ASIC
Australian Securities & Investments Commission

REPORT 387

Penalties for corporate wrongdoing

March 2014

About this report

This report outlines the penalties available for a range of corporate wrongdoing under legislation administered by the Australian Securities and Investments Commission (ASIC), to enable consideration of whether they are proportionate and consistent with those for comparable wrongdoing:

- in overseas jurisdictions (i.e. Canada (Ontario), Hong Kong, the United Kingdom and the United States); and
- within the Australian context (i.e. across other domestic regulators and legislation administered by ASIC).

The findings in this report will inform our submission to the Financial System Inquiry.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this report are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

Contents

Executive summary

1 Effective regulation depends on achieving enforcement outcomes that act as a genuine deterrent to misconduct. The public expect the Australian Securities and Investments Commission (ASIC) to take strong action against corporate wrongdoers. Effective enforcement is therefore critical for ASIC in pursuing our strategic priorities of promoting fair and efficient financial markets, and ensuring confident and informed investors and financial consumers.

2 Central to effective enforcement are penalties set at an appropriate level, and having a range of penalties available for particular breaches of the law. Having a range of penalties allows ASIC to calibrate our response with sanctions of greater or lesser severity commensurate with the misconduct. This aims to deter other contraventions, and promote greater compliance, resulting in a more resilient financial system.

3 The findings in this report will inform our submission to the Australian Government's Financial System Inquiry.

4 The report explores how the penalties available to ASIC for corporate wrongdoing compare with penalties available internationally. It also identifies differences in penalties between legislation in Australia.

5 Comparing maximum penalties for similar types of corporate wrongdoing under different legislation is a measure of whether the penalties available to ASIC are proportionate and consistent. International comparisons are especially relevant given the increasingly globalised and cross-border nature of modern business transactions.

6 In this report, we look at the penalties available in Australia compared with those in some other jurisdictions with comparable legal systems—Canada (Ontario), Hong Kong, the United Kingdom and the United States. We also make some domestic comparisons between the maximum penalties available to other comparable Australian Government regulators, as well as between the penalties available in the different pieces of legislation we administer.

7 To facilitate our comparison, we have examined the penalties that are available for different types of:

(a) market misconduct—insider trading, market manipulation, continuous disclosure and false statements to the market; and

(b) financial services misconduct—inappropriate advice, unlicensed conduct, fraud and false or misleading representations.

8 While enforcement of statutory directors' and officers' duties is an important part of our enforcement work, our research shows that the way other jurisdictions deal with these duties primarily through common law and

equitable principles differs too markedly to compare this type of wrongdoing: see paragraph 37. It is not included in our analysis as a result.

International comparison

9 A comparison of penalties available to ASIC with penalties available overseas indicates in general the following:

(a) Both maximum terms of imprisonment and fines (monetary criminal penalties: see Table 2) available to ASIC are broadly consistent with those available in other jurisdictions. Exceptions include the significantly higher prison terms available in the United States (see Table 3) and the lower fines in Australia for punishing unlicensed conduct and contraventions of continuous disclosure obligations (see Table 4).

(b) A broader range of non-criminal monetary penalties is available in other jurisdictions, including:

(i) greater flexibility to impose higher non-criminal penalties and scope to use non-criminal penalties against a wider range of wrongdoing (see Table 5). For example, in some jurisdictions, the quantum of non-criminal penalties may be a multiple such as three times the financial benefit obtained for some contraventions (e.g. Hong Kong and the United States). In addition, in the United Kingdom, large administrative penalties can be imposed by the regulator; and

(ii) the ability to require disgorgement—that is, the removal of financial benefit (e.g. profits gained). In the overseas jurisdictions we have surveyed, the power to require disgorgement is either provided in legislation (as in Canada (Ontario), Hong Kong and the United States) or is incorporated as a step in the process of penalty setting by the regulator (as in the United Kingdom) (see Table 6 and Appendix 2 in this report).

Domestic comparison

10 There are differences between the penalties available under the *Corporations Act 2001* (Cwlth) (Corporations Act) and penalties in other legislation for corporate wrongdoing, whether administered by other Australian Government regulators for similar categories of wrongdoing or by ASIC.

11 In the jurisdictions of other Australian Government regulators, the maximum civil penalties available are higher than those available in the Corporations Act. For example, there are differences between maximum civil penalties that ASIC can pursue (a maximum $1.7 million for bodies corporate) and the civil penalties available to other Australian regulators (up to $17 million for bodies corporate): see Table 7.

12 In addition, while the civil penalties that may be sought by ASIC are set at fixed amounts, some Australian regulators can seek civil penalties that represent a multiple of the financial benefit obtained from the misconduct. For example, for cartel conduct, the Australian Competition and Consumer Commission (ACCC) can seek a civil penalty that is the greater of $10 million, three times the value of the benefits obtained that are reasonably attributable to the contravention or 10% of the annual turnover of the company (including related entities).

13 Across legislation administered by us, the maximum penalty amounts available for some comparable types of wrongdoing also vary. For example, the provision of financial services without an Australian financial services (AFS) licence attracts a criminal penalty under the Corporations Act with the maximum fine that may be imposed on an individual being $34,000. In contrast, an individual who engages in credit activity without an Australian credit licence is subject to the same criminal penalty, or alternatively a civil penalty up to ten times greater—that is, up to $340,000.

A Background to the report

Key points

This section:

- sets out the purpose of this report;
- outlines the importance of addressing corporate wrongdoing;
- explains ASIC's role and approach to dealing with corporate wrongdoing; and
- explains the methodology used to compare the availability of penalties for corporate wrongdoing.

The purpose of this report

14 The purpose of this report is to outline the penalties available for a range of corporate wrongdoing under legislation administered by ASIC to enable consideration of whether they are proportionate and consistent with those for comparable wrongdoing:

(a) in overseas jurisdictions (i.e. Canada (Ontario), Hong Kong, the United Kingdom and the United States); and

(b) within the Australian context (i.e. across other domestic regulators and legislation administered by ASIC).

15 The legislation administered by ASIC (referred to in this report as 'ASIC-administered legislation') includes the following Acts and related legislation:

(a) the Corporations Act;

(b) the *Australian Securities and Investments Commission Act 2001* (Cwlth) (ASIC Act);

(c) the *National Consumer Credit Protection Act 2009* (Cwlth) (National Credit Act); and

(d) the *Superannuation Industry (Supervision) Act 1993* (Cwlth) (SIS Act).

16 This report surveys the penalties available to corporate regulators in Canada (Ontario), Hong Kong, the United Kingdom and the United States for contraventions involving insider trading, market manipulation, continuous disclosure, false statements to the market, inappropriate advice, unlicensed conduct, fraud and false or misleading representations.

17 It also considers penalties within the Australian context by examining categories of conduct (e.g. unlicensed conduct, fraud and false or misleading representations) that are regulated by different pieces of legislation in Australia and taking into account whether these produce consistent outcomes.

18 In our submission to the Senate Inquiry into ASIC's performance, we noted that penalties under the relevant legislation have not been comprehensively reviewed for over a decade. We suggested that a holistic review could consider:

(a) criminal penalties;

(b) civil penalties; and

(c) the broader availability of infringement notices.

19 The findings in this report will inform our submission to the Australian Government's Financial System Inquiry.

The impact of corporate wrongdoing

20 For the purposes of this report, corporate wrongdoing is misconduct that occurs in the corporate, financial market or financial services sectors. This type of misconduct generally breaches corporate, financial market or financial services laws. It may involve the misuse of a professional position or information obtained in a professional capacity.

21 The harm caused by corporate wrongdoing can be significant. For example:

(a) investors can lose money where they have relied on inappropriate advice and invested in products that are not suited to their risk appetite, financial situation or needs and objectives; and

(b) people who obtain financial advantages by exploiting information asymmetries between well-informed 'insiders' and less well-informed market participants (including retail investors) undermine confidence and trust in the fairness of our markets and discourage participation in them.

22 Recognising the damage corporate wrongdoing can have on our corporate, financial market and financial services sectors, it is important that we have a set of regulatory and enforcement tools that can be used to effectively and efficiently punish and deter this type of wrongdoing.

23 Recent domestic and international corporate scandals have emphasised there is increasing community and public expectation that those who are involved in corporate wrongdoing will be punished.[1] The size of recent penalties imposed for corporate wrongdoing has led to commentary about the appropriateness of the current penalty levels under the legislation we administer.

ASIC's approach to corporate wrongdoing

24 ASIC is Australia's corporate, markets and financial services regulator. We contribute to Australia's economic reputation and wellbeing by ensuring that

[1] For example, see recent comments made by Chief Justice Warren of the Supreme Court of Victoria, reported in M Dunckley, 'Top judge warns of harsher sentences for corporate crimes', *Australian Financial Review*, 7 January 2014, p. 3.

Australia's financial markets are fair and transparent, and underpinned by confident and informed investors and consumers and an efficient registration and licensing system.

25 The ASIC Act requires ASIC to enforce and give effect to the law. Enforcement action is one of several regulatory tools we use to respond to potential breaches of the law.[2]

26 Depending on the seriousness and consequences of the corporate wrongdoing, we pursue the regulatory and enforcement sanctions and remedies best suited to the circumstances of a case and what we want, and are able, to achieve.

27 We may take action against corporations, individuals, or both, depending on the circumstances of the case. For example, taking action against individuals who are directly responsible or in charge, instead of corporations, may reduce the incentive for those individuals and others in similar positions to engage in like misconduct given the potential impact on their reputation and livelihood. This approach is likely to have a greater deterrent effect.

28 Generally, we seek to deter repetition of the wrongdoing in the future—both by those involved in the wrongdoing (specific) as well as the broader business community through greater awareness of its consequences (general).

29 To do so, a range of regulatory and enforcement sanctions and remedies are available to us. We have the choice of pursuing punitive, protective, preservative, corrective or compensatory actions, or otherwise resolving matters through negotiation or issuing infringement notices. These types of actions are summarised in Table 1 and sanctions attached to them vary in consequence. Some will be relatively mild, while others will be more serious, such as imprisonment.

Table 1: Types of action available to ASIC

Type of action	Description
Punitive	We can pursue action in the courts to punish a person or entity in response to the misconduct. Actions include: • criminal penalties (e.g. terms of imprisonment; fines; community service orders)—matters giving rise to criminal penalties are prosecuted by the Commonwealth Director of Public Prosecutions, with the exception of a number of minor regulatory offences, which are prosecuted by ASIC; and • civil monetary penalties. All monetary penalties in these types of actions are payable to the Commonwealth.

[2] Other regulatory tools that we use include education, policy advice, guidance, surveillance and stakeholder engagement.

Type of action	Description
Protective	We can take administrative action decided by an ASIC delegate designed to protect consumers and financial investors. Actions include: • disqualification from managing a corporation; • a ban on providing financial services or engaging in credit activities; • revocation, suspension or variation of conditions of a licence; and • public warning notices. We can also apply to the court for a disqualification order.
Preservative	We can take court action to protect assets or compel someone to comply with the law (e.g. through an injunction or freezing order).
Corrective	We can seek a court order for corrective disclosure.
Compensatory	We can begin a representative action in the courts to recover damages or property for those who have suffered loss (e.g. ASIC Act, s50; Corporations Act, s1317J).
Negotiated or agreed outcome	We can use negotiated alternatives to remedies where these can achieve an effective regulatory outcome. These include: • enforceable undertakings; and • payment of infringement notices.

Source: Information Sheet 151 *ASIC's approach to enforcement* (INFO 151).

30 Private actions can also be pursued against corporate wrongdoers. However, while these actions have the potential to play an important role in penalising corporate wrongdoing in individual cases, they do not necessarily have the broader deterrent effect in Australia's corporate, financial market and financial services sectors that we often seek. This is because the costs of private litigation can be prohibitive to individual investors and financial consumers and they are therefore relatively rare. Private actions also tend to be confined to their particular facts and do not necessarily produce lasting positive behavioural change that we aim to achieve.

31 In contrast, public enforcement has greater potential to produce meaningful changes because it tends to attract greater industry awareness and may be supported by the use of a combination of other regulatory and enforcement tools that achieve desired outcomes. For example, in the same case, we may ban a person from being involved in management of a corporation to deter misconduct, enter into an enforceable undertaking to improve conduct, and provide guidance to industry to help it comply with the law more effectively in the future.

32 Ultimately, effective regulation depends on achieving enforcement outcomes that act as a genuine deterrent to future misconduct. ASIC's credibility as an effective regulator depends on our ability to detect corporate wrongdoing and use our regulatory and enforcement toolkit in a way that maximises the deterrent effect on corporate wrongdoing and provides incentives for

compliance with the law. Effective rules that are monitored and enforced will not achieve this objective alone. Rather, having a range of penalties allows us to calibrate our response with sanctions of greater or lesser severity commensurate with the misconduct.

33 The toolkit of criminal, civil and administrative sanctions needs to adequately cover the typical range of corporate wrongdoing, with corresponding penalties that are set at an appropriate level given the nature of misconduct and the type of entity (individual or corporate) likely to be involved. Any gaps in this toolkit can present a barrier to taking an effective enforcement approach because appropriate remedies may not be available.

34 There are various factors relevant to determining the level at which penalties should be set. An American legal commentator has characterised 'white collar crime' as being about 'greed and self-aggrandizement' that 'responds to fear'.[3] This means that, if fear of contravention is not high enough, or the deterrent impact is not strong enough, greed can prevail and wrongdoing may ensue. For example, if a penalty for particular wrongdoing is set too low, a wrongdoer may conclude that paying the penalty is worth the benefit obtained in engaging in the wrongdoing—it may be perceived by the wrongdoer simply as a cost of doing (albeit illegal) business.

Comparison with other jurisdictions

35 Our analysis in this report focuses on whether the penalties available to ASIC are generally available, proportionate and consistent with those available for comparable wrongdoing:

(a) in overseas jurisdictions—Canada (Ontario), Hong Kong, the United Kingdom and the United States; and

(b) in Australia—specifically:

  (i) in the jurisdictions of other relevant Australian Government regulators such as the ACCC and the Australian Transaction Reports and Analysis Centre (AUSTRAC);

  (ii) in Australian states and territories for matters involving fraud; and

  (iii) across legislation administered by us.

36 Across jurisdictions, similar terminology is often adopted to describe equivalent wrongdoing, although, in practice, how such offences are defined in legislation and how penalties are calculated can differ significantly.[4] For the purposes of conducting our analysis in this report, the wrongdoing types include insider trading, market manipulation, continuous disclosure, false

[3] David Feige, 'How to deter white collar crime', *The Nation*, 11 July 2005.
[4] For example, language and definitions of offences can differentiate treatment of wrongdoing. For a discussion of the difficulties in comparing the treatment of insider trading in the United States and Canada, see B Schecter, 'How the SEC and OSC differ in their approaches to trading offences', *Legal Post*, 2014.

statements to the market, inappropriate advice, unlicensed conduct, fraud and false or misleading representations. We think these are reasonably comparable even if the offence or contravention differs slightly.

37 However, some types of corporate wrongdoing differ so markedly from Australia that we do not consider it appropriate to do a comparison across jurisdictions in any meaningful way. For example, while addressing breaches of directors' and officers' duties is an important part of our enforcement work, Australia is unique in having specific statutory duties to which significant penalties can apply. In contrast, in other jurisdictions, the penalty for breaching directors' and officers' duties generally turns on common law and equitable principles.

38 In conducting our analysis for the purposes of this report, we have also adopted the definitions set out in Table 2.

Table 2: Definitions of penalties and related tools

Penalty	Definition
Administrative penalties	Monetary penalties that can be imposed by a regulator or an administrative tribunal, without the sanction of a court. Note: In this report, 'administrative penalties' do not include non-pecuniary actions: see paragraph 42.
Civil penalties	Monetary penalties that a court orders to be paid following findings of wrongdoing in a civil proceeding
Disgorgement	Removal of the financial benefit (profits gained or losses avoided) from the wrongdoer
Fines	A monetary penalty imposed by a court for committing a criminal offence
Non-criminal penalties	Covers both administrative penalties and civil penalties

39 This report focuses on the punitive sanctions regulators can pursue, being:

(a) criminal penalties (e.g. a term of imprisonment or a fine); and

(b) non-criminal penalties (e.g. a civil monetary penalty or an administrative penalty).[5]

40 We use maximum penalties to benchmark and compare differences in penalties between ASIC-administered legislation and other domestic and international jurisdictions. We have taken this approach because maximum penalties have a direct bearing on how serious a contravention is perceived to be. Statutory maximum penalties are set by Parliament and reflect the legislature's view of the seriousness of each contravention offence.

[5] In comparing our penalties to those imposed in other jurisdictions, we have found our overseas counterparts use administrative penalties in a similar way to how we seek to use civil penalties. Consequently, we have considered the two as equivalent using the term 'non-criminal penalties'.

41 However, we recognise that penalties imposed by courts are not typically the maximum penalty available in legislation. Maximum penalties are meant to address the worst possible wrongdoing for the relevant contravention, and, as such, are reserved for egregious examples at the far end of the spectrum of wrongdoing. Most penalties that are actually imposed fall below the maximum penalty available and are influenced by a range of variables: see paragraphs 47–50.

42 This report does not consider ASIC's broader enforcement and regulatory toolkit (e.g. non-pecuniary remedies such as disqualifications, bannings or enforceable undertakings). It also does not focus on remedies that have no punitive element, such as compensation orders (i.e. equitable remedies that provide a means of redressing financial losses caused by wrongdoing). However, depending on the circumstances of a particular case, these may be a more appropriate remedy to pursue.

Case studies

43 This report refers to case studies of types of corporate wrongdoing to specifically illustrate the differences between penalties imposed in different jurisdictions. However, there are key differences between our jurisdiction, powers and approach, and those of our international counterparts. These differences should be taken into account when comparing penalty regimes for corporate wrongdoing across jurisdictions.

44 Differences include:

(a) whether both criminal and civil proceedings are used to punish the same wrongdoing;

(b) how sentencing principles that apply in each jurisdiction guide judicial decision-making; and

(c) the scale of the misconduct.

Barriers to using both criminal and civil action

45 There are legal and practical barriers that prevent us from seeking both criminal and civil penalties for the same contravention. For example, in Australia, civil proceedings cannot be brought for the same conduct after a criminal conviction has been entered.[6] Alternatively, if criminal proceedings are brought when civil proceedings are already in train for the same conduct, the civil proceedings will be stayed until the criminal proceedings are decided.[7]

46 In contrast, some overseas jurisdictions (e.g. the United States) allow concurrent criminal and civil proceedings for the same alleged wrongdoing (though as a matter of practice, a court may determine that civil proceedings

[6] Corporations Act, s1317M.
[7] Corporations Act, s1317N.

should be stayed while criminal proceedings are being conducted). As highlighted in Sections C and D, criminal penalties as well as administrative or civil penalties have been obtained for the same conduct in some cases.[8]

Sentencing principles

47 Different sentencing principles apply in each jurisdiction and guide judicial decision-making on the penalties imposed. These differences reflect the development of the law of that particular jurisdiction and the environment in which it is applied (including public and community expectations of how it will be applied). While there are similar general principles, the differences in how these principles are applied in each jurisdiction affect overall penalty profiles.

