistance please contact our Financial Services Corporate Governance and Regulatory Investigations Team Michael Bracken – Principal and Catherine Osborne – Consultant.**



Michael Bracken, Principal  
+61 2 9018 9977  
mbracken@meridianlawyers.com.au



Catherine Osborne, Consultant  
+61 2 9018 9944  
cosborne@meridianlawyers.com.au

Disclaimer: This information is current as of March 2019. This article does not constitute legal advice and does not give rise to any solicitor/client relationship between Meridian Lawyers and the reader. Professional legal advice should be sought before acting or relying upon the content of this article.