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LawyersWeekly MASTERCLASS SERIES

# RESPONDING TO REGULATORY INVESTIGATIONS

## WORKBOOK

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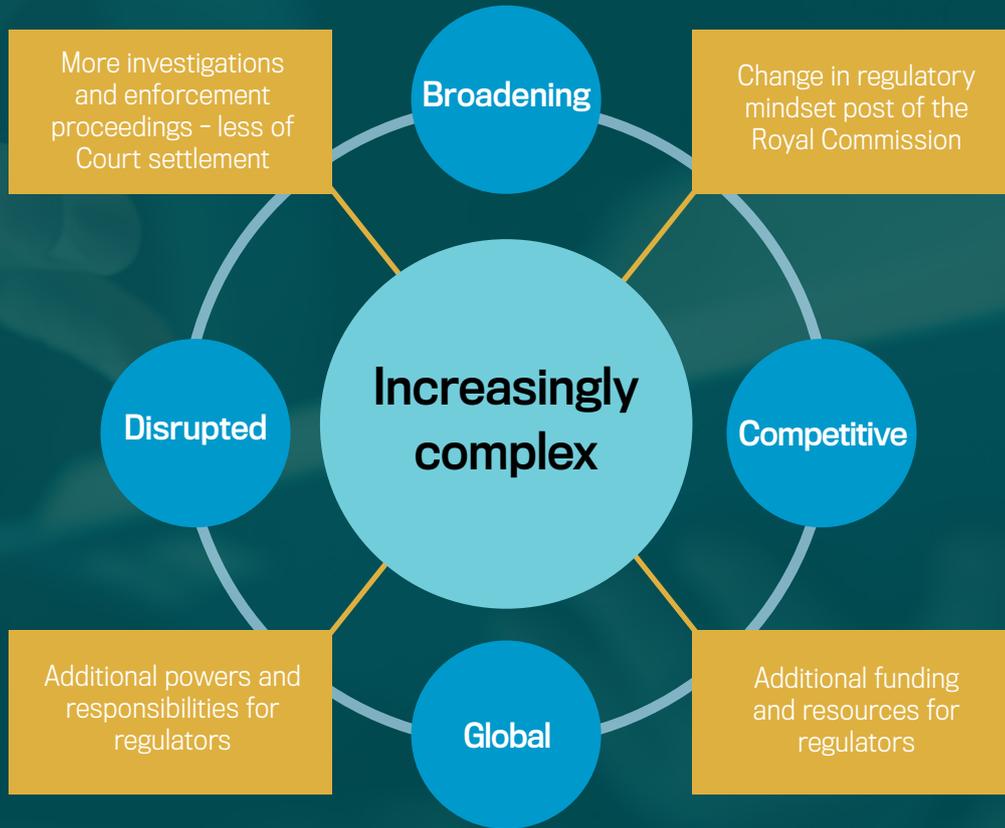
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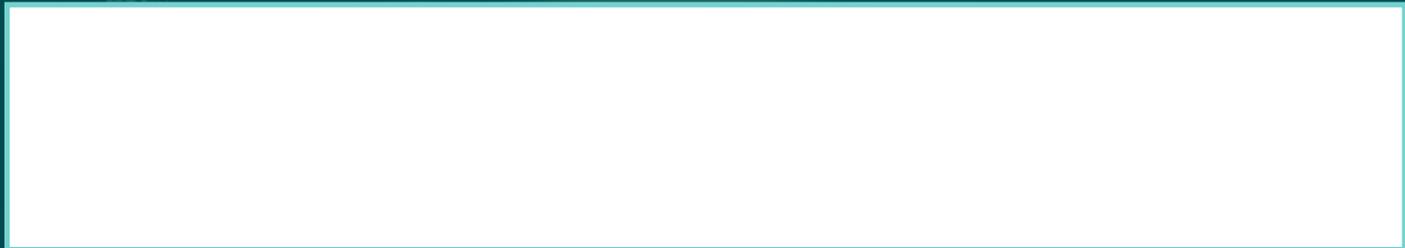
# Regulatory Framework