48 In the United States, for example, all federal offences are graded and a sentencing table indicates appropriate prison terms, taking into account criminal history (referred to as 'grid sentencing').[9] Most federal crimes fall into one of 43 offence levels. Each offender is assigned to one of six 'criminal history categories' based on the nature and severity of the misconduct.

49 Multiple count adjustments are directed according to instructions for how to achieve a 'combined offence level', providing incremental punishment for significant additional criminal conduct. The courts must take these instructions into account in imposing appropriate sentences, but can impose penalties that depart from them where there are aggravating or mitigating circumstances reflecting the particular conduct.

50 There is no equivalent to 'grid sentencing' in Australia, which is especially apparent in the treatment of multiple offences. For example, applying the totality principle, courts often determine an appropriate sentence for each offence the accused is convicted of, and then impose a total sentence that is 'just', 'appropriate' or 'proportionate' in light of the severity of the overall offending conduct. This often results in concurrent sentences or only partially consecutive or cumulative sentences for multiple offences.

The scale of misconduct

51 The scale of misconduct clearly has a significant impact on penalties imposed. For example, in the United States, Mr Bernard Madoff was sentenced to 150 years in jail for running a ponzi scheme that resulted in over $USD13 billion in losses to investors.[10] In contrast, one of the largest ponzi schemes operated in Australia resulted in investors being owed over $AUD82 million, with the operator, Mr Graeme Hoy, receiving a sentence of 13.75 years in prison. We have taken into account the scale of relevant misconduct when analysing the case studies in this report.

---

[8] See, for example, the case study on Mr Raj Rajaratnam in the United States in Table 9 of this report.
[9] United States Sentencing Commission, *2013 USSC Guidelines Manual*, November 2013, Chapter 5, Part A. See Appendix 3 for a copy of the grid.
[10] See www.justice.gov/usao/nys/madoff/20090626sentencingmemorandumfiled.pdf and Table 23 for further information.

B Availability of penalties: Key findings

Key points

This section sets out the key findings of this report.

In summary, our analysis of penalties available for a range of corporate wrongdoing in overseas jurisdictions indicates that generally:

- both the maximum terms of imprisonment and fines available in Australia are broadly consistent with those available in the overseas jurisdictions surveyed; and
- non-criminal monetary penalties—including administrative penalties and disgorgement—are not as widely available and are lower in Australia when compared with the overseas jurisdictions surveyed.

Our analysis of penalties available across the legislation administered by other domestic regulators, and ASIC-administered legislation, identified some differences, including the level of civil penalties available.

Penalties available in overseas jurisdictions

52 Given the increasingly globalised and cross-border nature of modern business transactions, it is appropriate to look at how penalties for corporate wrongdoing in Australia compare with those available in overseas jurisdictions.

53 Our comparison of the penalties available in Australia with those available overseas indicates in general the following:

(a) Both the maximum terms of imprisonment and fines available to ASIC are broadly consistent with those available in other jurisdictions. The main exceptions are that:

(i) significantly higher maximum prison terms are available in the United States compared with Australia and the other jurisdictions surveyed; and

(ii) in Australia, lower fines are available for punishing contraventions of the continuous disclosure obligations and unlicensed conduct.

(b) A broader range of non-criminal monetary penalties is available in other jurisdictions, including:

(i) greater flexibility to impose higher non-criminal penalties (e.g. penalties that are a multiple of the financial benefit obtained by the wrongdoer) and scope to use non-criminal penalties when punishing a wider range of wrongdoing; and

(ii) the ability to require disgorgement (i.e. to require the profits gained or losses avoided to be removed from the wrongdoer).

54 Our analysis compares the types of penalties available in each overseas jurisdiction surveyed in this report. The case studies of different types of misconduct in Sections C and D also illustrate the impact that the differences in maximum penalties and the availability of civil and administrative penalties and disgorgement have on the way corporate wrongdoing is punished.

Legislated maximum criminal penalties

55 Maximum prison terms in Australia are generally comparable with those in other jurisdictions, with the exception of the maximum term of imprisonment in the United States, which is 20 years: see Table 3.

Table 3: Comparison of prison terms (years)

Country	Insider trading	Market manipulation	Disclosure	False statements	Unlicensed conduct	Fraud
Australia	10	10	5	10	2	10
Canada*	10	10	5	5	5	14
Hong Kong	10	10	—	10	7	10
United Kingdom	7	7	—	7	2	10
United States	20	20	20	20	20	20[11]

* Note: References to 'Canada' in tables and figures throughout this report are to 'Canada (Ontario)'.

56 Similarly, maximum fines in Australia are generally comparable to most other jurisdictions. An exception is that the fines available for breaches of continuous disclosure obligations and unlicensed conduct are comparatively lower in Australia than those in other jurisdictions: see, for example, Table 4.

[11] Fraud offences that amount to 'securities and commodities fraud' attract a maximum prison term of 25 years under the *Sarbanes-Oxley Act 2002*: see 18 U.S.C. § 1348.

Table 4: Comparison of fines for individuals ($AUD)[12]

Country	Insider trading	Market manipulation	Disclosure	False statements	Unlicensed conduct	Fraud
Australia	Greater of $765,000, or 3 times the benefit gained	Greater of $765,000, or 3 times the benefit gained	$34,000	Greater of $765,000, or 3 times the benefit gained	$34,000	Greater of $765,000, or 3 times the benefit gained[13]
Canada	Greater of $5.25 million, or 3 times the benefit gained	$5.25 million	$5.25 million	$5.25 million	$5.25 million	—
Hong Kong	$1.44 million	$1.44 million	—	$1.44 million	$720,000	—
United Kingdom	Fine (unlimited)	Fine (unlimited)	—	Fine (unlimited)	Fine (unlimited)	Fine (unlimited)
United States	$5.6 million	$5.6 million	$5.6 million	$5.6 million	$5.6 million	$5.6 million

Broader non-criminal penalties

57 In the overseas jurisdictions surveyed, there is greater scope to impose higher non-criminal penalties tailored to the scale of the misconduct being punished. Other jurisdictions have a degree of flexibility built into their civil penalties that ensure the monetary penalty is over and above any benefit obtained.

58 In comparison, in Australia, maximum civil penalties are relatively lower and are set at fixed amounts. This means that it may not always be possible to ensure a wrongdoer does not profit from their conduct, since the maximum fine that may be imposed may be substantially lower than the financial benefit obtained as a result of the wrongdoing.

59 Our research indicates that the two key reasons for the greater flexibility in the non-criminal penalty regimes in overseas jurisdictions are availability of civil and administrative penalties, including the maximum penalties available, and whether disgorgement is available, either separately or as a consideration built into the penalties regime.

Availability of non-criminal penalties

60 In Australia, the non-criminal penalties available to ASIC are court imposed civil penalties, and infringement notices.

[12] All monetary conversions in this report are based on the daily exchange rate published by the Reserve Bank of Australia as at 31 December 2013.
[13] This is the maximum fine for dishonest conduct under s1041G of the Corporations Act. While this section is not specifically directed towards fraud, conduct that constitutes fraud also frequently raises issues of dishonest conduct.

61 While civil penalties are available for a range of corporate wrongdoing,[14] 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 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).

62 We may issue infringement notices to deal with less serious contraventions of continuous disclosure, the market integrity rules, the National Credit Act and the unconscionable conduct and consumer protection provisions of the ASIC Act. Constitutional considerations limiting the exercise of judicial power to the courts mean that the relevant statute cannot impose an obligation on the recipient of an infringement notice to pay the penalty specified in the notice.[15]

63 Rather, the relevant statutory regimes provide that:

(a) the penalty specified in an infringement notice may be materially less than a court imposed penalty for a contravention of the same provision;

(b) a person who complies with an infringement notice is not taken to have contravened the relevant provision or have committed an offence; and

(c) ASIC cannot take court proceedings against a person who has complied with an infringement notice on the matter covered by the notice.

64 In comparison to overseas jurisdictions (see Table 5), the following can be observed:

(a) There are examples where the potential maximum non-criminal penalty is higher than the maximum non-criminal penalty available in Australia. For example, in the United States, the civil penalty for insider trading is up to three times the profit gained or loss avoided, while civil penalties for market manipulation, continuous disclosure breaches, false statements to the market and unlicensed conduct can be calculated as the gross amount of pecuniary gain. Depending on the nature of the misconduct, these penalties have the potential to be much higher than the maximum civil penalties possible in Australia ($AUD200,000 for an individual and $AUD1 million for a corporation).

(b) Administrative penalties are more widely available in overseas jurisdictions and can be used to punish serious wrongdoing. For example, in the United Kingdom, the Financial Conduct Authority (FCA) can impose a penalty of such amount as it considers appropriate for any contravention of the

[14] See Appendix 1.
[15] This lack of obligation to pay the penalty in an infringement notice means that the penalty under such a notice cannot be properly characterised as an administrative penalty.

Financial Services and Markets Act 2000 (UK).[16] In Hong Kong, the Securities and Futures Commission (SFC) can order a regulated person to pay a penalty not exceeding the amount that is the greater of $HKD10 million or three times the amount of the profit gained or loss avoided.[17]

Table 5: Comparison of civil and administrative penalties for individuals ($AUD)[18]

Country	Insider trading	Market manipulation	Disclosure	False statements	Unlicensed conduct	Inappropriate advice
Australia	Civil: $200,000	Civil: $200,000	Civil: $200,000	—	—	Civil: $200,000
Canada	Administrative: $1.05 million	Administrative: $1.05 million	Administrative: $1.05 million	Administrative: $1.05 million	Administrative: $1.05 million	Administrative: $1.05 million
Hong Kong	Administrative: unlimited	—	Civil: $1.12 million	—	—	Administrative: greater of $1.4 million, or 3 times the benefit gained
United Kingdom	Civil and administrative: unlimited	Civil and administrative: unlimited	Administrative: unlimited	Civil and administrative: unlimited	—	Administrative: unlimited
United States	Civil: 3 times the benefit gained[19]	Civil: greater of $111,000, or the benefit gained	Civil: greater of $111,000, or the benefit gained	Civil: greater of $111,000, or the benefit gained	Civil: greater of $111,000, or the benefit gained	Administrative: $83,850

Availability of disgorgement

65 ‘Disgorgement’ is the removal of financial benefit (such as profits illegally obtained or losses avoided) that arises from wrongdoing, or the act of paying these monies, on demand or by legal compulsion. For example, any profit made by wrongdoing is ‘disgorged’ from those involved in the wrongdoing in addition to any penalties that are imposed.

66 Disgorgement is a vehicle for preventing unjust enrichment. This means that disgorgement orders can offer significant deterrent value by reducing the likelihood that wrongdoers can consider penalties to be merely a business cost.

[16] *Financial Services and Markets Act 2000* (UK), s66 and 206.
[17] *Securities and Futures Ordinance 2002* (HK), Ch 571, s194.
[18] This table does not address the availability of disgorgement, which is addressed in Table 6. Some contraventions that do not attract a civil or administrative penalty may nonetheless be subject to disgorgement orders. For example, in Hong Kong, market manipulation does not attract a civil or administrative penalty; however, disgorgement is available.
[19] For control persons, the maximum non-criminal penalty is the greater of $AUD1.1 million or three times the benefit obtained.

Table 6: Availability of disgorgement in non-criminal proceedings

Country	Insider trading	Market manipulation	Disclosure	False statements	Unlicensed conduct	Inappropriate advice
Australia	×	×	×	×	×	×
Canada	✓	✓	×	✓	✓	✓
Hong Kong	✓	✓	×	✓	×	×
United Kingdom	✓	✓	✓	✓	×	✓
United States	✓	✓	✓	✓	✓	✓

67 While ASIC can brief the Australian Federal Police (AFP) and the Commonwealth Director of Public Prosecutions to bring an action to confiscate the proceeds of crime in criminal matters under the *Proceeds of Crime Act 2002* (Cwlth) (POCA),[20] we do not currently have any equivalent disgorgement provisions in ASIC-administered legislation for civil penalty proceedings.

68 A disgorgement order is not equivalent or similar to a compensation order under the Corporations Act. A compensation order involves identifying the party who has suffered the loss, and once the damage has been quantified, returning this to the injured party.[21] Disgorged money in other jurisdictions may be paid to the relevant government to be absorbed back into consolidated revenue (as in Canada (Ontario) and Hong Kong in certain instances), or directed to compensation funds for victims or investor education or advocacy programs (as in Canada (Ontario), the United Kingdom and the United States). While the precise mechanism of disgorgement varies between jurisdictions, the fundamental feature of disgorgement in all jurisdictions remains that the illegal profits gained or losses avoided are removed from the wrongdoer.

69 Having access to disgorgement increases the flexibility regulators have to address wrongdoing efficiently and effectively. Examples include the following:

(a) In Canada (Ontario), if a person has not complied with the securities law, the Ontario Securities Commission (OSC) may require that person to disgorge to the OSC any amounts obtained as a result of the non-compliance.[22]

(b) In Hong Kong, the Market Misconduct Tribunal can order disgorgement up to an amount not exceeding the amount of any profit gained or loss avoided by the person as a result of market misconduct.[23]

[20] POCA actions must be run separately from actions seeking to penalise the misconduct itself. They are unsuitable for situations where compensation orders may follow because the forfeited money goes into a 'confiscated assets account' and cannot be restrained for the benefit of the victims.
[21] See, for example, Corporations Act, s1325, 1317H and 1317HA.
[22] Securities Act (Ontario), s127.

(c) In the United Kingdom, the FCA follows a five-step framework for determining the appropriate level of financial penalty—the first of these is disgorgement to remove any financial benefit derived directly from a breach. It is only then that the FCA proceeds to look at the seriousness of the breach, aggravating and mitigating circumstances, an appropriate deterrent effect, and a settlement discount (if applicable): see Appendix 2.

(d) In the United States, the Securities and Exchange Commission (SEC) has secured more than $USD1.8 billion in disgorgement orders in each of its four most recent fiscal years—more than the agency has been awarded in statutory penalties each year over the same period.[24]

Canada (Ontario), Hong Kong and the United States have disgorgement remedies built into their legislation.[25]

Penalties available to other domestic regulators

70 A comparison of the penalties available to ASIC with those available to other domestic regulators shows there are differences between the penalties available to different regulators.

71 Table 7 sets out the maximum available civil penalties in relevant Australian legislation. There are significant differences between the civil penalties ASIC can pursue (a maximum $1.7 million for bodies corporate) compared with civil penalties available to other regulators (up to $17 million for bodies corporate).

72 In evaluating these different civil penalty maximums, it is important to be mindful of the different regulatory contexts these regulators operate in. While the regulators generally have comparable and complementary remits—focusing on ensuring fair and transparent markets and promoting competition and fair trade (including through the countenance of money laundering) for the benefit of confident and informed investors, consumers, businesses and the community—they can also be distinguished.

73 For example, AUSTRAC also seeks to counter the financing of terrorism. This dimension of AUSTRAC's remit augments the severity of penalties available to AUSTRAC beyond the maximum penalties expected in the ACCC's and ASIC's context. Similarly, the ACCC regulates restrictive trade practices that can have significant sector-wide and economic impacts, for example, in industries that can be considered fundamental to Australia's infrastructure (e.g. energy, rail and communication). This provides context

[23] Securities and Futures Ordinance (HK), s257.
[24] In 2012, 2011, 2010 and 2009 the following statutory penalties were secured respectively (USD): $1 billion, $928 million, $1 billion, $345 million: SEC, *Select SEC and market data*, Fiscal 2009–2012.
[25] Securities Act (Ontario), s127(1); Securities and Futures Ordinance (HK), s257; Securities Exchange Act (US), s21B.

when considering some of the differences between the maximum penalties available to the ACCC, as compared with ASIC.

Table 7: Comparison of maximum civil penalties in Australia[26]

Act	Maximum penalty for an individual ($AUD)	Maximum penalty for a body corporate ($AUD)
Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cwlth) (AUSTRAC)[27]	$3.4 million	$17 million
ASIC Act (ASIC)	$340,000	$1.7 million
Australian Consumer Law (ACCC)	$220,000	$1.1 million
Competition and Consumer Act 2010 (Cwlth) (ACCC)	$500,000	Greater of $10 million, 3 times the value of benefits obtained, or 10% of annual turnover
Corporations Act (ASIC)	$200,000	$1 million
National Credit Act (ASIC)	$340,000	$1.7 million

74 The civil penalties in the Corporations Act have not been increased since they were enacted in 1992, when the maximum penalty for an individual was set at $200,000. In 2004, they were extended to include bodies corporate, with a maximum penalty for a body corporate of $1 million. These are flat dollar amounts (not linked to penalty units), and have not been altered for inflation.

75 In 2007, Treasury undertook a review of sanctions in corporate law.[28] Most submissions indicated that civil penalties under the Corporations Act should be increased.[29]

76 There are some differences in the penalties available for similar corporate wrongdoing types across the legislation administered by different Australian authorities. For example, s12DB of the ASIC Act provides a maximum fine of $1.7 million for corporations that make false or misleading representations, while s29 of the Australian Consumer Law administered by the ACCC provides a lower fine of $1.1 million for making false or misleading representations about goods or services.

[26] For the way in which these penalties interact with specific forms of misconduct, see Sections C and D of this report.
[27] The civil penalties under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* apply to all civil penalty offences covered by that Act, not only terrorism related offences.
[28] Treasury, *Review of sanctions in corporate law*, 2007, http://archive.treasury.gov.au/contentitem.asp?ContentID=1182.
[29] Treasury, *Submissions: Review of sanctions in corporate law*, 2007, http://archive.treasury.gov.au/contentitem.asp?ContentID=1285.

Penalties available across ASIC-administered legislation

77 There are currently differences between the penalties available for unlicensed conduct between the credit and financial services regimes in Australia, in that the newer legislation ASIC administers (National Credit Act) applies higher civil penalties than the criminal penalties available for the same type of conduct under the Corporations Act.[30] If we pursue an individual for providing unlicensed financial services under the Corporations Act, we could obtain at most a criminal fine of $34,000.[31] In contrast, if we pursue an individual for engaging in unlicensed credit activity under the National Credit Act, we could obtain a civil penalty of up to $340,000.

[30] Civil penalties are not available for unlicensed financial services provider conduct under the Corporations Act.
[31] A $34,000 fine applies to an individual providing unlicensed financial services; a multiple of five applies for a body corporate: Corporations Act, s911A and 1312.

