Australian Finance Industry Association Limited
ABN 13 000 493 907
L11 130 Pitt Street Sydney NSW 2000
02 9231 5877 www.afia.asn.au

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

24 November 2017

By email: ASICenforcementreview@treasury.gov.au

Dear Sir/Madam

Strengthening Penalties for Corporate and Financial Sector Misconduct

The Australian Finance Industry Association (AFIA) welcomes the opportunity to comment on the ASIC's Review Taskforce *Positions Paper 7 Strengthening Penalties for Corporate and Financial Sector Misconduct*.

AFIA is uniquely placed to advocate for the finance sector given our broad and diverse membership of over 100 financiers operating in the consumer and commercial markets through the range of distribution channels including digital access. A fact sheet on AFIA is enclosed.

AFIA supports actions to ensure that the penalties available to ASIC are an effective deterrent for corporate and financial sector misconduct. The penalty regime must also send a consistent message that poor conduct is unacceptable and it should also reflect the gravity of the misconduct. Our specific comments (attached) focus on ensuring that the key positions put forward by the Taskforce meets these principles. To assist in ensuring that changes to ASIC's penalty regime meet their policy goals AFIA provides comment in the following key areas:

- expansion of the civil penalty regime
- proposed new disgorgement remedy
- expansion of the infringement notice regime
- new civil penalties for the National Credit Code

We note actions by the Taskforce are aimed to enhance ASIC's penalty regimes. Our comments are designed to align with this process.

We look forward to having the opportunity to review and comment on draft legislation and continuing to work with the Government on ensuring that the penalties available to ASIC are a strong deterrent for corporate and financial sector misconduct.

We thank Treasury for granting us an extension to lodge this submission but we note our concerns about timeframes for consultation on what are significant matters deserving considered feedback from stakeholders including AFIA. Industry should be given a timeframe to respond that allows consideration of the issues raised and feedback on key areas to inform the Government's consideration. Further, timeframes for consultation should account for the fact that industry needs to consider the potential interactions with existing obligations and possible future obligations raised through the current high volume of regulatory proposals.

Timeframes should also account for the necessity for businesses to consider how regulatory proposals will impact them in the future as they grow and develop. They should also reflect the broad range and variation of participants (including within the AFIA membership) from large publicly listed entities through to small entities. All need to consider the potential implications of proposed reforms. For smaller participants these may be more significant than for larger.

Smaller participants' ability to consider may be more challenged by competing priorities for their resources than for larger participants. Though we acknowledge that our larger members are equally challenged given the significant level of proposed reforms to our industry. It is essential that regardless of size / resourcing all have adequate opportunity to consider and inform public policy reform in our industry.

The truncation of consultation appears to be an ongoing problem with timeframes getting narrower and narrower despite the issues being of significant relevance and potential impact to our members and others in the financial services sector (e.g. consultation on broad policy including APRA's new reserve powers and product specific reforms on additional regulation of credit card and consumer lease, and open banking). We encourage the Government to revise its approach to consultation to ensure a process that achieves critical policy priorities with implementation designed to minimise if not avoid unintended consequence.

If you have any questions regarding this submission please contact Alex Thrift, Economic & Policy Senior Adviser at alex@afia.asn.au or via 02 9231 5877.

Kind regards

Helen Gordon
Chief Executive Officer

Attachments:
1. AFIA Feedback;
2. AFIA Background

ATTACHMENT 1: AFIA DETAILED COMMENTS – STRENGTHENING PENALTIES FOR CORPORATE AND FINANCIAL SECTOR MISCONDUCT

AFIA provides the following detailed comments in response to the Positions Paper.

Disgorgement Remedies for Civil Penalty Proceedings

The Positions Paper notes that currently ASIC does not have any clear mechanism to seek disgorgement of financial benefits in civil penalty proceedings. Disgorgement remedies are a way to prevent potential wrong doers from viewing penalties as a cost of doing business.

We note that the Positions Paper recommends that disgorgement remedies should be available to the courts in civil proceedings brought by ASIC (position 10). This would apply for civil offences under the Corporations, Credit and ASIC Acts. We recognise that this position will make it clear that it may not be appropriate for wrong doers to retain a profit or avoid a loss from contravening the law. Disgorgement would be in and above any pecuniary penalties.

ASIC should only seek a disgorgement remedy in situations where it is clearly identifiable that a wrong doer has made a gain or avoided a loss that directly relates to the wrong doing. Further, ASIC should only be able to seek disgorgement remedies where the financial benefit of the wrong doing can be clearly quantified. We support the Positions Paper view that it should be left to the Courts to determine whether disgorgement is appropriate and if so what the disgorgement amount should be.