## What is the current regulatory environment?



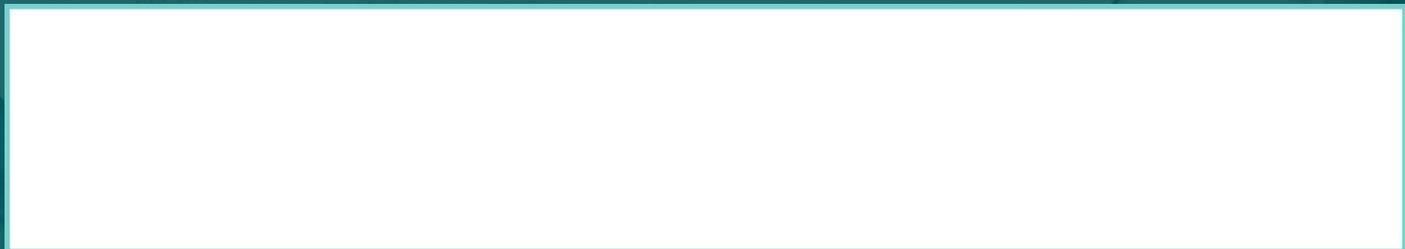
## What are the regulators' goals?

# What is ASIC's enforcement pyramid and how does it operate?



## How do we manage the regulatory environment?

- Volunteering information vs requiring compulsory production
- Governance and process regarding investigation
- Claiming privilege
- Seeking to 'contain' investigation
- Ongoing engagement to understand regulator's thinking
- Settlement offers
- Containing publicity
- Defending regulatory prosecution



# Hypothetical scenario

## Buy-N-Large Limited (BNL)



What are the potential enforcement consequences:

From the ASX?

From ASIC?

# Compulsory information gathering

## Notice to produce documents – section 33 of the ASIC Act

(1) ASIC may give to a person a **written notice requiring the production** to a specified member or staff member, at a specified place and time, **of specified books** that are in the **first mentioned person's possession** and relate to:

- (a) **affairs of a body corporate**; or
- (ab) affairs of a registered scheme; or
- (b) a matter referred to in any of paragraphs 31(1)(g) to (m), inclusive; or
- (c) a matter referred to in paragraph 32A(c)

Note: **Failure to comply** with a requirement made under this section is **an offence** (see section 63).

## What considerations are relevant when responding to the notice to produce?

## Notice requiring examination – s 19 of the ASIC Act

- (1) This section applies where **ASIC, on reasonable grounds, suspects or believes** that a person can give information relevant to a matter that it is investigating, or is to investigate, under Division 1.
- (2) ASIC may, **by written notice** in the prescribed form given to the person, **require the person**:
- (a) to give to ASIC all reasonable assistance in connection with the investigation; and
  - (b) **to appear** before a specified member or staff member **for examination on oath** and to answer questions

Note: **Failure to comply** with a requirement made under this subsection is **an offence** (see section 63).

- (3) A notice given under subsection (2) must:
- (a) state the general nature of the matter referred to in subsection (1); and
  - (b) set out the effect of subsection 23(1) and section 68.

What recommendations should you give to a person who will be compulsorily examined?

How should you respond to requests for voluntary production of material?

Tips for complying with ASIC's compulsory information gathering powers

- **Develop a regulatory notice response plan**
  - Set up a team
  - Identify document repositories and search teams
  - Consider privilege and confidentiality claims
  - Assess extensions for time production in tranches, if compliance is not achievable
  - Avoid blanket privilege claims
- **Prepare for potential s 19 examinations**
- **Proactive engagement with ASIC**
  - Voluntary conversations?

# Search and seizure

## Applicant for warrant – section 35 of the ASIC Act

- (1) Where a member or staff member has **reasonable grounds to suspect** that **there are, or may be within the next 3 days**, on particular premises in Australia, **books whose production could be required under this Division**, he or she may:
  - (a) lay before a magistrate an **information on oath or affirmation** setting out those grounds; and
  - (b) **apply for the issue of a warrant** to search the premises for those books.
- (2) On an application under this section, the magistrate may require further information to be given, either orally or by affidavit, in connection with the application.

