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Review of Sanctions for Breaches of Corporate Law
Corporations and Financial Services Division
The Treasury
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ASFA SUBMISSION ON THE REVIEW OF SANCTIONS IN CORPORATE LAW

The Association of Superannuation Funds of Australia Ltd (ASFA) is pleased to make this submission to the Commonwealth Treasury on the *Review of Sanctions in Corporate Law*, released for comment on 5 March 2007.

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. Our members, which include corporate, public sector, industry and retail superannuation funds, account for more than 5.7 million member accounts and over 80% of superannuation savings.

1. GENERAL COMMENTS

ASFA supports the Government's broad strategy to reduce regulatory burden and achieve simpler and more effective regulation. We welcome the Review of Sanctions in Corporate Law as having the potential to discourage excessively risk-averse behaviour by companies, while at the same time providing adequate protection for consumers.

2. SPECIFIC COMMENTS

Proposed status of criminal sanctions versus civil in corporate law

ASFA welcomes the proposals to restrict the imposition of criminal penalties to serious and substantial wrongdoing (paragraph 2.18), and to replace criminal sanctions with civil penalties in less serious cases, particularly where the wrongdoing was neither intentional nor reckless (para 2.35).

For example, reckless or intentional breaches of directors' duties by superannuation fund trustees have the potential to severely disadvantage fund members, and therefore require the significant disincentive of criminal sanctions. However the threat of criminal sanctions for inadvertent breaches can, in some cases, lead to unwillingness on the part of skilled and conscientious people to serve as trustee directors and a reluctance by existing directors to take appropriate risk. Neither of these responses is likely to be in the best interests of fund members.

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Proposed status of administrative sanctions in corporate law

ASFA endorses the proposed application of administrative sanctions to minor breaches, involving strict or absolute liability and no forensic inquiry. Minor breaches of low level record keeping and reporting provisions generally involve no element of moral wrongdoing and have minimal impact on the integrity of the financial system. Therefore they do not warrant either criminal or civil proceedings.

ASFA recognises that some form of deterrent is necessary and agrees that administrative sanctions would be appropriate. However ASFA is of the view that administrative sanctions should not be extended by ASIC to trivial breaches that would currently attract a warning rather than any penalty.

General protection for directors

ASFA supports the provision of a consistent defence to relieve directors of liability for decisions made where they act in a bona fide manner, within the scope of the corporation's business, reasonably and incidentally to the corporation's business and for the corporation's benefit (para 3.2).

Such a defence would provide greater certainty to directors who have, while exercising appropriate care and diligence and acting only in the best interests of the company, been required to make decisions that involve some degree of risk. The specific criteria should be sufficient to preclude the availability of the defence to directors acting out of self-interest or in a reckless manner.

Inconsistent approach between sections 180 and 181

ASFA supports the inclusion of rational belief in the section 181 test of good faith (paras 3.16 to 3.18).

The different tests that currently apply in sections 180 and 181 create uncertainty for directors and make it more difficult for them to make necessary decisions. In particular, the objective test contained in section 181 raises the risk that directors could make a decision that appeared at the time to be in the best interests of the corporation, but that later, due to unforeseen circumstances, proved not to be so. Inclusion of rational belief into the section 181 test of good faith should alleviate this problem without diminishing directors' responsibilities to undertake appropriate due diligence and make properly informed decisions.

Review of section 189

ASFA supports the reversion to the original subparagraph 189(b)(ii), i.e. that reliance on the advice of others would be reasonable after making proper inquiry if the circumstances indicated the need for inquiry (paras 3.19 to 3.26).

The current requirement to make an independent assessment of information or advice received has the potential to place too high a burden on directors. In particular, it is not clear what is required by way of independent assessment. This lack of clarity could result in risk-averse directors making extensive inquiries whenever they rely on the advice of others, regardless of whether the particular situation justifies such inquiries. Such an excessive level of inquiry would hamper efficient decision-making and impose unnecessary costs on the company.

The previous formulation, requiring proper inquiry if the circumstances indicate the need for inquiry, appears to provide a satisfactory balance between the need for appropriate diligence by directors and the undesirability of placing too high a burden on directors.

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Maximum penalties

ASFA endorses the suggestion that moving details of the maximum penalty for an offence into the relevant provision of the Corporations Act would improve both understanding and clarity (para 3.33). The current situation is inconsistent and confusing.

If you have any questions or comments on this submission, please feel free to contact Sue Willems or me at the ASFA Secretariat on 02 9264 9300.

Yours sincerely,

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