The Courts should also consider whether to apply a disgorgement penalty when also considering a pecuniary penalty order and penalty order amount. This will prevent overly punitive amounts being ordered by the Court against the defendant that may not be in line with the nature of the wrong doing.

We also recommend that if a disgorgement remedy is made available that ASIC should release guidance on how and when it will be applied. This guidance should be developed with industry input and consultation.

We envisage where a disgorgement remedy is being sort that it is likely that there will be parallel proceedings for compensation. Any amount received under a disgorgement remedy should be made available to satisfy compensation orders. Otherwise a defendant could be penalised more than once for the same offence and this may result in amounts being ordered against that entity not aligning with the nature of the wrong doing. This mirrors the Taskforce's position 11 that priority should be given to compensation.

AFIA recommends:

1. ASIC should only be able to seek a disgorgement remedy in certain circumstances and develop guidance in consultation with industry on when it will seek disgorgement remedies.
2. Courts should:
    a. be left to determine whether disgorgement is appropriate and the quantum;
    b. consider whether to apply a disgorgement penalty when also considering a pecuniary penalty order.
3. Disgorgement amounts should be applied against compensation orders before being paid into consolidated revenue.

Priority should be given to compensation

AFIA supports that the Corporations Act should be amended to require Courts to give priority to compensation (position 11). The ASIC Act and National Credit Act already require the Courts to give preference to compensation remedies if a defendant has insufficient funds to pay a pecuniary penalty and compensation.

While penalties should represent a strong deterrent to wrong doing priority should be given to compensation orders where a defendant cannot pay a penalty and compensation. Compensation should be given priority to restore victims to their original position before the defendant is penalised for the wrong doing.

AFIA recommends:

4. Consistent with the existing provisions in both the National Credit Act and ASIC Act, the Corporations Act should be amended to require Courts to give priority to compensation orders.

Expanding the Civil Penalty Regimes in the Corporations, ASIC And Credit Acts

ASIC can seek civil remedies in situations where the circumstances fall short of criminal conduct but still warrant a sanction to promote compliance. Criminal remedies should only be sought in situations where conduct is genuinely criminal. Civil remedies should be sought where there is no criminality involved and where appropriate to seek compensation orders for affected individuals.

The Taskforce makes a number of recommendations to expand the civil penalty regime to existing criminal provisions under table 6 of the Positions Paper.

We note under the proposals to expand the civil penalty regime (as per table 6 of the Positions Paper) that an offence may be prosecuted under either criminal or civil regimes. By attaching civil proceedings to existing criminal offences there is a possibility that the message for the seriousness of these offences may become mixed. For example, if ASIC pursues action under the civil or criminal proceedings for instances of similar behaviour it will send mixed messages to both the industry and the community on the seriousness of that offence and what penalties should apply for any future breaches.

Such a situation may undermine one of the key principles of a penalty regime that penalties should be clear and consistent. Equally public confidence in the regulatory regime may be undermined. The underlying principle on determining whether to pursue an offence through criminal or civil proceedings should reflect the seriousness of the offence; where behaviour is genuinely criminal, criminal proceedings should appropriately be taken.

We note that ASIC already publishes guidance (INFO 151) on its enforcement approach including that ASIC will pursue the regulatory and enforcement sanctions best suited to the circumstances of a case. In expanding the civil penalty regime to a range of new offences ASIC will need to make clear where it intends to pursue a matter under the existing criminal or new civil penalty regime. This could be achieved by amending INFO 151 or through new guidance. We also recommend in the development of new guidance that safe harbours are developed to the new civil offences. This would allow businesses to fully understand how ASIC expects them to behave to minimise risk of action under the new civil offences. To have a practical, operational relevance these safe harbours would be best developed with industry involvement.

It may also be prudent to review ASIC's internal decision-making processes that dictate when it will pursue penalties. Part of this is to ensure that there is a clear separation between an investigating team and the decision based on its findings whether to seek penalties under either criminal or civil proceedings.

AFIA recommends:

5. ASIC develop new guidance around the circumstances that would influence its decision to pursue criminal or civil penalties or infringement notices. This would include the development of safe harbours to the new civil offences
6. This guidance should be developed in partnership with industry to incorporate existing and appropriate industry practices.

Expanding the Infringement Notice Regime and Peer Review Panel

The Positions Paper recommends that infringement notices be extended to an appropriate range of civil penalty provisions (position 15). This expansion covers a wide range of offences under the Corporations Act, the National Credit Act and Credit Code (detailed in Annex B of the Positions Paper).

We note that under the proposed expansions to both the infringement notice regime and civil penalty regime ASIC would have the option of pursuing penalties under three penalty regimes (for example s. 911A and s. 912D of the Corporations Act). We note the Positions Paper states each penalty regime should be used as appropriate (according to the key principles contained in Section One of the Paper). However, having up to three penalty regimes for a single offence may lead to a level of uncertainty as to what facts would be relevant to and dictate which type of penalty would be sought by ASIC. As stated above, ASIC should develop detailed guidance, in consultation with industry, on how it will determine what penalties it will pursue including circumstances of mitigating factors.