C Fair and efficient markets: Penalties relating to market misconduct

Key points

This section summarises and compares penalties within the Australian context and overseas jurisdictions for corporate wrongdoing relating to market misconduct to assess whether these penalties are generally available, proportionate and consistent.

The types of wrongdoing considered in this section involve:

- insider trading;
- market manipulation;
- disclosure by listed companies (continuous disclosure); and
- false statements to the market.

Insider trading

78 Insider trading generally refers to a situation where a person who is aware of confidential, price-sensitive information affecting the value of particular securities trades in those securities, discloses that information to another person likely to trade in those securities.

79 In Australia, insider trading is regulated under the Corporations Act and can attract either criminal penalties or civil penalties: see Table 8.

80 In 2010, the criminal penalties in Australia were increased to the greater of $765,000 or three times the profit gained or loss avoided, and/or 10 years imprisonment, for an individual found guilty of engaging in insider trading. The penalty for a corporation was increased to the greater of $7.65 million, three times the profit gained or loss avoided, or up to 10% of the body corporate's annual turnover in the relevant period.[32]

81 The 10 year maximum prison term in Australia is generally comparable with the maximum in other jurisdictions (Canada (Ontario): 10 years, Hong Kong: 10 years, United Kingdom: 7 years), with the exception of the maximum in the United States, which is 20 years: see Figure 1. Australia's fines are also comparable to most other jurisdictions with scope to impose penalties that reflect more than the size of any benefits derived from the insider trading. For example, in Australia and Canada (Ontario), the legislation allows for

[32] Before these amendments, an individual who engaged in insider trading in Australia and was found guilty of a criminal offence was subject to a maximum fine of $220,000 and/or five years imprisonment; for corporations, the maximum fine was $1.1 million for insider trading.

criminal penalties to be imposed that are multiples of any benefits gained: see Figure 2.

82 In contrast, Australia's non-criminal monetary penalties differ significantly from those available in other jurisdictions. In Australia, the maximum civil penalties that apply for insider trading are $200,000 for individuals and $1 million for corporations. While we generally pursue criminal action for insider trading given the seriousness of the misconduct, it is important to have available commensurate civil penalties for use in those cases where pursuit of criminal charges is not appropriate (e.g. where there is insufficient evidence of proof of insider trading beyond reasonable doubt).

83 Currently, the maximum civil penalties are out of step with the broader range of non-criminal penalties available in other jurisdictions. For example, in Canada (Ontario), Hong Kong, the United Kingdom and the United States, significant non-criminal monetary penalties can be imposed for insider trading, including disgorgement: see Figure 3. This ensures that profits made, or losses avoided, through wrongdoing are not retained. In Canada (Ontario), Hong Kong and the United Kingdom, these penalties can also be pursued administratively.

84 The case studies (see Table 9) show examples of the penalties that Australia and overseas jurisdictions have imposed for insider trading. The United States, for example, where a civil penalty of $USD92.8 million was imposed on Mr Raj Rajaratnam (in addition to criminal penalties) highlights that the ability to tailor non-criminal monetary penalties to the scale of the wrongdoing being punished can be a useful tool when dealing with wrongdoing of different levels of seriousness.

Table 8: Maximum penalties and disgorgement for insider trading[33]

Country	Maximum prison term (years)	Maximum fine ($)	Maximum non-criminal monetary penalty/ disgorgement ($)
Australia	10	Corporation: Greater of $AUD7.65 million, 3 times the benefit gained, or 10% of annual turnover Individual: Greater of $AUD765,000 or 3 times the benefit gained	Civil penalties: $AUD1 million (corporation) $AUD200,000 (individual)

[33] Respectively: Corporations Act, s1043A, 1317E, 1317G and Sch 3; Criminal Code of Canada, s382.1, Securities Act (Ontario), s76(1), 122 and 127(1); Securities and Futures Ordinance (HK), s270, 291, 257(1)(d) and 303; *Criminal Justice Act 1993* (UK), s52 and 61; *Financial Services and Markets Act 2000* (UK), Pt 8, s118; *Securities Exchange Act 1934* (US), s20A, 21A, 21B and 32.

Country	Maximum prison term (years)	Maximum fine ($)	Maximum non-criminal monetary penalty/ disgorgement ($)
Canada	10	$CAD5 million ($AUD 5.25 million) or 3 times the profit made/loss avoided	Administrative penalty of $CAD1 million ($AUD1.05 million) for each violation Disgorgement
Hong Kong	10	$HKD10 million ($AUD1.44 million)	Administrative penalty (unlimited) Disgorgement
United Kingdom	7	Unlimited	Civil penalty (unlimited) Administrative penalty (unlimited), including disgorgement
United States	20	Corporation: $USD25 million ($AUD27.94 million) Individual: $USD5 million ($AUD5.6 million)	Civil penalty up to 3 times the profit gained/loss avoided. For control persons, up to greater of $USD1 million ($AUD1.1 million) (as adjusted for inflation from time to time by SEC regulation) or 3 times the profit gained/loss avoided Disgorgement

Figure 1: Maximum prison term (years) for insider trading

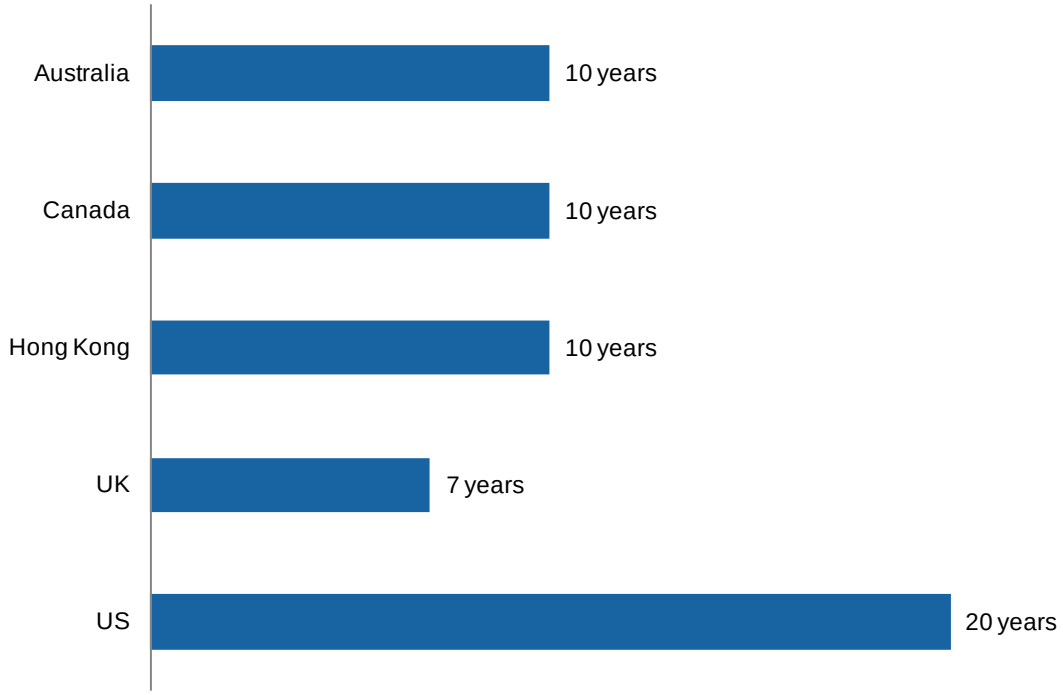


Figure 2: Maximum fines (AUD) for insider trading

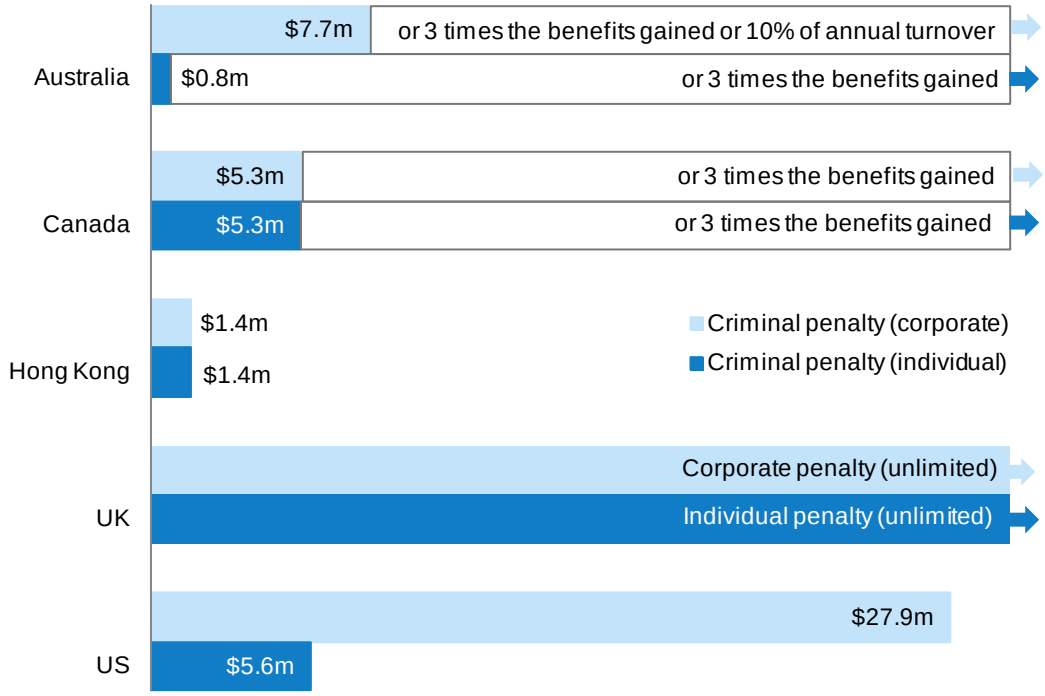


Figure 3: Maximum non-criminal penalties and disgorgement (AUD) for insider trading

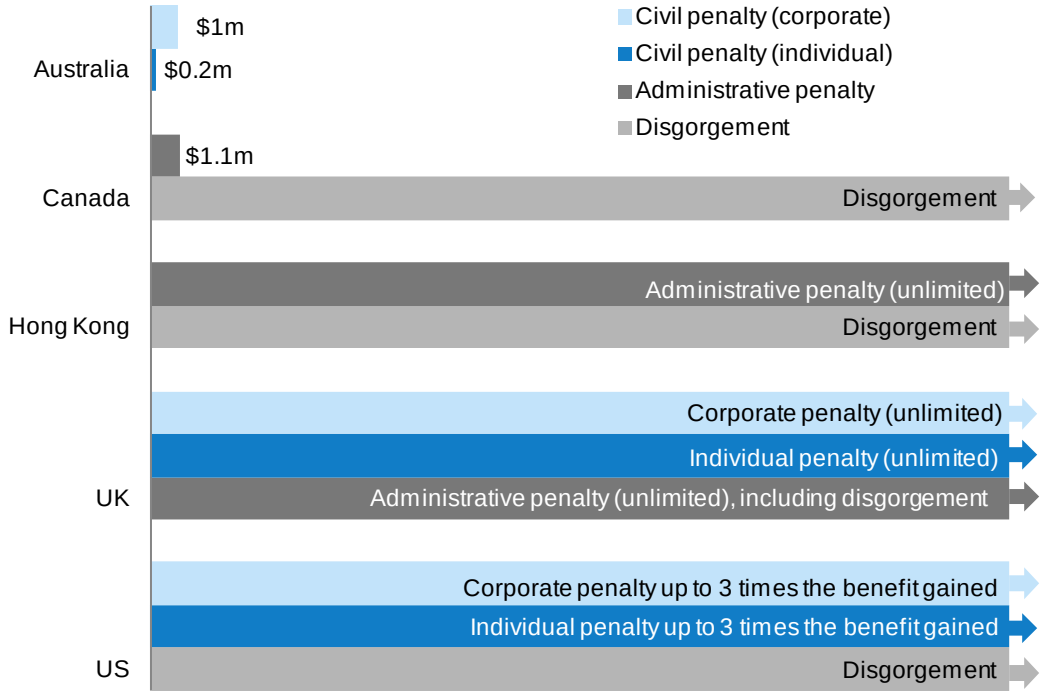


Table 9: Examples of penalties for insider trading in Australia and overseas

Country	Details	Criminal penalties	Non-criminal penalties and other regulatory outcomes
Australia	In December 2010, Mr John Hartman, a former equities dealer, pleaded guilty to 25 charges of insider trading for allegedly procuring a friend to front run contracts for difference, making a profit of over $AUD1.59 million.	3 years imprisonment[34] Orders made by consent under POCA of $AUD1.57 million[35]	No monetary penalty imposed under the Corporations Act
Australia	In May 2013, Mr Norman Graham, former head of a stockbroking firm, was convicted of insider trading (two charges) after pleading guilty to selling shares for two clients before a negative company announcement to minimise losses.	No prison term was imposed. Fined $AUD30,000[36]	
Canada	In May 2013, the OSC settled with Mr Ming Chao Zhao, a former financial adviser. Between June 2010 and December 2011, he engaged in insider trading, using material information he obtained through his involvement with a number of merger and acquisition transactions, and trading through a family member's account who had a different surname. He made approximately $CAD416,000.[37]		Administrative penalty of $CAD750,000 Disgorgement of $CAD416,719
Hong Kong	In December 2013, Mr Du Jun, a former managing director of Morgan Stanley Asia Limited, was convicted of six charges of insider dealing in shares of CITIC Resources Holdings.[38] Mr Jun bought shares in the company on the basis of price-sensitive information about a proposed deal to acquire oil field assets in China. He realised a profit of $HKD33.4 million from selling 13 million shares after the deal was announced.	6 years imprisonment[39] Fined $HKD1.688 million	Ordered to pay $HKD23.9 million to 297 investors Banned from re-entering the industry for life

[34] Mr Hartman was originally sentenced to 4.5 years imprisonment. He was re-sentenced on appeal to an overall term of 3 years imprisonment with a single pre-release period of 15 months: see ASIC Advisory (10-258AD) *Former equities dealer imprisoned on front-running and tipping charges* and ASIC Advisory (11-285AD) *Appeal on sentence upheld for John Hartman*.
[35] See footnote 20 for discussion of POCA matters and their drawbacks.
[36] See Media Release (13-114MR) *Former managing director of stockbroking firm convicted of insider trading*.
[37] See www.osc.gov.on.ca/en/Proceedings_set_20130430_ming-chao-zhao.htm, www.osc.gov.on.ca/en/40428.htm.
[38] See www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=13PR120, www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/enforcement-news/doc?refNo=13PR15 and www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/enforcement-news/doc?refNo=12PR101.
[39] Mr Jun was originally sentenced to 7 years imprisonment. He was re-sentenced on appeal to 6 years imprisonment.

Country	Details	Criminal penalties	Non-criminal penalties and other regulatory outcomes
United Kingdom	In February 2011, Mr Christian Littlewood, a former senior investment banker, was convicted of tipping off his wife and a friend to invest hundreds of thousands of pounds in companies when he learned their share price was set to increase. Mr Littlewood pleaded guilty to eight counts of insider trading.[40] The insider trading generated a total profit of £590,000.[41]	3 years and 4 months imprisonment	Confiscation order of £767,000
United States	In May 2011, Mr Raj Rajaratnam, a former hedge fund manager, was convicted in criminal proceedings of securities fraud (nine counts) and conspiracy to commit securities fraud (five counts) related to his use of insider tips and confidential information to conduct illegal trades generating financial benefits of more than $USD46.5 million. In November 2011, Mr Rajaratnam was also found liable for insider trading in a related SEC civil enforcement action.[42]	11 years imprisonment $USD10 million fine[43]	Ordered to pay a non-criminal financial penalty of $USD92.8 million[44] Disgorgement of an unspecified amount[45]

[40] See www.fsa.gov.uk/library/communication/pr/2012/082.shtml.
[41] Mrs Littlewood also had a confiscation order of £767,000 made against her under the *Proceeds of Crime Act 2002* (UK). The total amount confiscated in this case, including an order of £640,000 against Mr and Mrs Littlewood's friend, was £2.17 million.
[42] See www.sec.gov/litigation/litreleases/2011/lr22140.htm and www.justice.gov/usao/nys/pressreleases/May11/rajaratnamrajverdictpr.pdf. Mr Rajaratnam was also ordered to pay $USD53.82 million forfeiture.
[43] See www.sec.gov/news/press/2011/2011-233.htm.
[44] See www.sec.gov/news/press/2011/2011-233.htm.
[45] In this case, an unspecified amount of disgorgement and prejudgment interest was deemed to be satisfied by the forfeiture imposed on Mr Rajaratnam in criminal proceedings.

Market manipulation

85 Market manipulation generally refers to a person trading in securities to create an artificial price for those securities. While this misconduct can result in private loss for investors (and private gain for the market manipulators), it also involves a less easily quantifiable public cost in terms of damage to the market and investor confidence.

86 In Australia, market manipulation is regulated under the Corporations Act and can attract either criminal penalties or civil penalties, as is the case in overseas jurisdictions: see Table 10.

87 The 10 year maximum prison term in Australia for wrongdoing involving market manipulation is generally comparable with the maximum in other jurisdictions (Canada (Ontario): 10 years, Hong Kong: 10 years, United Kingdom: 7 years), with the exception of the maximum in the United States of 20 years: see Figure 4.

88 However, similar to insider trading, the non-criminal monetary penalties differ significantly from those available in other jurisdictions. In Australia, civil penalties (maximum $200,000 for individuals and $1 million for corporations) are available for punishing market manipulation. These maximum civil penalties are out of step with the broader range of non-criminal penalties available in other jurisdictions. For example, in Canada (Ontario), the United Kingdom and the United States, significant non-criminal monetary penalties, including disgorgement, can be imposed. This ensures that profits made, or losses avoided, through wrongdoing are not retained. In Canada (Ontario) and the United Kingdom, these penalties can also be pursued administratively.

89 The case studies (in Table 11) provide examples of the penalties that Australia and overseas jurisdictions have imposed in cases involving market manipulation. The United Kingdom example of Mr Goenka, where the (then) FSA used its administrative powers to impose a $USD6.5 million fine for market manipulation, highlights that the ability to tailor non-criminal monetary penalties to the scale of the wrongdoing being punished can be a useful tool when dealing with wrongdoing of different levels of seriousness.