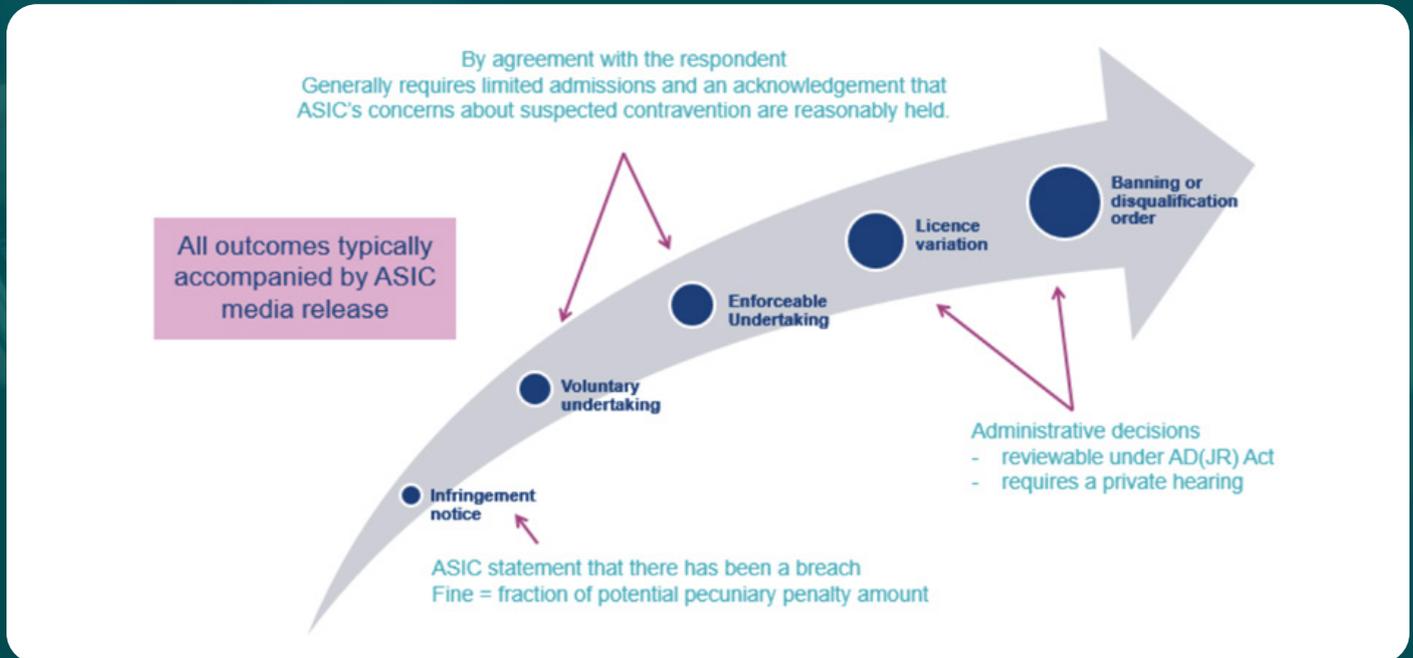
## Execution of warrant – section 36 of the ASIC Act

- (1) Before any person enters premises under a search warrant issued under section 36, a member of the Australian Federal Police must:
  - (a) **announce that the member is authorised to enter the premises**; and
  - (b) give any person at the premises an opportunity to allow entry to the premises.
- (2) ...member of the Australian Federal Police is not required to comply with subsection (1) if he or she believes on reasonable grounds that **immediate entry to the premises is required to ensure that the effective execution of the warrant is not frustrated**.
- (3) If the occupier of the premises is present... :
  - (a) the member of the Australian Federal Police must make available to the occupier a copy of the warrant; and
  - (b) the occupier is entitled to observe the search being conducted.
- ....
- (6) If books are seized under the warrant, the member of the Australian Federal Police or a person assisting the member **must provide a receipt** for the books.

## How should you deal with search warrants and dawn raids?

# Enforcement options

## What are the administrative penalties?



## How does ASIC operate as a model litigant?

## Considerations in settlement with regulators

# Post-enforcement

Ensure ongoing compliance and limit the potential for future regulatory investigations

## Golden Rules

Always be polite and responsive - return telephone calls promptly, be courteous

Be assertive when appropriate

Gather factual evidence, analyse strengths and weaknesses in position early

Seek to understand the regulator's concerns and drivers; and develop appropriate response

## Additional notes



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