

WHAT IS THE FUTURE FOR REGULATORY ENFORCEMENT IN AUSTRALIA?

11 June 2020 | Australia
Legal Briefings - By **Andrew Eastwood**

In the aftermath of the Hayne Royal Commission, Australia's regulators increasingly adopted an aggressive enforcement approach.

Chastened by public criticism, and having been given greater funding by the Government, more investigations were commenced. Court actions were brought in relation to matters that previously would likely have been the subject of a negotiated outcome. And more referrals were made to the CDPP to consider criminal prosecutions. Covid-19 has seen regulators act with clemency as businesses struggle with the new normal. But that leniency looks soon to end.

When Covid-19 hit, our regulators have, appropriately, exercised forbearance and eased off on the level of enforcement action. The pace of regulatory investigations has slowed, regulators acknowledging the challenges faced in this environment for businesses to respond promptly to their inquiries. Very few new court actions have been brought; for instance, the ACCC has not commenced any new court actions since 1 March 2020, whilst in the corresponding period last year it commenced 7 separate proceedings." Further, the regulators' focus in this period has narrowed. For instance, in March 2020 ASIC announced a "recalibration" of its regulatory priorities, saying that it would maintain its enforcement activities but would target "action necessary to prevent immediate consumer harm, egregious illegal conduct and other time critical matters".

As restrictions are gradually reduced, and the economy starts to recover from the effects of the pandemic, a key question is whether our regulators will revert to the combative stance they took in 2019 and early 2020.

The current answer appears to be “yes”. In recent weeks, Rod Sims, ACCC Chairman, was reported to have said that the “five month litigation drought” would end soon, with enforcement action ramping back up as early as the second half of this year. ASIC’s Chairman, James Shipton, has also said that ASIC’s appetite for high-profile litigation has not diminished, and that “past illegal conduct, including behaviour identified by the Hayne royal commission, must continue to be a priority”.

The regulators’ position is understandable, given the criticism levelled at financial institutions and regulators in the Hayne Royal Commission and generally.

However, is it right for the regulators to act as if Covid-19 and its effects never happened, including the measures taken (and financial pain borne) by our financial institutions to help stabilise the economy? Just as all businesses and their employees are planning for what the ‘new normal’ will be like, it surely makes sense for our regulators to do the same and test whether prior enforcement settings and priorities still make sense. In particular, reflection is required as to whether the best use of our regulators’ enforcement monies are spent fighting expensive old wars, sometimes about conduct that occurred up to 10 years ago, when our world has now changed so significantly.

This is not a call for weak regulators. Our regulators should have an appropriate enforcement mindset. Strong, consistent and fair enforcement of the law is good for business and the overall economy.

The issue is with where regulators’ activity is best directed. ASIC’s priorities during Covid-19 – including preventing immediate consumer harm and accelerating payment of outstanding remediation to customers – will continue to be appropriate as we recover from the pandemic. Also, once the effects of the pandemic are substantially behind us, it will be important for our regulators to conduct a look back on how financial institutions, and other key businesses, performed during Covid-19. Key areas to explore in such a review will be issues like business continuity and operational resilience. This would bring us into line with the approach of overseas regulators, and help ensure that we learn from this experience. It might not attract the headlines, however activity of that nature will be more valuable to the Australian community going forward than costly litigation about the past.

This article was first published by the [Australian Financial Review, 10 June 2020](#).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**ANDREW
EASTWOOD**
PARTNER, SYDNEY

+61 2 9225 5442
Andrew.Eastwood@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

**SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND
MORE**

Close

© HERBERT SMITH FREEHILLS LLP 2021