Table 10: Maximum penalties and disgorgement for market manipulation[46]

Country	Maximum prison term (years)	Maximum fine ($)	Maximum non-criminal monetary penalty/ disgorgement ($)
Australia	10	Corporation: Greater of $AUD7.65 million, 3 times the benefits gained, or 10% of annual turnover Individual: Greater of $AUD765,000 or three times benefits gained	Civil penalties: $AUD1 million (corporation) $AUD200,000 (individual)
Canada	10	$CAD5 million ($AUD5.25 million)	Administrative penalty of $CAD1 million ($AUD1.05 million) for each violation Disgorgement
Hong Kong	10	$HKD10 million ($AUD1.44 million)	Disgorgement
United Kingdom	7	Unlimited	Civil penalty (unlimited) Administrative penalty (unlimited), including disgorgement
United States	20	Corporation: $USD25 million ($AUD27.94 million) Individual: $USD5 million ($AUD5.6 million)	Civil penalty up to $USD100,000 ($AUD111,000) for natural person or $USD500,000 ($AUD560,000) for any other person (as adjusted for inflation from time to time by SEC regulation), or the gross amount of pecuniary gain to such defendant from the violation Disgorgement

[46] Respectively: Corporations Act, s1041A, 1317E, 1317G and Sch 3; Criminal Code of Canada, s382; Securities Act (Ontario), s126.1(1)(a), 127(1) and 122(1); Securities and Futures Ordinance (HK), s257(1)(d), 274, 275, 278, 295, 296, 299 and 303; Financial Services and Markets Act (UK), Pt 8, s118; Financial Services Act (UK), s89–92; Securities Exchange Act (US), s9(a), 21 and 32.

Figure 4: Maximum prison term (years) for market manipulation

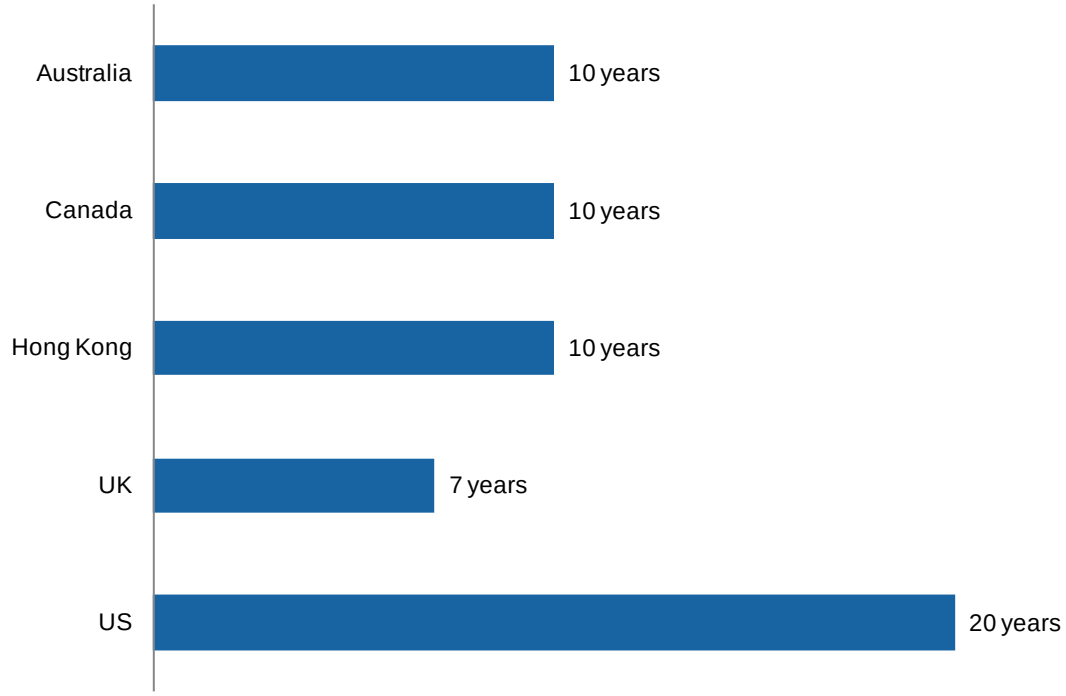


Figure 5: Maximum fines (AUD) for market manipulation

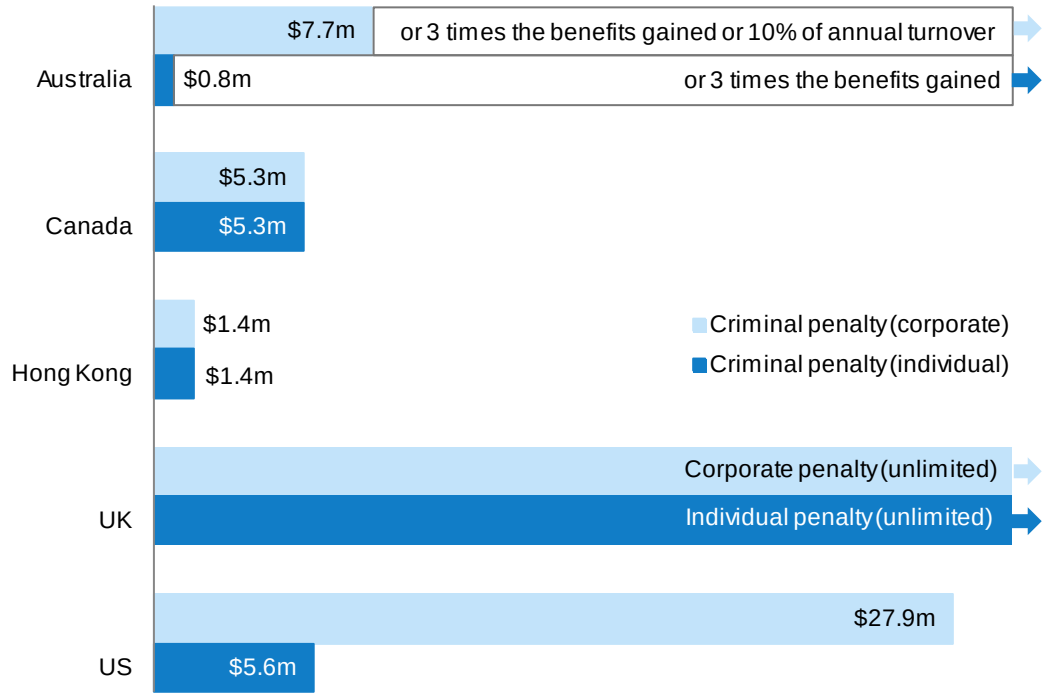


Figure 6: Maximum non-criminal penalties and disgorgement (AUD) for market manipulation

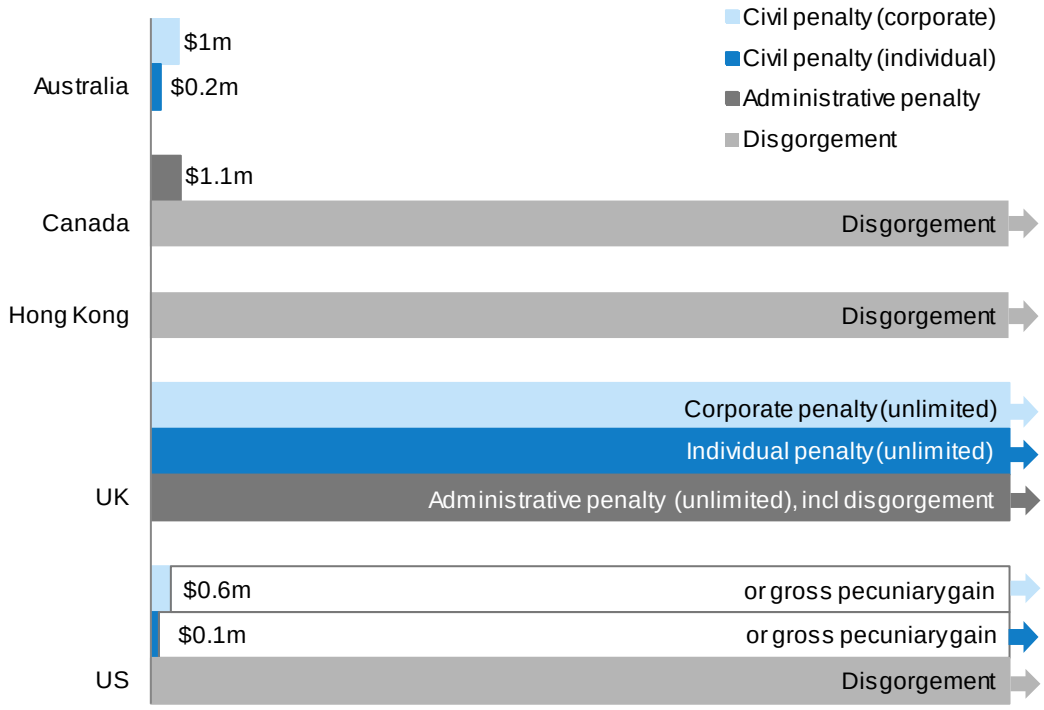


Table 11: Examples of penalties for market manipulation in Australia and overseas

Country	Details	Criminal penalties	Non-criminal penalties and other regulatory outcomes
Australia	In November 2013, Mr Thai Quoc Tang was convicted of creating a false or misleading appearance in the market when trading in the shares of biological technology company, Tissue Therapies Limited (he was charged with two rolled up market manipulation offences and received two years imprisonment for each offence to be served concurrently).	2 years imprisonment[47]	
Australia	In April 2010, Mr Soust was given a civil penalty. Mr Soust, former Chief Executive Officer of Select Vaccines, had purchased shares in Select Vaccines (in his mother's name) shortly before the close of the market for the calendar year with the objective of increasing the price of the company's shares to secure a performance bonus of $AUD24,500.[48]		$AUD80,000 Disqualified from managing a corporation for 10 years
Canada	In February 2012, the OSC settled its administrative proceedings against Mr Irwin Boock, who had engaged in trading activity causing a misleading appearance between 2006 and 2009.[49]		$CAD70,000 administrative penalty $CAD145,300 disgorgement
Hong Kong	In November 2009, a group of four investors were sentenced for manipulating the share price of Asia Standard Hotel Group by producing a false picture of the depth and liquidity and increasing the share price by 78%.[50]	26–30 months imprisonment for each defendant	
United Kingdom	In January 2013, the FCA imposed a disgorgement order and an administrative penalty on Mr Chaligné, a Swiss-based fund manager. Mr Chaligné arranged for orders to be placed in late trading to try to increase the price of the shares listed on exchanges in Europe and Northern America to boost the value of his Cayman Islands fund.[51]		Administrative penalty of £900,000 Disgorgement of £290,000

[47] See Media release (13-309MR) *Queensland man jailed for market manipulation.*
[48] See ASIC advisory (10-88AD) *ASIC obtains pecuniary penalty and disqualification order against former Select Vaccines director*.
[49] See www.osc.gov.on.ca/en/Proceedings_set_20120210_boocki.htm and www.osc.gov.on.ca/en/Proceedings_rad_20120210_boocki.htm.
[50] See www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=09PR167.
[51] See www.fca.org.uk/static/fca/documents/final-notices/stefan-chaligne.pdf.

Country	Details	Criminal penalties	Non-criminal penalties and other regulatory outcomes
United Kingdom	In October 2011, the (then) FSA imposed a fine and a restitution order on Mr Goenka for placing trade orders (in October 2010), which artificially inflated the closing price of Reliance GDRs, an instrument traded on the International Order Book of the London Stock Exchange.[52]		Administrative penalty of $USD6.52 million plus restitution of $USD3.1 million
United States	In September 2012, the SEC imposed penalties on Hold Brothers On-line Investment Services and some of its clients for manipulative trading. A number of Hold Brothers executives were also found to have wilfully aided and abetted and caused Hold Brothers' and its clients' violation of the manipulation provisions. Hold Brothers clients repeatedly used their Hold Brothers accounts to manipulate publicly traded stocks. They did so by placing orders with no intention of executing them, to trick others into trading stocks at artificial prices. Hold Brothers executives were aware of red flags which indicated manipulative trading was occurring through Hold Brothers accounts but failed to conduct proper investigation into the warning signs.[53]		Hold Brothers: $USD635,000 disgorgement and interest, and $USD1.9 million administrative penalty 3 Hold Brothers executives: $USD75,000 each in administrative penalties and industry bans for 2–3 years Clients: $USD1.25 million disgorgement Orders on each party to cease and desist from further violations of the manipulation provisions

[52] See www.fca.org.uk/static/pubs/final/rameshkumar_goenka.pdf.
[53] See www.sec.gov/News/PressRelease/Detail/PressRelease/1365171484972.

Disclosure by listed companies (continuous disclosure)

90 Disclosure of price sensitive information by listed companies to the market is fundamental to ensuring market integrity. Those who invest in quoted securities should have equal access to information that may affect their investment decisions. Timely disclosure of material information about the business and affairs of listed companies encourages confidence and participation in financial markets, creating a level playing field for all market participants.

91 Achieving continuous disclosure requires entities to have adequate systems in place, and to make sound decisions on how, when and what to disclose. In Australia, breaches of the continuous disclosure provisions are subject to criminal and civil penalties. We can also issue infringement notices for alleged contraventions of continuous disclosure.

92 Table 12 compares the penalties available for failing to provide adequate and accurate continuous disclosure to the market in Australia and other jurisdictions. Some of the key differences are as follows:

(a) Australia, Canada (Ontario) and the United States are the only jurisdictions that have criminal sanctions available for breaches of continuous disclosure obligations, with the criminal penalties available in the United States being significantly higher than those available in Australia and Canada (Ontario).[54]

(b) Australia's civil penalty maximums for corporations are generally comparable with those available in Hong Kong and the United States. However, in the United States, civil penalties can also be calculated to reflect the amount of any benefit derived by the breach.

(c) The payments under infringement notices in Australia are significantly lower than the administrative penalties available in Canada (Ontario) ($CAD1 million per violation) and the United Kingdom (unlimited).

93 The case studies in Table 13 illustrate that, in Australia, we have some scope to punish breaches of the continuous disclosure obligations through civil penalties and administrative remedies, though the penalties to date have been lower than those imposed overseas. For example, in Canada (Ontario) and the United Kingdom, the enforcement outcomes achieved through administrative processes could only be attained in Australia through civil penalties imposed by the courts.

[54] There have been only two criminal penalties pursued by ASIC for breach of the continuous disclosure requirements in the time since the infringement notice regime commenced operation and these two prosecutions arose out of the same matter. The prosecutions involved two former directors of Harts Australasia for allegedly being knowingly concerned in the company's non-disclosure of its unexpected losses. The prosecutions were unsuccessful.

Table 12: Maximum penalties and disgorgement for disclosure breaches[55]

Country	Maximum prison term (years)	Maximum fine	Maximum non-criminal monetary penalty (or infringement notice penalty)/disgorgement
Australia	5	Corporation: $AUD170,000 Individual: $AUD34,000	Civil penalties: $AUD1 million (corporation); $AUD200,000 (individual) Infringement notices of $AUD100,000, $AUD66,000, or $AUD33,000 per violation depending on market capitalisation
Canada	5	$CAD5 million ($AUD5.25 million)	Administrative penalty of $CAD1 million ($AUD1.05 million) for each failure to comply
Hong Kong	Not applicable	Not applicable	Civil penalty of $HKD8 million (imposed on the corporation, a director or chief executive officer) ($AUD1.12 million)
United Kingdom[56]	Not applicable	Not applicable	Administrative penalty (unlimited), including disgorgement
United States	20	Corporation: $USD25 million ($AUD27.94 million) Individual: $USD5 million ($AUD5.6 million)	Civil penalty of $USD100,000 ($AUD111,000) for natural person or $USD500,000 ($AUD560,000) for any other person (as adjusted for inflation from time to time by SEC regulation), or the gross amount of pecuniary gain to defendant from the violation Disgorgement

[55] Respectively: Corporations Act, s674, 1312, 1317E, 1317G and Sch 3; Securities Act (Ontario), s75, 122(1) and 127(1); Securities and Futures Ordinance (HK), Pt XIVA, s307B; Disclosure and Transparency Rules (UK), 1.3.4R, 2.2.1R and 1.5.3R; Securities Exchange Act (US), s13(a), 15d, 21 and 32.

[56] We note that a criminal prosecution could potentially be brought in the United Kingdom under s89(1)(c) of the Financial Services Act (UK) for dishonest concealment of material facts or under s3 of the Fraud Act (UK) for dishonest failure to disclose information with the intention of making a gain or causing a loss.

