15 November 2017

ASIC Enforcement Review
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Thank you for the opportunity to make a submission on the Position Paper “Strengthening Penalties for Corporate and Financial Sector Misconduct”. I provide the following comments:

**Criminal Penalties: Imprisonment**

From the perspective of general deterrence, I do not think there is a strong case for increasing the current maximum terms of imprisonment set out in the *Corporations Act 2001*. I am not aware of evidence to support the proposition that increasing maximum imprisonment terms increases the general deterrent effect. I very much doubt that potential offenders would be likely to think to themselves: ‘I’ll run the risk of a 5 year imprisonment term, but if I could face 10 years gaol I will not offend’. I suspect the far more effective deterrent is the fear that misconduct will be detected in the first place, will be reported to relevant authorities, will be thoroughly investigated, and will lead to undesired consequences.

Nevertheless, as the paper notes, the penalty regime should also strive to be clear and consistent and reflect the gravity of the proscribed conduct. Accordingly, for example, I would agree that the maximum terms of imprisonment for breaches of ss 206A and 920C should be consistent, and should probably be increased, as both relate to persons failing to comply with a direction from a court or regulator, potentially leading to significant consumer harm.

On the other hand, the disclosure-related offences identified in section 2.1.2 of the paper already have consistent maximum imprisonment terms which adequately (or, arguably, more than adequately) reflect the gravity of the misconduct, and do not need to be increased.

**Civil Penalties for Serious Misconduct (such as Insider Trading)**

An issue not discussed in the paper is whether civil penalties should apply in cases of serious misconduct, such as insider trading.

In this regard, note that ASIC has stated that its approach

in more recent times has been (generally) to pursue criminal proceedings....Although preparation for such cases takes longer (necessarily so with a high standard of proof and when individual freedom is at issue), ASIC’s view is that criminal proceedings and sanctions, including imprisonment, are what will ‘focus the minds’ of those who may be inclined to stray (so-called ‘general deterrence’).[[1]](#footnote-1)

Nevertheless, the fact that Parliament has provided for civil penalties for insider trading and various other serious contraventions implies that, in some circumstances, civil penalty proceedings, rather than criminal proceedings, may be more appropriate.

It is, however, extremely difficult to identify those circumstances. If circumstances in which civil penalty proceedings would be appropriate cannot be envisaged and articulated in respect of cases of serious misconduct, it would be better to provide for criminal penalties only for those cases.

A possible counter-argument is that civil penalties for contraventions such as insider trading should continue to exist in order to facilitate responsive regulation. In my view, however, while responsive regulation may be an appropriate objective in relation to some areas of corporate and financial services regulation, it is an inappropriate model in relation to serious misconduct such as insider trading.

**Penalties for breaches of Part 7.7A**

The paper does not discuss the penalties which apply in relation to breaches of Part 7.7A. These provisions include the following:

* The best interests obligations;
* Fee disclosure obligations;
* The conflicted remuneration ban.

At present, only civil penalties apply in relation to breaches of Part 7.7A. An important issue to consider is whether criminal penalties should apply in any circumstances, for example, where the contravention is reckless or intentionally dishonest.

Criminal penalties applied under the broadly equivalent law which existed before the enactment of the best interests obligations – notably, the reasonable basis for advice rule under section 945A of the Corporations Act (now repealed). It may also be noted that while a breach of the best interests obligations does not attract any criminal penalty, breaches of the broadly comparable provisions in the *National Consumer Credit Protection Act 2009* – namely, the responsible lending obligations in ss123, 124 and 133 – do attract criminal penalties. The goal of consistency would be promoted by criminalising breaches of the best interests obligations in appropriate circumstances.

It may also be observed that the Corporations Act already allows for criminal penalties to be imposed in respect of certain breaches of the law relating to financial services, such as the failure to provide a Financial Services Guide (FSG) to a retail client: s952C. It seems anomalous that the law imposes criminal penalties in respect of a failure to provide an FSG, but not in respect of arguably more serious misconduct, such as failing to act in the best interests of the client, or in relation to broadly equivalent conduct, such as failing to provide a fee disclosure statement when required by law.

**Criminal Penalties: Corporations**

Many articles have been written over the years on whether criminal proceedings should be brought against corporations given their inanimate nature and the fact that penalties which are most likely to deter misconduct (notably imprisonment) cannot be imposed. While fines are the usual penalty, they may not deter misconduct unless they are very large, in which case they can indirectly harm persons not responsible for the misconduct (such as creditors and employees).

I am not convinced that increasing fines is the best way to combat corporate crime. It is certainly not the only way. In any event, whether fines for corporate offenders are increased or not, I suggest that policymakers consider ways of broadening the range of penalties or other consequences which may apply where a corporation is convicted of an offence. One specific issue which arises in this regard is whether corporations should be required to disclose their prior convictions when tendering for public contracts.[[2]](#footnote-2)

**Disqualification from Managing Corporations**

The power to disqualify a person from managing corporations under s206C is discussed on page 43 of the paper. It should be noted that the power under s206C relates to corporation/scheme civil penalty provisions only, such as directors’ and officers’ duty breaches. It does not apply in relation to financial services civil penalty provisions.

An issue which should be considered is whether s206C should be amended to include the power to disqualify a person from managing corporations where they have contravened a financial services civil penalty provision, such as the continuous disclosure obligations and the provisions of Part 7.7A.

**Should a breach of s180 give rise to a Civil Penalty?**

Yes.

The failure by a director or officer to act with reasonable care and diligence should, in appropriate cases, be penalised. It should be noted that the imposition of a pecuniary penalty order is discretionary, not mandatory. It should also be noted that in appropriate cases the court has the power to relieve a person from liability in relation to a contravention: s1317S.

Yours Faithfully,

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1. Tony D’Aloisio, Insider Trading and Market Manipulation, 13 August 2010. (Supreme Court of Victoria Law Conference, Melbourne). [↑](#footnote-ref-1)
2. The Commonwealth Procurement Rules do not appear to require officials to check whether a corporation tendering for a government contract has been convicted of an offence in the past. This may be seen to be anomalous, given that individuals seeking government employment are often required to disclose their prior convictions. [↑](#footnote-ref-2)