AFIA is also concerned that infringement notices may be used in preference to other proceedings as a finding of culpability is not a pre-cursor to their issue. The relatively less onerous basis for their issue, may see infringement notices used more frequently than circumstances may warrant. This would undermine the purpose and principles of the infringement notice regime. Further, infringement notices are not easily challenged as they not reviewable by the AAT or the courts. The only way an infringement notice can be effectively challenged is if the defendant does not pay. If an infringement notice is not paid ASIC may take civil action that places a substantial burden on the entity for what may amount to an insignificant or inconsequential breach. A defendant may make a commercial decision to just pay the infringement notice rather than seek the potentially more costly avenue of objecting or defending ASIC action despite a view that it is not guilty of an offence.

To overcome these concerns we support ASIC establishing a Financial Services and Credit Panel (FSCP) and that it should be expanded to have the power to issue infringement notices. A panel should involve industry representatives that have experience across the financial services and credit industry (including the various business models, distribution channels (e.g. digital/fintech) and products) together with ASIC representatives will add a strong element of industry peer review to the infringement notice regime. To ensure consistency all ASIC infringement notices should be made by this Panel.

We note ASIC has selected for appointment individuals for its Financial Services and Credit Panel (FSCP) on 10 November 2017 and released regulatory guidance on the Panel on 16 November 2017. Each sitting will comprise two industry representatives and an ASIC official. Industry representatives will bring a depth knowledge on the market and industry practices that would be most relevant in determining when the circumstances warrant the issue of infringement notices.

AFIA recommends:

7. ASIC should develop detailed guidance, in consultation with industry, on how it will determine when an infringement notice will be issued.
8. The Financial Services and Credit Panel should be given the sole power to issue infringement notices that attract penalties.
9. The FSCP should ensure that it includes a range of representatives that have experience from across the financial services and credit industry (including the various business models, distribution channels (e.g. digital/fintech) and products).

Credit Code Provisions – New Penalty Provisions

The Credit Code currently provides for civil penalties for contraventions of key requirements under section 111 of the Code. The Positions Paper suggests expanding civil penalties to a number of other offences under the Credit Code that are currently only criminal offences. Relevant to our Members this includes offences for false or misleading representations for credit contracts and consumer leases (s. 154(1) and s. 179U(1) of the Code).

We question the need to extend civil proceedings to these offences in addition to the existing criminal proceedings. Unlike many of the other provisions noted in Appendix D these two provisions are not clear cut and require further investigation by ASIC and an opportunity for the defendant to challenge ASIC's view. We note that creating new civil offences may enhance ASIC's flexibility to respond to this type of conduct. However, criminal proceedings for these offences are adequate to reflect that a breach constitutes serious misconduct. Attaching civil proceedings and penalties to these offences may also send conflicting messages to stakeholders about how seriously ASIC may view these offences.

We also question the need to extend civil proceedings to these offences as they overlap with provisions in the ASIC Act (s. 12DB and s. 12DF) that deal with false and misleading representations and conduct. These provisions already have attached criminal and civil penalties.

If civil offences are made for these two offences we recommend that a similar defence to the existing criminal defence be made available. That is, entities should be found not guilty if they can prove that they reasonably believed that the representation they made was not false or misleading. Further, without such a defence regulated entities may be inappropriately prosecuted for very minor or inconsequential breaches. As stated above, ASIC should also provide guidance to create a safe harbour on any new civil offences to reduce uncertainty for regulated entities on when they will be applied.

AFIA also remains concern with the significant number of offence provisions that operate on a strict liability basis. We recommend that the need for each of these warrants testing to see if they remain relevant and justifiable in the enhanced regulatory environment.

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AFIA
Australian Finance Industry Association

Australia's Leading Advocate for the Australian Finance Industry

Financing Australia's Future

Representing over

100 MEMBERS

Auto Financiers, Equipment Financiers, Banks, ASX-Listed and Private Lenders, Fleet Lessors, Rental Operators, Credit Card Providers, Consumer Lessors, Cashflow Financiers, Insurance Premium Funders, Fintech and more

$152 BILLION to GDP

Finance industry contribution

1 MILLION CARS FINANCED

By AFIA members each year

450,000 PEOPLE

Employed by the finance industry

$2.7 TRILLION TOTAL LOANS

Current total credit, Including $1.7 Trillion in Housing Loans and $0.9 Trillion to Australian Businesses

$80 BILLION IN EQUIPMENT

Currently under finance, reported by AFIA members