Figure 7: Maximum prison term (years) for disclosure breaches

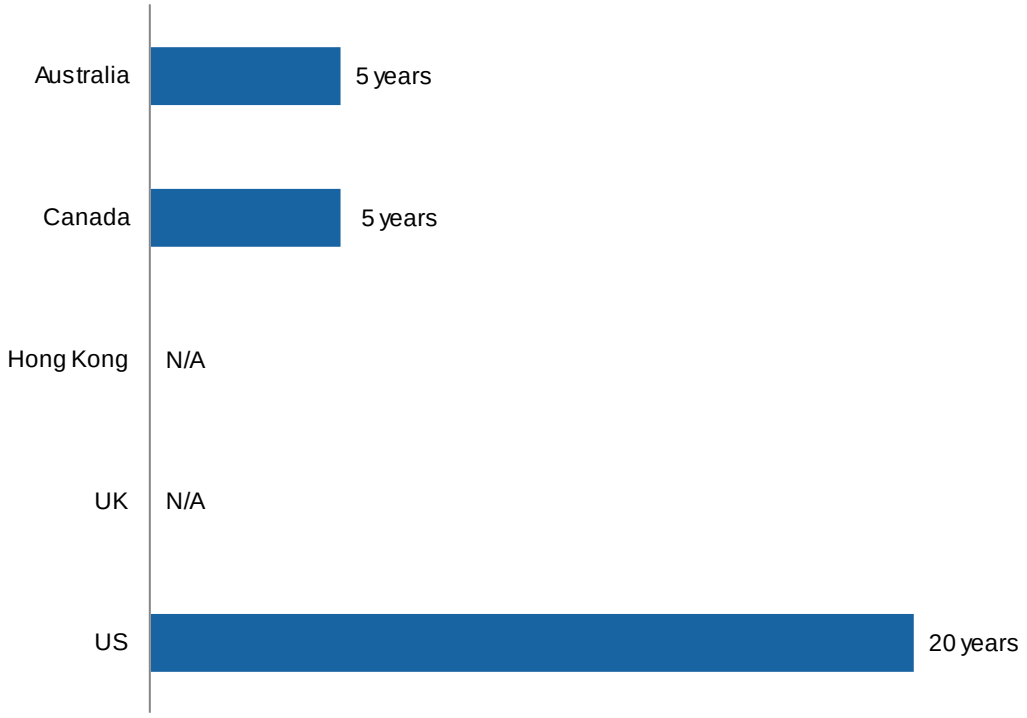


Figure 8: Maximum fines (AUD) for disclosure breaches

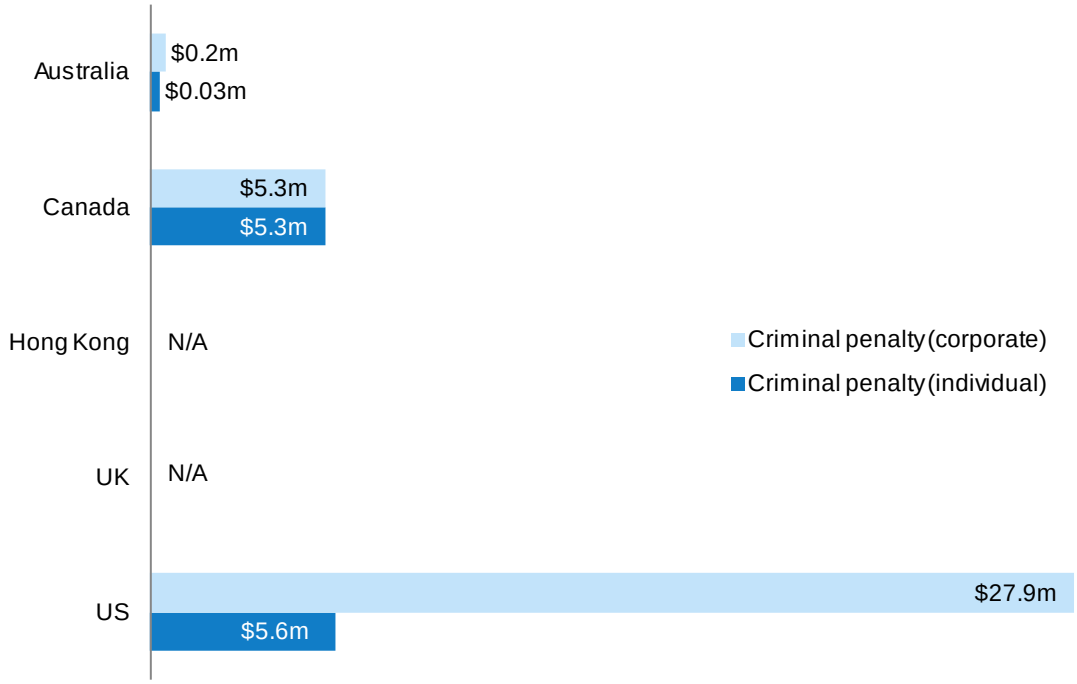


Figure 9: Maximum non-criminal penalties and disgorgement (AUD) for disclosure breaches

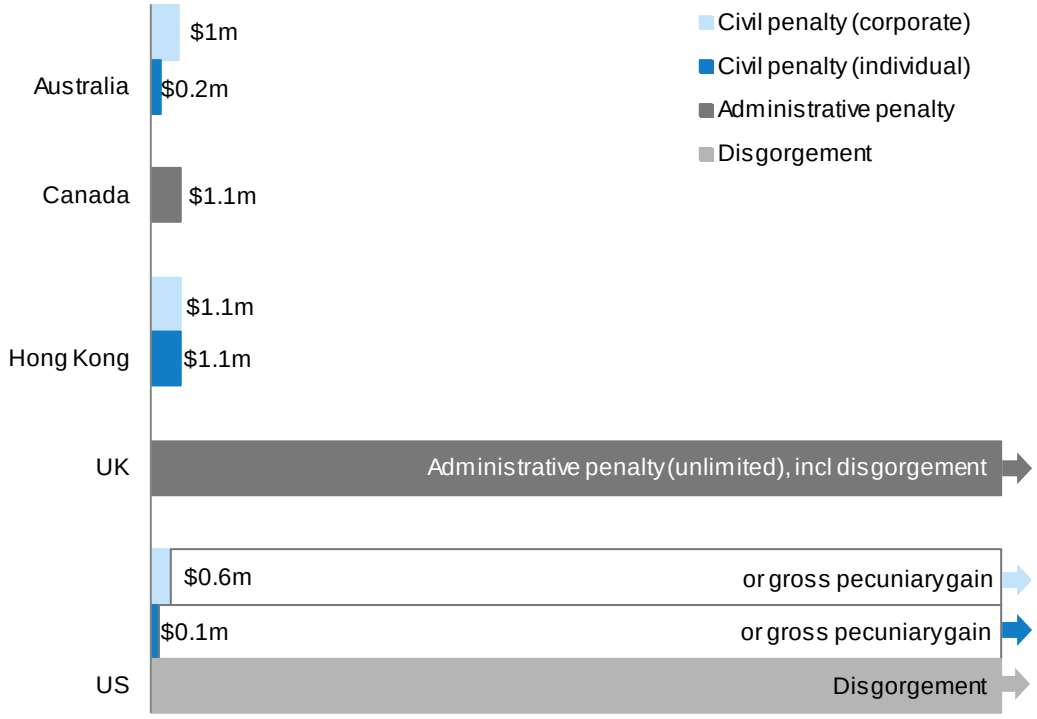


Table 13: Examples of penalties for disclosure breaches in Australia and overseas[57]

Country	Details	Non-criminal penalties and other regulatory outcomes
Australia	In July 2006, Chemeq agreed to a court declaration that it contravened its continuous disclosure obligations on two occasions.[58] The first contravention occurred when Chemeq failed to tell the Australian Securities Exchange (ASX) about costs of constructing and commissioning new manufacturing facilities, while the second contravention concerned Chemeq's failure to disclose information about the commercial impact of a patent granted in the United States in 2004.	Civil penalties of $AUD500,000
Australia	In March 2012, Leighton Holdings (Leighton) paid penalties for three infringement notices.[59] The infringement notices were issued following an investigation by ASIC into the matters in an announcement Leighton made to the market on 11 April 2011 where Leighton announced a write down of $AUD907 million to its profit forecast.	Infringement notice of $AUD300,000 paid. In addition, ASIC accepted an enforceable undertaking from Leighton committing the company to review its disclosure practices.
Canada	In 2011, the OSC imposed sanctions on Coventree and its two most senior officers for failing on two occasions to issue press releases and material change reports, resulting in four breaches of Coventree's disclosure obligations as a reporting issuer in Canada. The executives were also prohibited for one year from acting as an officer or director of a reporting issuer, other than Coventree.[60]	The monetary sanctions totalled $CAD2.25 million in penalties and costs, including an administrative penalty of $CAD1 million on the firm, and a cumulative $CAD1 million penalty on the two executives.
United Kingdom	In 2013, the then Financial Services Authority (FSA) fined Lamprell for failing to update the market about its financial difficulties ahead of a profits warning, which wiped 57% off its share price, and failing to adequately monitor its financial performance against its budget and market expectations.[61] This was the first time the then FSA used its revised penalty regime for continuous disclosure involving a failure to disclose inside information and linked the penalty imposed on Lamprell to its market capitalisation.	Administrative penalty of £2.4 million

[57] Section 307N of the Securities and Futures Ordinance (HK) that requires listed companies to disclose information was recently enacted in 2012. As a result, we were unable to find any appropriate case studies from Hong Kong that considered the provision.
[58] See Media release (06-246MR) *Chemeq Limited ordered to pay $500,000 in fines for breach of continuous disclosure provisions.*
[59] See Media release (12-53MR) *Leighton Holdings complies with three ASIC infringement notices for alleged continuous disclosure breaches and ASIC accepts compliance enforceable undertaking*.
[60] See www.osc.gov.on.ca/documents/en/Proceedings-RAD/rad_20111223_coventree.pdf.
[61] See www.fca.org.uk/your-fca/documents/final-notices/2013/fsa-final-notice-2013-lamprell-plc.

Country	Details	Non-criminal penalties and other regulatory outcomes
United States	In January 2011, the SEC reached a settlement with NIC Inc. and three corporate executives over their failure to disclose more than $USD1.8 million in perks paid to a former CEO over a 6-year period.[62]	Combined penalty of $USD2.8 million. Some executives were barred from being an officer of a public company or practising as an accountant for a period of time.

[62] See www.sec.gov/2011/2011-8.htm.

False statements to the market

94 A fundamental principle of financial markets regulation is that all investors should have access to accurate information so long as they participate in the markets. Where entities disclose false or misleading information to the public, it can have a negative impact on those investors that rely on the information, and can also have a broader public cost. Like other market abuses, misleading statements can diminish confidence in market efficiency, and cause market failures if prevalent.

95 In Australia, a person contravenes the Corporations Act if they make a statement that is false in a material particular or is materially misleading, and is likely to induce someone into buying or selling financial products (the person must not care whether the statement is true or false, or know or ought reasonably to have known that the statement or information is false).[63] It is a criminal offence subject to a maximum of 10 years imprisonment, and/or a fine.

96 Table 14 summarises the penalties available for making false or misleading statements to the market in Australia and other jurisdictions. While the maximum imprisonment term for making misleading statements in Australia is at the higher end when compared to the overseas jurisdictions reviewed, the fine is low where the benefit obtained cannot be quantified: see Figure 10 and Figure 11.

97 There are no non-criminal monetary penalties available for breaches of s1041E (making misleading statements) of the Corporations Act. This differs from overseas jurisdictions where a broad range of non-criminal monetary penalties can be used to tailor the penalty to reflect the nature and scale of the misconduct.

98 To date in Australia there have been few criminal prosecutions under s1041E. In the James Hardie case (see Table 15), we took action against the directors under the directors' duties provisions in the Corporations Act, rather than s1041E. A significant component of the punishment for making misstatements to the market in that matter involved the non-pecuniary penalty of banning of the directors from managing corporations.

[63] Corporations Act, s1041E.

Table 14: Maximum penalties and disgorgement for making false statements[64]

Country	Maximum prison term (years)	Maximum fine	Maximum non-criminal monetary penalty/disgorgement
Australia	10	Corporation: Greater of $AUD7.65 million or three times the benefits gained or 10% of annual turnover Individual: Greater of $AUD765,000 or three times benefits gained	Not applicable
Canada	5	$CAD5 million ($AUD5.25 million)	Administrative penalty up to $CAD1 million ($AUD1.05 million) for each violation Disgorgement
Hong Kong	10	$HKD10 million ($AUD1.44 million)	Disgorgement (civil)
United Kingdom	7	Unlimited	Civil penalty (unlimited) for market abuse cases only Administrative penalty (unlimited), including disgorgement
United States	20	Corporation: $USD25 million ($AUD27.94 million) Individual: $USD5 million ($AUD5.6 million)	Civil penalty of $USD100,000 ($AUD111,000) for a natural person or $USD500,000 ($AUD560,000) for any other person (as adjusted for inflation from time to time by SEC regulation), or the gross amount of pecuniary gain to such defendant as a result of the violation Disgorgement

[64] Respectively: Corporations Act, s1041E and Sch 3; Securities Act (Ontario), s126.2(1), 122(1) and 127(1); Securities and Futures Ordinance (HK), s277, 298, 303 and 257(1)(d); Financial Services Act (UK), s89, 91 and 92; Financial Services and Markets Act (UK), s397; Securities Exchange Act (US), s10b, 21 and 32; Rules and Regulations promulgated under the Securities Exchange Act (US), Rule 10b-5.

Figure 10: Maximum prison term (years) for making false statements

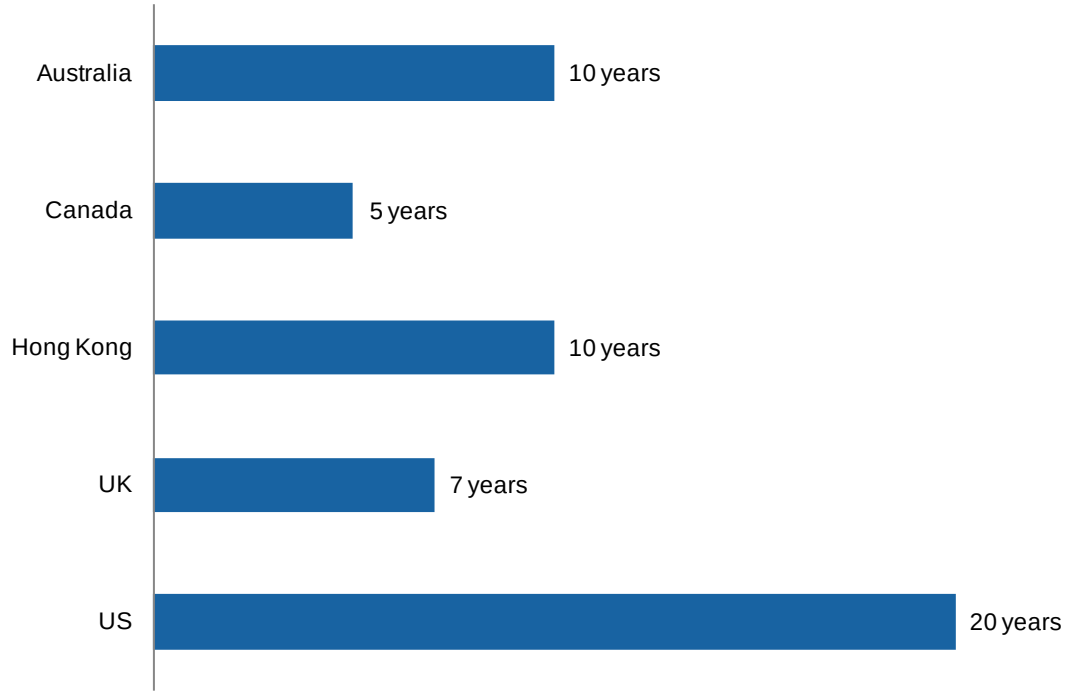


Figure 11: Maximum fines (AUD) for making false statements

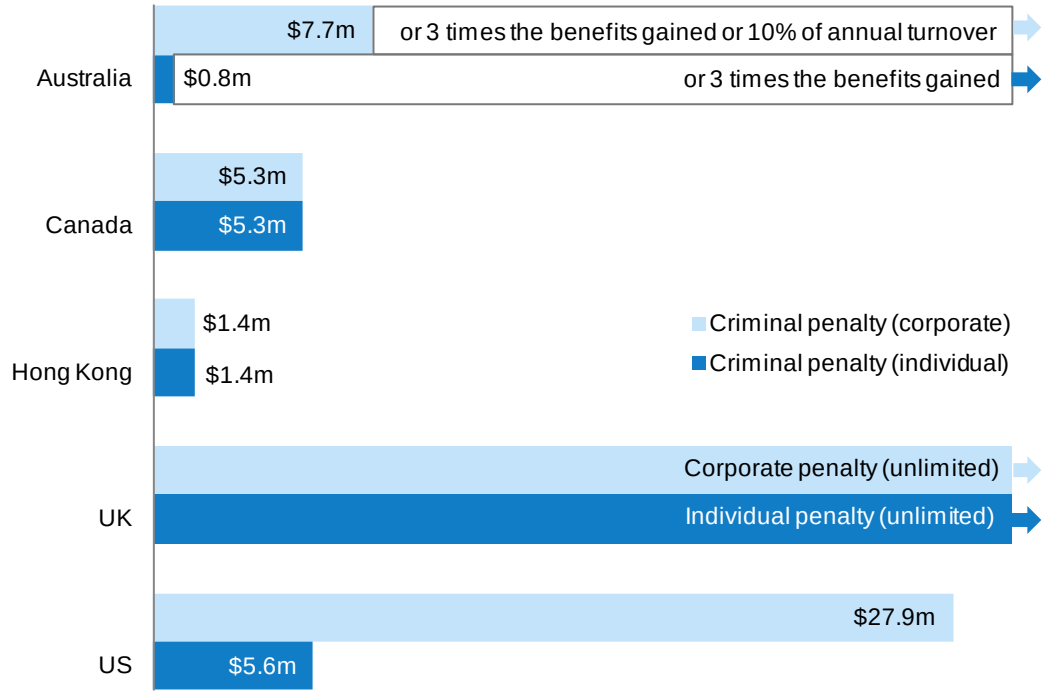


Figure 12: Maximum non-criminal penalties and disgorgement (AUD) for making false statements

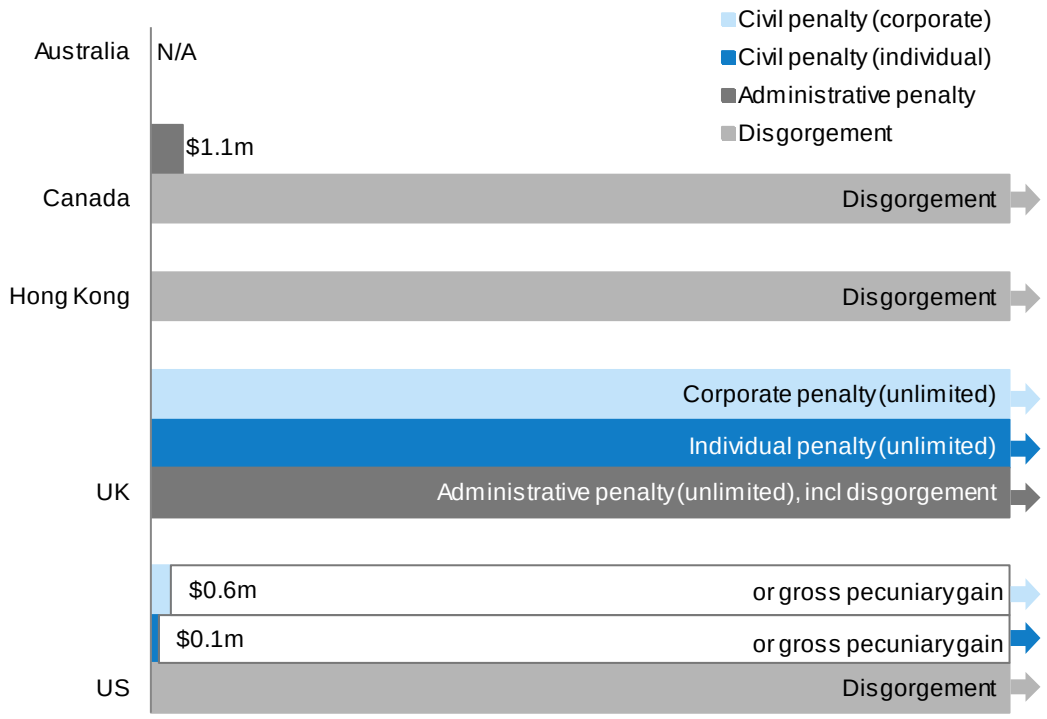


Table 15: Examples of penalties for false statements in Australia and overseas[65]

Country	Details	Non-criminal penalties and other regulatory outcomes
Australia	In November 2012, the court imposed civil penalties against James Hardie's former non-executive directors and former company secretary and general counsel. The penalties were imposed for failing to exercise duties as directors with care and diligence by releasing a misleading statement about the adequacy of asbestos compensation funding.[66]	$AUD20,000–$AUD75,000 per director Each director and company secretary/general counsel was banned from being involved in the management of a corporation for between 2 and 7 years.
United Kingdom	In August 2004, the then FSA fined The 'Shell' Transport and Trading Company and The Royal Dutch Petroleum Company NV for making false or misleading announcements of proved reserves between 1998 and 2003 and failing to correct the same despite indications and warnings from 2000 to 2003 that the proved reserves announced to the market were false and misleading.[67]	£17 million
United States	In November 2012, the SEC settled fraudulent statements claims against BP on public statements made about the impact of the Deepwater Horizon oil spill into the Gulf of Mexico. The SEC alleged the company lodged various SEC forms, which underestimated the flow rate, despite possessing numerous other calculations indicating a significantly higher flow rate. Company executives also made public statements, which repeated the lower flow rate, despite having internal data indicating otherwise. Further, BP failed to correct the misrepresentations after a government task force determined the flow rate.	BP agreed to pay $USD525 million.[68]
United States	In June 2011, the SEC settled negligent disclosure claims against JP Morgan Securities for allegedly misleading investors in a complex mortgage securities transaction as the housing market was starting to plummet.[69]	JP Morgan agreed to pay $USD153.6 million (which comprised disgorgement of $USD18.6 million, prejudgment interest of $2 million and a penalty of $USD133 million).[70]

[65] We were unable to find comparable case studies in either Canada or Hong Kong. While both these jurisdictions have comparable provisions governing false statements, the fact situation of the case studies we found in Canada and Hong Kong primarily raised fraud concerns, rather than being clear examples of false statements. As a result, we have not included case studies for these jurisdictions.
[66] See Media release (12-275MR) *Decision in James Hardie penalty proceedings*.
[67] See www.fsa.gov.uk/pubs/final/shell_24aug04.pdf.
[68] See www.sec.gov/litigation/litreleases/2012/lr22531.htm. In this case, BP also pleaded guilty to criminal conduct in a matter brought by the US Department of Justice.
[69] See www.sec.gov/news/press/2011/2011-131.htm.
[70] $USD125.87 million of the total amount was returned to investors and $USD27.73 million was paid to the US Treasury.

