24 November 2017

Financial Systems Division (Corporate)

The Treasury

Langton Crescent

PARKES ACT 2600

Via email: asicenforcementreview@treasury.gov.au

Dear Sir/ Madam

# ASIC Enforcement Review - Position Paper 7 Strengthening Penalties for Corporate and Financial Sector Misconduct

CPA Australia represents the diverse interests of more than 160,000 members in 118 countries. We make this submission on behalf of our members and in the broader public interest.

CPA Australia commends the government on the breadth and comprehensiveness of this review. It brings the penalties regime into greater alignment with community expectations and alleviates much of the confusion within a complex area of corporate law. Looking to the future, it would seem vital that these reforms, once put into effect, are appropriately communicated within the business community. CPA Australia would be pleased to lend its support to any such awareness raising initiatives. Additionally, it will be interesting to observe over time whether the reforms, particularly those around criminal penalties, drive errant companies to consider availing themselves of mooted Deferred Prosecution Agreement arrangements as canvassed in a series of consultation papers from Attorney-General’s Department.

# Position 1: The maxim imprisonment penalties for criminal offences in ASIC-administered legislation should be increased as outlined

As indicated, CPA Australia supports these proposals, and we make a number of observations. Criminal offences in relation to financial reporting are dealt with in paragraphs 24 and 25 of the Position Paper. The proposed maximum penalties relating to subsection 344(2) have great merit, however we observe that the benefits metric may be difficult to apply in limited instances where the dishonesty pertains to failure against the section 286 obligation to keep financial records. Continuous disclosure obligations are subsequently dealt with in paragraphs 26 and 27. Without adopting a firm position on the matter, we query the extent of the differentiation in proposed maximum penalty against that proposed to be applied to financial reporting, and question also whether there might be a basis also for inclusion of a benefits element.

# Position 3: The maximum penalty for breach of section 184 should be increased to reflect the seriousness of the offence

CPA Australia supports the proposed increased penalty and likewise would support the views of ASIC expressed in paragraph 68 that clarity should be given in the wording of subsections 184(2) and (3) that the offence applies even where the benefit is to the corporation. More broadly, we query whether the wording of the related sections 182 and 183 ought also to be reviewed in the context of judicial interpretation which has ensued since their enactment.

# Position 4: The Peters test should apply to all dishonesty offences under the Corporations Act

CPA Australia believes the objective test of dishonesty established in *Peters v R* being that “according to the standards of ordinary, decent people”, is an entirely appropriate one given the economic character of behaviour governed by the Corporations Act, and that moreover, any inconsistency between the Criminal Code and the Corporations Act is of lesser concern given the need for a consistent approach within the latter.

# Position 5: remove imprisonment as a possible sanction for strict and absolute liability offences

# Position 6: Introduce and ordinary offence to complement a number of strict and absolute liability offences

CPA Australia agrees that the argument for removing imprisonment as a possible sanction for strict and absolute liability offences is compelling. Additionally, those obligations, offences against which are discussed in paragraph 14 and included in Annexure C, merit separate treatment. We would urge however, that if implemented, the list of ordinary offences be reviewed to determine the need for inclusion of additional provisions from the Corporations Act where the deliberate breach offends expected standards of conduct.

# Positions 7 and 8

We have no specific comments

# Position 9: Maximum civil penalty amounts in ASIC-administered legislation should be increased

CPA Australia is firmly in agreement that the section 1317G pecuniary penalty orders provisions are both out of step in terms of public expectations as to their quantum and lack flexibility in their application to address the nature and degree of specific wrongdoing. Adoption of a predominately maximum unit expression of the civil penalty is strongly favoured. The proposed maximum and aligning of penalty units for individuals under both the ASIC Act and the Corporations Act (paragraph 29 b.i and c.i) appears fair and sound in term of deterrent impact. The aligning of maximum civil penalties for corporations in contravention of the unconscionable conduct and consumer protection provisions of the ASIC Act with Australian Consumer Law, is likewise favoured. Nevertheless, the proposed increase in maximum penalty for corporations contravening civil penalty provisions of the Corporations Act should be that outlined in paragraph 29 c.ii. As such, we do not see at this juncture merit in alignment with proposed increased with the Australian Consumer Law (Question 11). Civil obligations under the Corporations Act are sufficiently distinct to obviate any need to directly reference the penalty regime in consumer law.

# Position 10: Disgorgement remedies should be available in civil penalty proceedings brought by ASIC under the Corporations, Credit and ASIC Acts

CPA Australia supports the proposal in Question 12 that ASIC be able to seek disgorgement remedies and that, as inferred by Question 13, the making and beneficiary of such order be left to the court’s discretion. Such approach would be consistent with incremental approaches to the development of discretionary remedies and the evolving judicial development of both unjust enrichment jurisprudence and the equitable remedy of an account of profits.

# Position 11: The Corporations Act should require courts to give priority to compensation

CPA Australia strongly agrees with this position as reflecting both sound public policy and reflecting the private law underpinnings of corporate law more generally, including protection of the corporation as a distinct legal person. A question raised though in our assessment, concerns any intention and the practicalities of redrafting the compensation orders provisions (principally sections 1317H, 1717HA and 1317HB) to achieve this effect.

# Position 12: Civil penalty consequences should be extended to a range of conduct prohibited in ASIC-administered legislation

CPA Australia is in broad agreement with the proposed sections coverage in Table 6 though query whether there are potentially instances of wrongdoing in relation to sections 670A, 727 and 728 that would merit also penalty and referencing as part of Annexure C. Similarly, we note the crossover of some sections as between Table 7 and Annexure C, and merely ask how it is proposed to treat and explain the dichotomy between civil and strict liability elements.

We conclude here with some general comments in response to Question 19 concerning section 180 of the Corporations Act. CPA Australia is of the view that this section should remain a civil law penalty provision. Understanding of the application of the section reflects a long line of judicial development around the duty of care in the corporate context and the shifting expectations as to the professionalism and ethical conduct of directors and officers. Behaviour of a character which is grossly negligent would seem adequately captured through the other civil law obligation in section 181, 182 and 183, and their criminal manifestation in section 184. Further, treating behaviour around a directors’ exercise of their statutory and constitutional powers in any different form would likely undermine what certainty there is of protection under the business judgment rule.

If you require further information on our views expressed in this submission, please contact Dr John Purcell, Policy Adviser – ESG, on +61 3 9606 9826 or at john.purcell@cpaaustralia.com.au.

Yours faithfully

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