D Confident and informed investors: Penalties relating to financial services misconduct

Key points

This section summarises and compares penalties within the Australian context and overseas for corporate wrongdoing relating to financial services misconduct to assess whether these penalties are generally available, proportionate and consistent.

The types of misconduct considered in this section are:

- inappropriate advice;
- unlicensed conduct;
- fraud; and
- false or misleading representations.

Inappropriate advice

99 Personal financial advice needs to ensure financial products are suitable for specific investors, taking into account their risk appetite, current financial situation and needs and objectives, and their experience and understanding of the type of products in question. If an investor does not receive appropriate advice, this can result in a poor outcome for the investor.

100 Most jurisdictions have non-criminal penalties for those who provide inappropriate advice to investors: see Table 16. However, criminal penalties are generally not available.

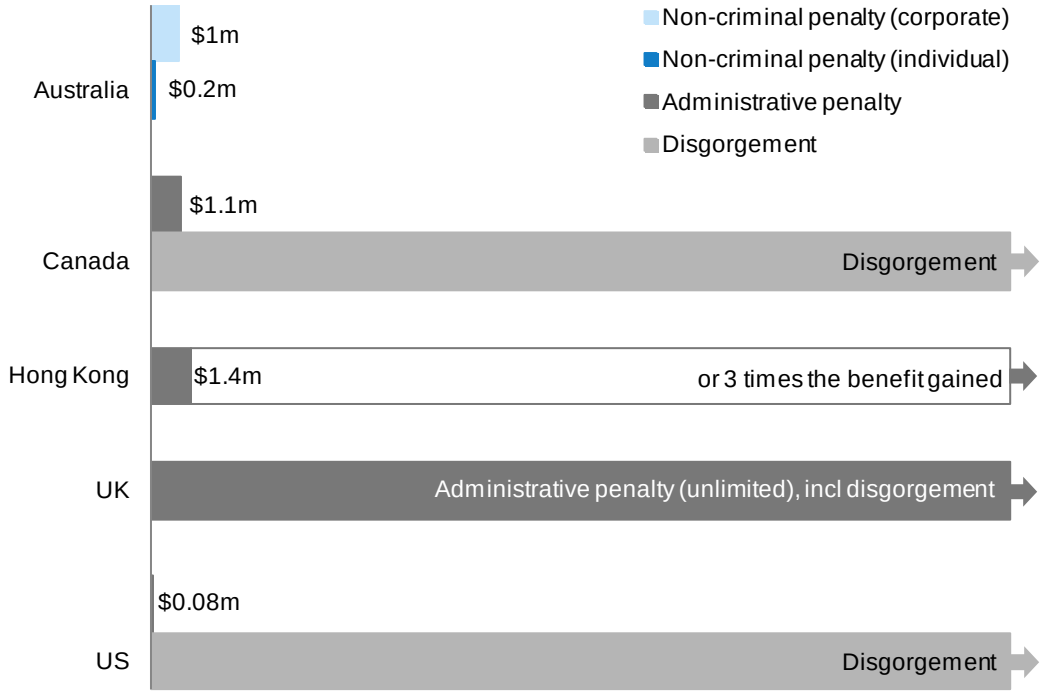
101 Figure 13 compares the maximum non-criminal penalties available for the provision of inappropriate financial product advice in Australia and other jurisdictions.

102 Similar to market-based contraventions, these penalties highlight that a key difference between Australian non-criminal penalties and others is that disgorgement and administrative penalties are typically available in other jurisdictions. The case studies in Table 17 illustrate the impact that these additional penalties can have on the way the provision of inappropriate financial product advice is punished. For example, in the United Kingdom, the FCA was able to impose a fine of over £1.8 million on AXA Wealth Services for failing to ensure it gave suitable investment advice to its customers. If faced with similar conduct in Australia, ASIC would need to pursue civil penalty orders through the court system (with a maximum penalty available of $AUD 1 million).

Table 16: Maximum non-criminal penalties and disgorgement for inappropriate advice[71]

Country	Maximum non-criminal monetary penalty/disgorgement
Australia	Civil penalties: $AUD1 million (corporation); $AUD200,000 (individual)
Canada	Administrative penalty up to $CAD1 million ($AUD1.05 million) for each violation Disgorgement
Hong Kong	Administrative penalty the greater of $HKD10 million ($AUD1.4 million) or 3 times the amount of the profit gained or loss avoided
United Kingdom	Administrative penalty (unlimited), including disgorgement
United States	Administrative penalty of $USD75,000 ($AUD83,850) Disgorgement

Figure 13: Maximum non-criminal penalties and disgorgement (AUD) for inappropriate advice



[71] Respectively: Corporations Act, Pt 7.7A, s1317E and 1317G; OSC Rule 31-505; Securities and Futures Ordinance (HK), s107 and 194 and Code of Conduct, paragraph 5.2, which sets out the obligations of licensed and registered persons; FCA Statements of Principle and Code of Practice for Approved Persons (UK), Principle 7; FINRA Rule 2111 (US) 'Suitability Rule, which requires that a firm or associated person 'have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the firm or associated person to ascertain the customer's investment profile.' See FINRA, Sanctions Guidelines: www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf.

Table 17: Examples of inappropriate advice in Australia and overseas

Country	Details	Loss	Non-criminal penalties and other regulatory outcomes
Australia	In February 2013, ASIC found AAA Financial Intelligence and AAA Shares (AAA), a national financial planning business, had breached the majority of its licence obligations, including failing to ensure that its representatives complied with relevant financial services laws when providing financial advice to retail clients.[72]	Not specified	Licence cancelled
Canada	In August 2008, the OSC found that Mr Daubney violated the 'know-your-client' and suitability requirements by making unsuitable investment recommendations to six investors and by failing to deal fairly, honestly and in good faith.[73]	Not specified. The OSC noted that Mr Daubney caused great harm to the investors who relied on him.	Registration terminated Permanently banned from becoming or acting as an officer or director of a registrant
Hong Kong	In August 2012, RBC Investment Management (Asia) Limited (RBC) was reprimanded and given an administrative penalty of $HKD4 million for its provision of investment advice to clients on a number of non-SFC authorised funds between November 2006 and July 2008.[74] The SFC found that RBC's systems had failed to ensure that its investment recommendations to clients were based on thorough analysis and were reasonable in all the circumstances.	Not specified However, in addition to the administrative penalty, RBC had to make repurchase offers to all eligible customers at a price equal to 100% of the principal amount invested.	Administrative penalty of $HKD4 million
United Kingdom	In September 2013, AXA Wealth Services Ltd (AXA) was given an administrative penalty for failing to ensure it gave suitable investment advice to its customers. The failings put a significant number of customers at risk of buying unsuitable products.[75]	Customer detriment unknown The FCA used AXA's revenue for the relevant period as an indicator of the seriousness of the breach: £25.75 million.	Administrative penalty of £1.8 million Agreement to conduct past business review and compensate all customers suffering a loss due to failings

[72] See Media release (13-019MR) *ASIC cancels licences of national financial planning business*.
[73] See www.osc.gov.on.ca/documents/en/Proceedings-RAD/rad_20080814_daubneyj.pdf.
[74] See www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=12PR86.
[75] See www.fca.org.uk/news/axa-fined-and-reviews-investment-sales-for-advice-failings.

Country	Details	Loss	Non-criminal penalties and other regulatory outcomes
United States	In January 2014, the Financial Industry Regulatory Authority (FINRA) found that between January 2009 and June 2013, Stifel, Nicolaus and Company (Stifel) made unsuitable recommendations of non-traditional exchange-traded funds (ETFs) to certain customers because some representatives did not fully understand the unique features and specific risks associated with leveraged and inverse ETFs; nonetheless, Stifel allowed the representatives to recommend them to retail customers. FINRA also found that Stifel did not have reasonable supervisory systems in place, including written procedures, for sales of leveraged and inverse ETFs.[76]	$USD340,000	Administrative penalty of $USD450,000 Restitution of $USD340,000 (to 59 customers)

[76] See www.finra.org/Newsroom/NewsReleases/2014/P412654.

Unlicensed conduct

103 In Australia, financial services providers and credit providers must be licensed by ASIC to operate these services and provide these products. The standards of conduct required of the licensee for the different types of licences are broadly similar. However, as entities are increasingly operating across industries in horizontally and vertically integrated businesses, it is reasonable to question whether the penalties for engaging in unlicensed conduct across financial services and credit industries should also be consistent.

104 In Australia, penalties for unlicensed conduct differ depending on whether the misconduct relates to the provision of financial services or credit: see Table 18. For example, the provision of financial services without an Australian financial services (AFS) licence attracts a criminal penalty under the Corporations Act with the maximum fine that may be imposed on an individual being $34,000. In contrast, an individual who engages in credit activity without an Australian credit licence is subject to the same criminal penalty, or alternatively a civil penalty up to ten times greater—that is, up to $340,000.

105 In addition, while maximum imprisonment terms in Australia are generally consistent with overseas jurisdictions, the maximum criminal financial penalties for unlicensed conduct in Australia are low in comparison to other jurisdictions: see Figure 14 and Figure 15. Some jurisdictions also have greater access to non-criminal penalties for unlicensed financial services conduct: see Figure 16.

106 The comparisons and the case studies in Table 20 illustrate the differences in penalties given in Australia compared with those overseas.

Table 18: Maximum penalties for unlicensed activity for individuals in Australia

Act	Description	Type of penalty	Penalty (units $AUD)	Prison term (years)
Corporations Act	A person carrying on a financial services business must hold an AFS licence: s911A(1)	Criminal	200/$34,000	2
National Credit Act	Carry on a credit activity without a licence: s29(1)	Civil	2000/$340,000	
	Carry on a credit activity without a licence: s29(2)	Criminal	200/$34,000	2

Table 19: Maximum penalties and disgorgement for providing financial services without a licence[77]

Country	Maximum prison term (years)	Maximum fine	Maximum non-criminal monetary penalty/disgorgement
Australia	2	Corporation: $AUD170,000 Individual: $AUD34,000	Not applicable
Canada	5	$CAD5 million ($AUD5.25 million)	Administrative penalty: $CAD1 million ($AUD1.05 million) for each failure to comply Disgorgement
Hong Kong	7	$HKD5 million ($AUD720,000) Daily fine of $HKD100,000 ($AUD14,400) for continuing offence	Not applicable
United Kingdom	2	Unlimited	Not applicable
United States	20	Corporation: $USD25 million ($AUD27.94 million) Individual: $USD5 million ($AUD5.6 million)	Civil penalty: $USD100,000 ($AUD111,000) for a natural person or $USD500,000 ($AUD560,000) for any other person (as adjusted for inflation from time to time by SEC regulation), or the gross amount of pecuniary gain to such defendant as a result of the violation Disgorgement

[77] Respectively: Corporations Act, s911A 1312 and Sch 3; Securities Act (Ontario), s25(1), 122(1)(c) and 127(1); Securities and Futures Ordinance (HK), s114; Financial Services and Markets Act (UK), s19 and 23; Securities Exchange Act (US), s15, 21 and 32.

Figure 14: Maximum prison term (years) for providing financial services without a licence

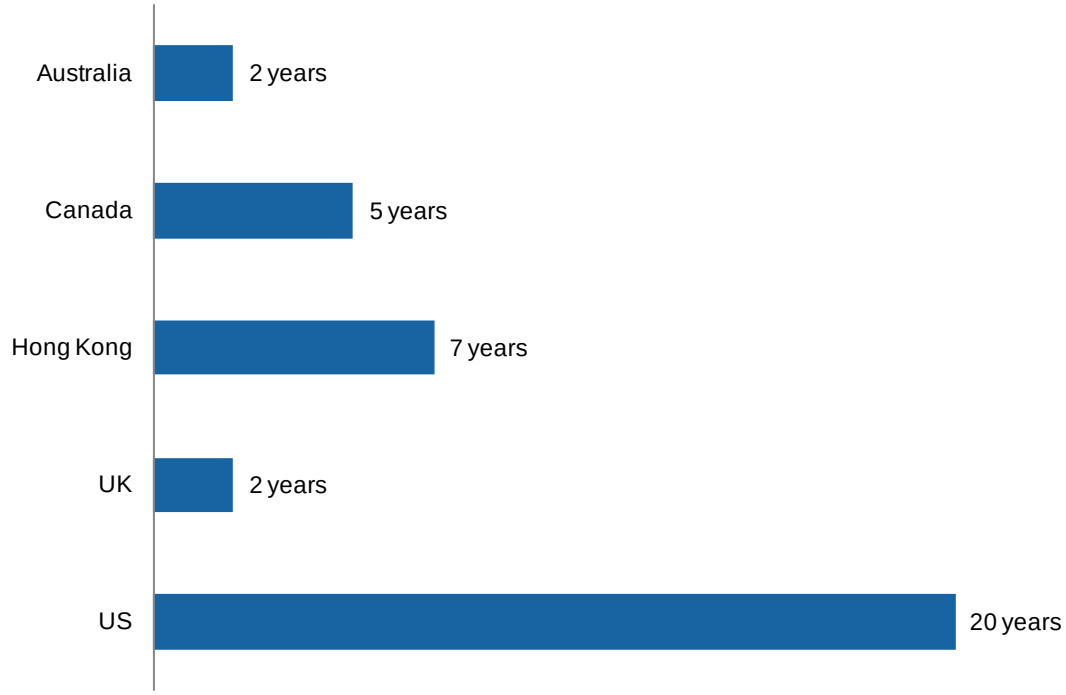


Figure 15: Maximum fines (AUD) for providing financial services without a licence

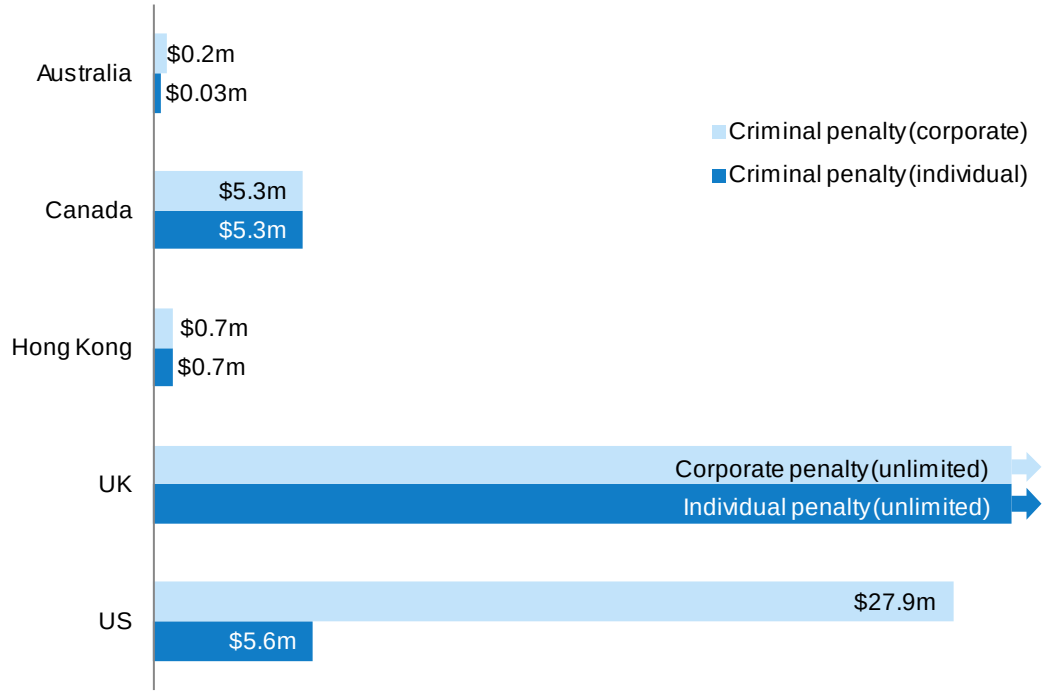


Figure 16: Maximum non-criminal penalties and disgorgement (AUD) for providing financial services without a licence

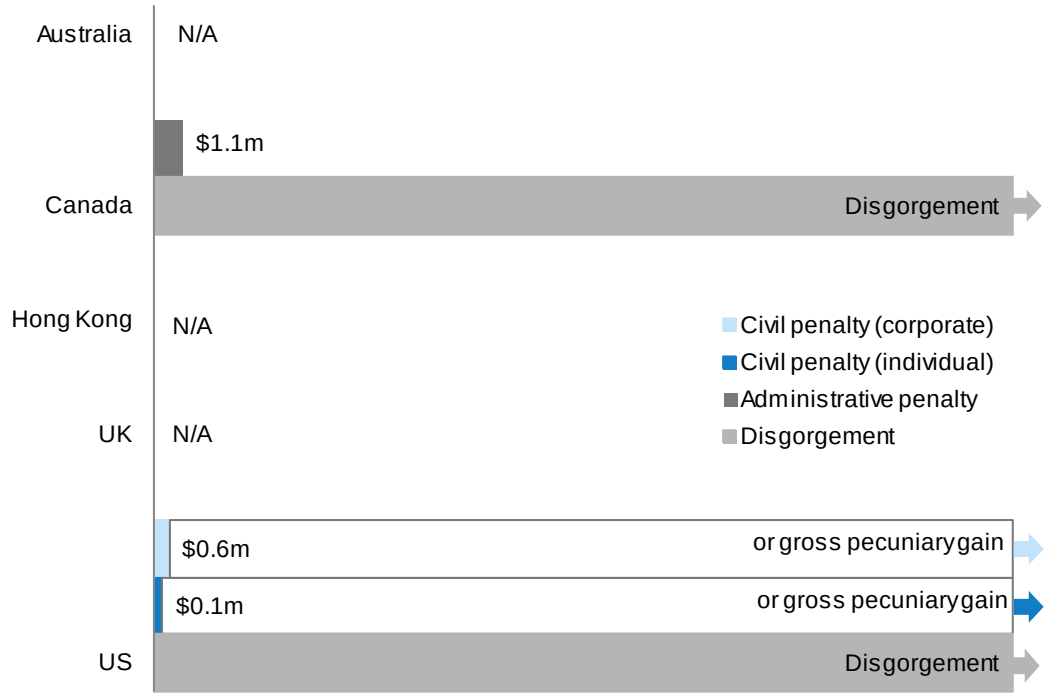


Table 20: Examples of penalties for unlicensed conduct in Australia and overseas[78]

Country	Description	Criminal penalties	Non-criminal penalties and other regulatory outcomes
Australia	In September 2011, Mr John Vafiadis was sentenced for providing unlicensed financial advice to investors. Mr Vafiadis was paid a total of $AUD233,714 in commission by the investors for his services, and in excess of $AUD1.3 million was invested in shares on his advice.[79]	6 months imprisonment	$AUD1.098 million compensation (in this case, reparation orders were made under the *Crimes Act 1914* (Cwlth))
Canada	In August 2009, the OSC found that five individuals traded in securities without registration and distributed securities without filing a prospectus.[80] An amount of up to $CAD33.9 million in investor funds was invested and lost.		Administrative penalties $CAD450,000 Disgorgement $CAD27.9 million, reflecting $CAD33.9 million less the $CAD6 million that had been repaid to investors
Hong Kong	In November 2013, Mr Gordon Mui Kwong Yin was sentenced for providing online advice on trading in futures contracts without a licence.[81] Mr Kwong offered trading advice on a website and received approximately $HKD128,700 in subscription fees from 113 clients.	3 months imprisonment (suspended for 12 months)	
United States	In March 2013, the SEC announced it had settled charges related to the activities of an unregistered broker, Mr William Stephens, who had received approximately $USD2.4 million in transaction-based compensation.[82] The monetary penalty was waived due to Mr Stephen's poor financial condition.		Disgorgement and prejudgment interest over $USD2.8 million[83] Permanently banned from the securities industry The firm was ordered to pay $USD375,000, while the senior managing partner was given a penalty of $USD75,000 and suspended from association in a supervisory capacity for nine months on the basis that they were aware of Stephen's brokerage activities and assisted him.

[78] The case studies for unlicensed conduct identified in the United Kingdom all included serious fraud. As a result, we did not consider them to be directly comparable to the other case studies and have not included them.
[79] See ASIC advisory (11-196AD) *Former Hobart financial adviser jailed on ASIC charges*.
[80] See www.osc.gov.on.ca/documents/en/Proceedings-RAD/rad_20100604_sabourinp.pdf.
[81] See www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=13PR109.
[82] See www.sec.gov/litigation/admin/2013/34-69090.pdf and www.sec.gov/News/PressRelease/Detail/PressRelease/1365171513172.
[83] In this case, because of the respondent's financial condition, the SEC waived payment of disgorgement and prejudgment interest and did not impose a financial penalty against the respondent.

Fraud

107 In Australia, ASIC can charge wrongdoers with fraud offences under state and territory criminal legislation, as well as under ASIC-administered legislation (though there is no general corporate fraud offence). This is in contrast to other jurisdictions (e.g. the United States), which have securities fraud offences.

108 Table 21 illustrates the potential variance in penalties for fraud within the Australian context. Notably, action taken under the Corporations Act would result in significantly lower maximum fines and prison terms than if similar action were taken under state or territory legislation.[84]

109 In Australia, the maximum prison term for fraud is comparable with the maximum penalties in other jurisdictions, with the exception of the United States where the maximum term of imprisonment is 20 years: see Table 22 and Figure 17. Only the United States has a fine and civil penalties beyond disgorgement of profits attached to its fraud provisions. The United Kingdom and the United States are the only jurisdictions which have non-criminal penalties available for fraud: see Figure 18.

110 The comparisons and the case studies in Table 23 illustrate that in Australia and all overseas jurisdictions, fraud can be punished with significant prison terms, depending on the scale of the misconduct. However, different approaches to sentencing can have a significant impact on the length of sentences imposed.

Table 21: Maximum penalties for fraud in Australia (criminal)

Act	Description	Maximum prison term (years)	Maximum fine ($AUD)
Corporations Act[85]	Good faith, use of position and use of information: s184	5	$340,000
	Fraud by officers: s596	2	$17,000
	Dishonest conduct: s1041G	10	$765,000 or 3 times the profit
ACT Criminal Code	Obtaining property by deception: s326	10	$170,000
	Conspiracy to defraud: s334	10	$170,000
NSW Crimes Act	Fraud: s192E	10	$110,000

[84] See 'Related information' in this report for full details of state and territory legislation. Tasmania is not included as the *Criminal Code Act 1924* (Tas) gives judicial discretion to impose a uniform maximum penalty of 21 years imprisonment and/or fine.
[85] While s184 and 1041G are not specifically directed towards fraud, conduct that constitutes fraud also frequently raises issues of acting in good faith by directors and officers and dishonest conduct.

Act	Description	Maximum prison term (years)	Maximum fine ($AUD)
Queensland Criminal Code	Fraud: s408C	Director or member of a governing body: 12 years Otherwise: 5 years	$459,520
South Australia Criminal Law	Deception: s139	Basic offence: 10 Aggravated offence: 15 years	$75,000
Victoria Crimes Act	Obtaining property by deception: s81	10	$173,232
	Obtaining financial advantage by deception: s82	10	$173,232
Western Australia Criminal Code	Fraud: s409	If the person deceived is 60 years or older: 10 years Otherwise: 7 years	Unlimited
	Company books etc, acts etc as to by director etc with intent to defraud: s419	7	Unlimited

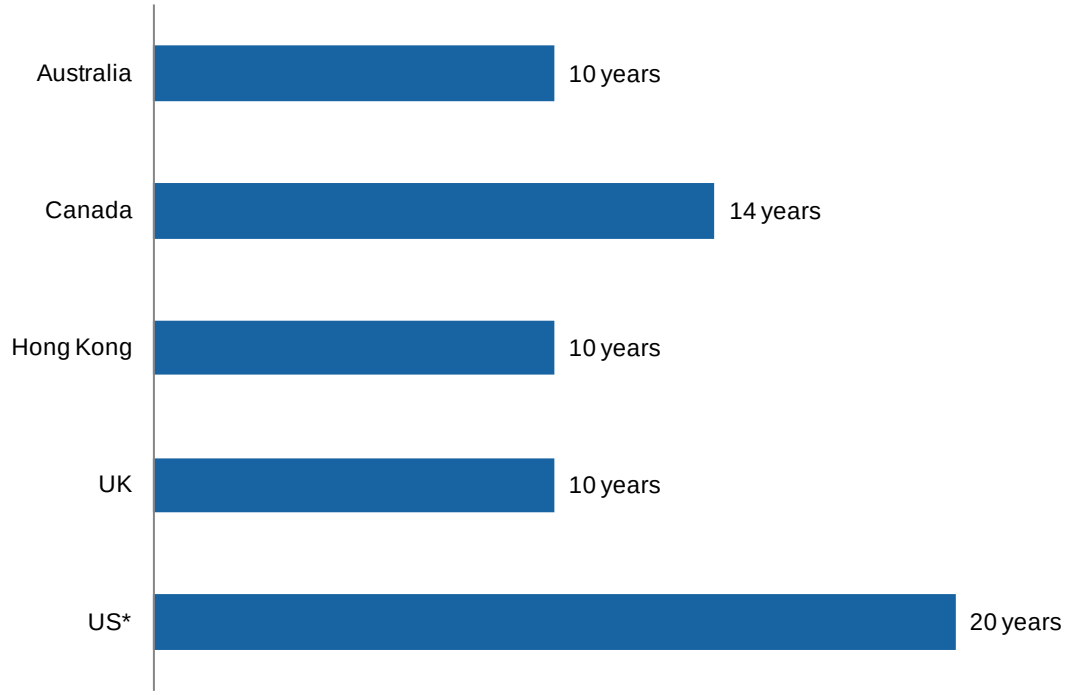
Table 22: Maximum penalties and disgorgement for fraud internationally[86]

Country	Maximum prison term (years)	Maximum fine	Maximum non-criminal monetary remedy/disgorgement
Australia	10	Corporations: greater of $7.65 million or three times the benefits gained or 10% of annual turnover Individual: greater of $765,000 or 3 times the benefits gained	Not applicable
Canada	14	Not applicable	Not applicable
Hong Kong	10	Not applicable	Not applicable
United Kingdom	10	Unlimited	Administrative penalty (authorised firms/approved persons), including disgorgement

[86] Respectively: Corporations Act, s1041G, Sch 3; Criminal Code 1985 (Canada), s380; Securities Act (Ontario), s126.1(1)(b), 127 and 122 (note s122 allows quasi-criminal proceedings to be conducted); Futures and Securities Ordinance (HK), s107, 300 and 303; Fraud Act (UK), s1; Securities Exchange Act (US), s10(b).

United States	20[87]	Corporation: $USD25 million ($AUD27.94 million) Individual: $USD5 million ($AUD5.6 million)	$USD100,000 ($AUD111,000) (natural person) or $USD500,000 ($AUD560,000) (any other person) (as adjusted for inflation from time to time by SEC regulation), or the gross amount of pecuniary gain to defendant from the violation Disgorgement

Figure 17: Maximum prison term (years) for fraud



[87] Fraud offences that amount to 'securities and commodities fraud' attract a maximum prison term of 25 years under the Sarbanes-Oxley Act: see 18 U.S.C. § 1348.

Figure 18: Maximum non-criminal penalties and disgorgement for fraud

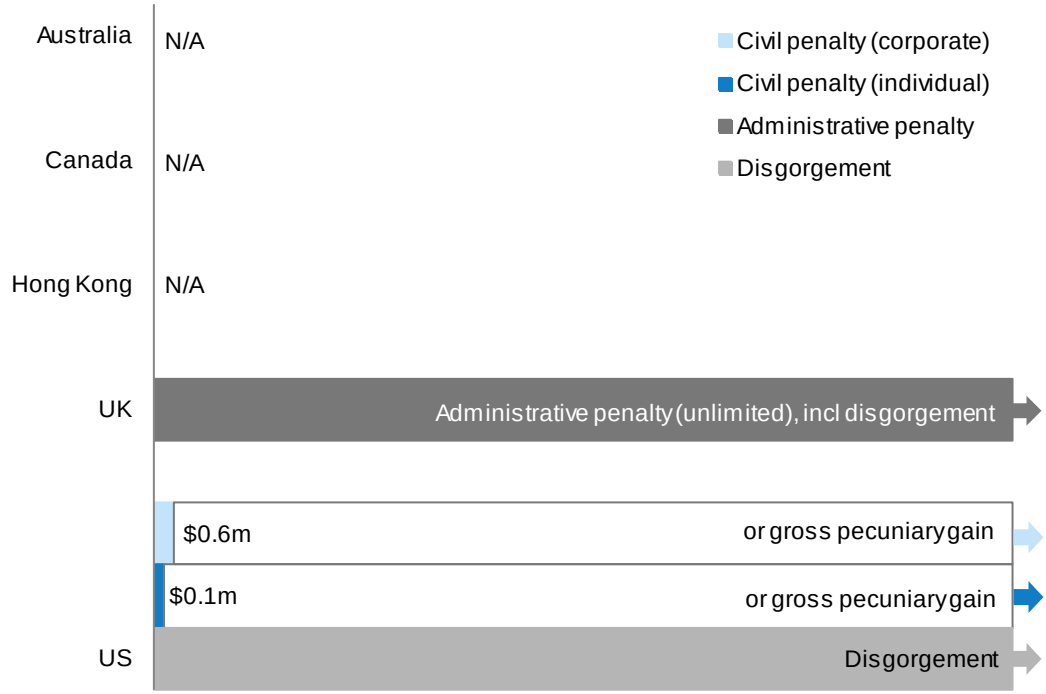


Table 23: Examples of penalties for investment fraud in Australia and overseas[88]

Country	Amount taken	Other details	Counts/charges	Criminal penalty
Australia[89]	$AUD82 million	In March 2011, Mr Graeme Hoy was sentenced following an ASIC investigation into the collapse of the Geelong-based company, Chartwell. The investigation uncovered that the collapse of Chartwell, in April 2008, was a direct result of Mr Hoy operating one of Australia's largest ponzi schemes with investors owed in excess of $AUD82 million.	44 counts of fraud	13.75 years imprisonment
United Kingdom[90]	£250 million	Mr Nicolas Levene pleaded guilty in 2012 to running an investment fraud that obtained over £250 million from investors. The offences took place between 2005 and 2009. A serious crime prevention order was also imposed by the court preventing Mr Levene from promoting or advising on financial investments for a period of five years on release from prison.	12 counts of fraud 1 count of false accounting 1 count of obtaining a money transfer by deception	12 years imprisonment
Canada[91]	$CAD10 million	Mr Kevin Warren Zietsoff was sentenced in February 2014. Mr Zietsoff operated a ponzi scheme over six years during which $CAD15 million was fraudulently obtained from investors in Canada and the United States. In addition to one count of fraud, Mr Zietsoff also admitted to securities fraud and reached a settlement with the OSC for this charge. Mr Zietsoff was also permanently banned from Ontario's capital markets and from being an officer or director of any company or as an investment fund manager.	1 count of fraud	4.5 years imprisonment

[88] We identified an investment fraud case study in Hong Kong, but have not included it in the table because we do not consider it was directly comparable. It involved the SFC reprimanding a company for failing to detect that one of its licensed representatives was responsible for a fraudulent scheme, rather than imposing a penalty on the real perpetrators of the fraud. For further details, see www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=11PR120.
[89] See ASIC advisory (11-55AD) *Chartwell director Graeme Hoy sentenced to jail for 13 years & nine months for one of Australia's largest ponzi schemes*.
[90] See www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/stockbroker-jailed-for-ponzi-fraud.aspx.
[91] See www.osc.gov.on.ca/en/NewsEvents_nr_20140107_osc-set-zietsoff.htm, www.osc.gov.on.ca/en/Proceedings_set_20140103_zietsoffk.htm and http://business.financialpost.com/2014/02/28/toronto-man-sentenced-to-4-5-years-in-prison-for-running-15m-ponzi-scheme/.

Country	Amount taken	Other details	Counts/charges	Criminal penalty
United States[92]	$USD13 billion	Mr Bernard Madoff was sentenced in 2009. Mr Madoff's fraud, a ponzi scheme, spanned 20 years with $USD170 billion flowing through the scheme over that period. However, as noted by the district sentencing judge, by any of these monetary measures, the fraud in this matter is unprecedented.	11 charges, including 1 count of securities fraud	150 years imprisonment Forfeiture of $USD170.8 billion

[92]See www.justice.gov/usao/nys/madoff/20090626sentencingmemorandumfiled.pdf; www.justice.gov/usao/nys/madoff/20090629sentencingtranscriptcorrected.pdf; www.fbi.gov/newyork/press-releases/2009/nyfo062909.htm; and www.sec.gov/litigation/litreleases/2009/lr20889.htm.

False or misleading representations

111 There are a number of provisions dealing with false or misleading representations in Australian law. While broadly similar, the provisions can differ depending on who is engaging in the wrongdoing—either an individual or body corporate—or the circumstances in which the conduct occurs. There are different maximum penalties available in different legislation for false or misleading representations. These variations are apparent in Table 24.

Table 24: Maximum penalties for false or misleading representations in Australia

Act	Description	Type of penalty	Penalty (units $AUD)	Prison term (years)
ASIC Act	False or misleading representations: s12DB	Criminal	Body corporate: $1.7 million Individual: $340,000	
	False or misleading representations: s12DB	Civil	Body corporate: $1.7 million Individual: $340,000	
Australian Consumer Law (ACCC)	False or misleading representations about goods or services: s29	Civil	Body corporate: $1.1 million Individual: $220,000	
National Credit Act	Knowingly give false or misleading information, in the course of engaging in credit activity: s160(1)	Civil	Individual: $340,000	
	Knowingly give false or misleading information, in the course of engaging in credit activity: s160(2)	Criminal	$17,000	2

Appendix 1: Civil penalty and infringement notice provisions available to ASIC

Relevant legislation	Section	Civil penalty	Infringement notice
Corporations Act[93]	s180(1), 181(1)– (2), 182(1)–(2) and 183(1)– (2), officers' duties	✓	
	s188(1)–(2), compliance with certain corporate conventions (secretaries etc.)	✓	
	s209(2), related parties rules	✓	
	s254L(2), 256D(3), 259F(2) and 260D(2), share capital transactions	✓	
	s344(1), requirements for financial reports	✓	
	s588G(2), insolvent trading	✓	
	s601FC(5), duties of a responsible entity	✓	
	s601FD(3), duties of officers of responsible entity	✓	
	s601FE(3), duties of employees of responsible entity	✓	
	s601FG(2), acquisition of interest in scheme by responsible entity	✓	
	s601JD(3), duties of members	✓	
	s601UAA(2), duties of officers of licensed trustee company	✓	
	s601UAB(2), duties of employees of licensed trustee company	✓	

[93] These provisions are known as the 'civil penalty provisions': s1317E(1). If a court is satisfied that a person has contravened one or more of the civil penalty provisions, it must make a declaration of contravention setting out the particulars required by s1317E(2), which then becomes conclusive evidence of these particulars. Only the Federal Court or a state or territory Supreme Court has the jurisdiction to make this type of order.

Relevant legislation	Section	Civil penalty	Infringement notice
Corporations Act (cont.)	s674(2) and(2A), 675(2) and (2A), continuous disclosure	✓	✓
	s798H(1), compliance with market integrity rules	✓	
	s901E, compliance with derivative transaction rules	✓	
	s903D, compliance with derivative trade repository rules	✓	
	s961K(1)–(2), breach of certain best interests duties (financial services licensee)	✓	
	s961L, compliance with certain best interests duties (financial services licensee)	✓	
	s961Q(1), breach of certain best interests duties (authorised representative)	✓	
	s962P, charging ongoing fee after the termination of an ongoing fee arrangement	✓	
	s962S(1), fee recipient must give fee disclosure statement[94]	✓	
	s963E(1)–(2), breach of ban on conflicted remuneration (financial services licensee)	✓	
	s963F, ensure representatives do not accept conflicted remuneration (financial services licensee)	✓	
	s963G(1), do not accept conflicted remuneration (authorised representative)	✓	
	s963J, employer must not pay employees conflicted remuneration	✓	
	s601UAB(2), duties of employees of licensed trustee company	✓	
	s963K, financial product issuer or seller must not give conflicted remuneration to financial services licensee or representative	✓	

[94] This provision is subject to a legislative amendment and may be removed from the Corporations Act: see Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014.

Relevant legislation	Section	Civil penalty	Infringement notice
Corporations Act (cont.)	s964A(1), platform operator must not accept volume-based shelf-space fees	✓	
	s964E(1), breach of asset-based fees on borrowed amounts (financial services licensee)	✓	
	s965, anti-avoidance of Pt 7.7A provisions	✓	
	s985E(1), issuing or increasing limit of margin lending facility without assessment	✓	
	s985H(1), failure to assess a margin lending facility as unsuitable	✓	
	s985J(1)–(2), failure to give assessment to retail client if requested before or after issue of facility or increase in limit	✓	
	s985J(4), demanding payment to give assessment to retail client	✓	
	s985K(1), issuing or increasing limit of margin lending facility if unsuitable	✓	
	s985L, making issue of margin lending facility conditional on retail client agreeing to receive communications through agent	✓	
	s985M(1)–(2), failure to notify of margin call (with or without agent)	✓	
	s1041A, market manipulation	✓	
	s1041B(1) and 1041C(1), false trading and market rigging	✓	
	s1041D, dissemination of information concerning illegal transactions	✓	
	s1043A(1)–(2), insider trading	✓	
	s29(6) of Sch 4, demutualisations	✓	

Relevant legislation	Section	Civil penalty	Infringement notice
ASIC Act[95]	s12CA, 12CB and 12CC, engaging in unconscionable conduct	✓	✓
	s12DB, false or misleading representations	✓	✓
	s12DC, false or misleading representations about financial products that involve interests in land	✓	✓
	s12DD, cash price to be stated in certain circumstances	✓	✓
	s12DE, offering rebates, gifts, prizes etc.	✓	
	s12DF, certain misleading conduct in relation to financial services	✓	✓
	s12DG(2), bait advertising	✓	✓
	s12DH, referral selling	✓	✓
	s12DJ, harassment and coercion	✓	✓
	s12DK, pyramid selling of financial products	✓	✓
	s12DL, unsolicited credit cards and debit cards	✓	✓
	s12DMA, liability of recipient for unsolicited financial services etc.	✓	✓
	s12DMB, assertion of right to payment for unauthorised advertisements	✓	✓
	s12DN, application of provisions to information providers	✓	✓
	s12GYB, compliance with substantiation notices	✓	✓
	s12GYC, false or misleading information etc.	✓	✓

[95] ASIC can give penalties or infringement notices for unconscionable conduct and breaches of most of the consumer protection provisions: s12GBA and 12GXC.

Relevant legislation	Section	Civil penalty	Infringement notice
National Credit Act and related legislation[96]	s29(1), prohibition on engaging in credit activities without a licence	✓	
	s30(1)(a)–(e) and 30(2), prohibitions on holding out and other advertising etc.	✓	✓
	s31(1), prohibition on conducting business with unlicensed persons	✓	
	s32(1), prohibition on charging a fee etc.	✓	✓
	s49(6), obligation to provide a statement or obtain an audit report if directed by ASIC	✓	
	s50(2), obligation to give ASIC information required by the regulations	✓	
	s51(1), obligation to provide ASIC with assistance if reasonably requested	✓	✓
	s52(2), obligation to cite Australian credit licence number	✓	
	s53(1) and 53(4), obligation to lodge annual compliance certificate	✓	
	s69(1), obligation not to give authorisation that has no effect	✓	
	s70(1), obligation to vary or revoke authorisation that ceases to have effect	✓	
	s71(1)–(2) and 71(4), obligation to notify ASIC etc. about credit representatives	✓	
	s73(3) and 73(5), ASIC may give licensee information about representatives	✓	✓
	s82(1), effect of banning orders	✓	
	s88(1)(a)–(d), obligation to keep financial records	✓	✓

[96] ASIC can give infringement notices for breaches of certain provisions as set out in reg 39 of the National Consumer Credit Protection Regulations 2010.

Relevant legislation	Section	Civil penalty	Infringement notice
National Credit Act and related legislation (cont.)	s95(1), obligation to retain financial records for 7 years	✓	✓
	s98(1), obligation for credit service licensees to maintain trust account	✓	✓
	s99(1)–(3), obligations in relation to trust account money	✓	✓
	s100(1)(a)–(b) and 100(2), obligation to lodge trust account statement and audit report	✓	✓
	s102(3)(a)–(c), auditors right of access to records, information etc.	✓	
	s104(1), auditor to report on certain matters	✓	
	s113(1), credit guide of credit assistance providers	✓	
	s114(1)(a)–(c), 114(4)–(6), quote for providing credit assistance etc.	✓	✓
	s115(1)(a)–(b) and 115(2), obligations of credit assistance providers before providing credit assistance for credit contracts	✓	✓
	s117(1), reasonable inquiries etc. about the consumer	✓	✓
	s118(1), when the credit contract must be assessed as unsuitable—entering contract or increasing the credit limit	✓	✓
	s119(1), when the credit contract must be assessed as unsuitable—remaining in credit contract	✓	✓
	s120(1) and 120(3), providing the consumer with the preliminary assessment	✓	
	s121(1)(a)–(c), fees, commissions etc. relating to credit contracts	✓	✓
	s122(1), no profiting from fees etc. paid to third parties	✓	✓
	s123(1)(a)–(b), prohibition on suggesting or assisting consumers to enter, or increase the credit limit under, unsuitable credit contracts	✓	✓

Relevant legislation	Section	Civil penalty	Infringement notice
National Credit Act and related legislation (cont.)	s124(1), prohibition on suggesting consumers to remain in unsuitable credit contracts	✓	✓
	s124A(1)(a)–(b), prohibition on providing credit assistance in relation to short-term credit contracts	✓	
	s124B(1)(a)–(b), licensee who makes representations about credit assistance in relation to small amount credit contracts must display information etc.	✓	
	s126(1), credit guide of credit providers	✓	
	s127(1), credit guide of credit providers who are assignees	✓	
	s128(1)(a)–(b), obligations of credit providers before entering credit contracts or increasing credit limits	✓	✓
	s130(1), reasonable inquires etc. about the consumer	✓	✓
	s131(1), when credit contract must be assessed as unsuitable	✓	✓
	s132(1), 132(2)(c)–(d) and 132(4), giving the consumer the assessment	✓	
	s133(1)(a)–(b), prohibition on entering, or increasing the credit limit of, unsuitable credit contracts	✓	✓
	s133AC(2), credit provider's website to provide capacity to generate Key Facts Sheet	✓	
	s133AD(2)(a)–(b), credit provider to provide Key Facts Sheet in other situations	✓	
	s133AE(2), what if more information is needed from the consumer?	✓	
	s133BC(1), application form for credit card contract to include up-to-date Key Facts Sheet	✓	
	s133BD(1)(a)–(c), credit provider not to enter into credit card contract unless Key Facts Sheet has been provided etc.	✓	
	s133BE(1), credit provider not to offer etc. to increase credit limit of credit card contract	✓	

Relevant legislation	Section	Civil penalty	Infringement notice
National Credit Act and related legislation (cont.)	s133BG(1), records of consents and withdrawals to be kept	✓	
	s133BH(3), credit provider to notify consumer of use of credit card in excess of credit limit	✓	
	s133BJ(1), records of consents and withdrawals to be kept	✓	
	s133BO(1), credit provider to apply payments in accordance with provisions	✓	
	s133CA(1)(a)–(b), prohibition on entering, or increasing the credit limit of, short-term credit contract	✓	
	s133CB(1)(a)–(b), licensee who makes representations about small amount credit contracts must display information etc.	✓	
	s133CC(1)(a)–(b), licensee must not enter into a small amount credit contract if the repayments do not meet the prescribed requirements	✓	
	s133DB(1), giving projections of equity before providing credit assistance or entering credit contract	✓	
	s133DC(2) and 133DD(2), making reverse mortgage information statement available on website of credit provider or credit assistance provider, or in other situations	✓	
	s133DE(1)–(2), representations that use the term ‘reverse mortgage’ etc.	✓	
	s136(1), credit guide of credit assistance providers	✓	
	s137(1)(a)–(b), 137(4)–(6), quote for providing credit assistance etc.	✓	✓
	s138(1)(a)–(b) and 138(2), obligations of credit assistance providers before providing credit assistance for consumer leases	✓	✓
	s140(1), reasonable inquiries etc. about the consumer	✓	✓
	s141(1), when the consumer lease must be assessed as unsuitable—entering lease	✓	✓

Relevant legislation	Section	Civil penalty	Infringement notice
National Credit Act and related legislation (cont.)	s142(1), when the consumer lease must be assessed as unsuitable—remaining in lease	✓	✓
	s143(1)(a)–(b) and 143(3), providing the consumer with the preliminary assessment	✓	
	s144(1)(a)–(b), fees, commissions etc. relating to consumer leases	✓	✓
	s145(1), no profiting from fees etc. paid to third parties	✓	✓
	s146(1)(a)–(b), prohibition on suggesting, or assisting with, unsuitable consumer leases	✓	✓
	s147(1), prohibition on suggesting to consumers to remain in unsuitable consumer leases	✓	✓
	s149(1), credit guide of lessors	✓	
	s150(1), credit guide of lessors who are assignees	✓	
	s151, obligations of lessors before entering consumer leases	✓	✓
	s153(1), reasonable inquires etc. about the consumer	✓	✓
	s154(2), when consumer lease must be assessed as unsuitable	✓	✓
	s155(1), 155(2)(c)–(d) and 155(4), giving the consumer the assessment	✓	
	s156(1), prohibition on entering unsuitable consumer leases	✓	✓
	s158(1), credit guide of credit representatives	✓	
	s160B(1), ‘independent’, ‘impartial’ or ‘unbiased’ etc.	✓	
	s160C(1), ‘financial counsellor’ etc.	✓	
	s160D(1), prohibition on giving misleading information etc.	✓	

Relevant legislation	Section	Civil penalty	Infringement notice
National Credit Act and related legislation (cont.)	s160E(2)–(3), requirements for giving authorisation to employer	✓	
	s160(1)–(2), credit guide of debt collectors	✓	
	s218(5), ASIC may refuse to receive document etc.	✓	
	s220(3), ASIC may require person to give information for document registers	✓	
	s225(2)(a)(i)–(iii), 225(2)(b), 225(5)(a)(i)–(iii) and 225(5)(b), offences relating to documents lodged with ASIC etc.	✓	
	s227(1)(a)–(b), concealing etc. of credit books	✓	
	s228(1), falsification of credit books	✓	
	s229(1), precautions against falsification of credit books	✓	✓
	s240(1), obstructing or hindering ASIC etc.	✓	
	s72(4) and 177B(4)(a)–(b) of the National Credit Code, changes on grounds of hardship	✓	
	Certain provisions in Sch2 of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*: • s6(1)(a)–(b)prohibition on engaging in credit activities if not registered or licensed during the period; • s17(6), obligation to provide a statement or obtain an audit report if directed by ASIC; • s18(2), obligation to give ASIC information required by the regulations; and • s19(1), obligation to provide ASIC with assistance if reasonably requested.	✓	

Appendix 2: FCA's approach to determining the appropriate level of financial penalty (United Kingdom)

How the FCA Penalty Scheme works

In the United Kingdom, the Financial Conduct Authority (FCA) determines the penalties that apply to corporate wrongdoing. The current FCA Penalty Scheme in the United Kingdom came into force from 6 March 2010. The details of the scheme are outlined in *The FCA Handbook*, which contains the *Decision procedure and penalties manual*. Part 6.5 of this manual focuses on determining the appropriate level of financial penalty.

In particular, DEPP 6.5.3 explains the procedure taken by the FCA when determining the appropriate penalty. The total amount payable by a person subject to enforcement action may be made up of two elements:

(a) disgorgement of the benefit received as a result of the breach; and

(b) a financial penalty reflecting the seriousness of the breach.

These elements are incorporated in a five-step framework, which can be summarised as follows:[97]

(a) the removal of any financial benefit derived directly from the breach;

(b) the determination of a figure which reflects the seriousness of the breach;

(c) an adjustment made to this figure to take into account any aggravating and mitigating circumstances;

(d) an upwards adjustment made to this amount, where appropriate, to ensure that the penalty has an appropriate deterrent effect; and

(e) if relevant, the application of a settlement discount (this discount does not apply to disgorgement of any financial benefit derived directly from the breach).

Determining the seriousness of the breach

In determining the seriousness of a breach, the FCA must consider all the factors relevant to the breach and, critically, the intention of the entity that

[97] See http://fshandbook.info/FS/html/FCA/DEPP/6/5.

has breached the law. In all cases, the FCA will assess the seriousness of the breach on a scale from Level 1 to Level 5: see Table 25.

Depending on the level of the breach:

(a) an individual may be fined a proportion of income during the time they breached the requirement in question;

(b) a firm may be fined a proportion of its relevant revenue; and

(c) a firm engaging in managing client money and/or assets may be fined a proportion of the client money which it holds or a proportion of the assets which it holds.

Table 25: The FCA's approach in determining a penalty that reflects the seriousness of a breach

Level of offence	Individual (proportion of income during the period in question)	Firm (proportion of revenue during the period in question)	Firm managing client money and/or assets
Level 1	0%	0%	0% for both client money and client assets
Level 2	10%	5%	1% for client money and 0.2% for client assets
Level 3	20%	10%	2% for client money and 0.4% for client assets
Level 4	30%	15%	3% for client money and 0.6% for client assets
Level 5	40%	20%	4% for client money and 0.8% for client assets

Source: Adapted from DEPP 6.5A of the FCA's *Decision procedure and penalties manual*

Appendix 3: Sentencing table for federal offences (United States)[98]

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

[98] See www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_5.pdf, available from the US Sentencing Commission (www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/index.cfm).

Key terms

Term	Meaning in this document
ACCC	Australian Competition and Consumer Commission
ACT Criminal Code	Criminal Code 2002 (ACT)
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001* (Cwlth), including regulations made for the purposes of that Act
ASIC-administered legislation	The following Acts and related legislation: • Corporations Act; • ASIC Act; • National Credit Act; and • SIS Act.
AUSTRAC	Australian Transaction Reports and Analysis Centre
Australian Consumer Law	Australian Consumer Law at Sch 2 of the Competition and Consumer Act
Competition and Consumer Act	*Competition and Consumer Act 2010* (Cwlth)
Corporations Act	*Corporations Act 2001* (Cwlth), including regulations made for the purposes of that Act
Crimes Act	*Crimes Act 1914* (Cwlth)
FCA	Financial Conduct Authority (previously the Financial Services Authority) (UK)
Financial Services Act (UK)	*Financial Services Act 2012* (UK)
Financial Services and Markets Act (UK)	*Financial Services and Markets Act 2000* (US)
FINRA	Financial Industry Regulatory Authority (US)

Term	Meaning in this document
Fraud Act (UK)	*Fraud Act 2006* (UK)
FSA	Financial Services Authority (UK) (see FCA)
INFO 151 (for example)	An ASIC Information Sheet (in this example numbered 151)
National Credit Act	*National Consumer Credit Protection Act 2009* (Cwlth)
National Credit Code	National Credit Code at Sch 1 of the National Credit Act
NSW Crimes Act	*Crimes Act 1900* (NSW)
OSC	Ontario Securities Commission
POCA	*Proceeds of Crime Act 2002* (Cwlth)
Queensland Criminal Code	Schedule of the *Queensland Criminal Code Act 1899* (Qld)
REP 281 (for example)	An ASIC report (in this example numbered 281)
RG 98 (for example)	An ASIC regulatory guide (in this example numbered 98)
Sarbanes-Oxley Act	*Sarbanes-Oxley Act 2002*
SEC	Securities and Exchange Commission (US)
Securities Act (Ontario)	Securities Act, R.S.O. 1990 (Ontario)
Securities and Futures Ordinance (HK)	Securities and Futures Ordinance 2002 (HK)
Securities Exchange Act (US)	*Securities Exchange Act 1934* (US)
SFC	Securities and Futures Commission (HK)
SIS Act	*Superannuation Industry (Supervision) Act 1993* (Cwlth)
South Australia Criminal Law	*Criminal Law Consolidation Act 1935* (SA)
Victoria Crimes Act	*Crimes Act 1958* (Vic)
Western Australia Criminal Code	Western Australia Criminal Code at Appendix B of the *Criminal Code Act Compilation Act 1913* (WA)

Related information

Headnotes

administrative penalty, banning, best interests obligations, civil penalty, continuous disclosure, criminal penalty, directors' duties, enforcement outcome, enforceable undertaking, false or misleading representations, financial service, fine, fraud, imprisonment, infringement notice, insider trading, market manipulation, misleading statements, penalties, unlicensed conduct

Regulatory guides

RG 98 *Licensing: Administrative action against financial services providers*

RG 100 *Enforceable undertakings*

RG 216 *Markets Disciplinary Panel*

Legislation

ACT Criminal Code

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cwlth)

ASIC Act

Australian Consumer Law

Competition and Consumer Act

Corporations Act; Corporations Regulations 2001

Crimes Act

Criminal Code of Canada

Criminal Justice Act 1993 (UK)

Disclosure and Transparency Rules (UK)

Financial Services Act (UK)

Financial Services and Markets Act (UK)

Fraud Act (UK)

NSW Crimes Act

National Credit Act; National Credit Code; *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*

POCA

Queensland Criminal Code

Sarbanes-Oxley Act

Securities Act, R.S.O. 1990 (Ontario)

Securities and Futures Ordinance (HK)

Securities Exchange Act (US)

SIS Act

South Australia Criminal Law

Victoria Crimes Act

Western Australia Criminal Code

Reports

REP 281 *ASIC enforcement outcomes: July to December 2011*

REP 299 *ASIC enforcement outcomes: January to June 2012*

REP 336 *ASIC enforcement outcomes: July to December 2012*

REP 360 *ASIC enforcement outcomes: January to June 2013*

REP 383 *ASIC enforcement outcomes: July to December 2013*

Information sheet

INFO 151 *ASIC's approach to enforcement*