



AUSTRALIAN INSTITUTE of  
SUPERANNUATION TRUSTEES

17 November 2017

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

Email: [ASICenforcementreview@Treasury.gov.au](mailto:ASICenforcementreview@Treasury.gov.au)

Dear Sir/Madam,

**Re: Strengthening Penalties for Corporate and Financial Sector Misconduct**

**In brief:**

AIST supports appropriate penalties for corporate and financial sector misconduct, and generally supports the positions taken in this Positions Paper. We agree that an effective regulator needs to have the regulatory resources, including penalty provisions, to allow them to provide effective enforcement. AIST cautions against disgorgement penalties which may inappropriately penalise the members of a superannuation fund

AIST welcomes the opportunity to comment on this positions paper. AIST believes that the financial system is fully reliant on a financial regulator being equipped with the resources to ensure that better enforcement is able to be undertaken. We believes that appropriate penalties form part of these resources, as well as providing appropriate punishments and deterrence.

As part of the Financial System Inquiry, the recommendation to introduce an industry funding model to better assure ASIC of appropriate resourcing was met with qualified support from AIST. We pointed at the time, in our submission on the final paper of the Inquiry, to the lack of transparency in relation to regulatory funding models then in place. We also noted that the setting of clearer objectives identifying the resources needed, as well as the review of a funding model was needed first.

During consultation for the proposed industry funding model, we objected to the model that was proposed, noting that a risk-weighting overlay was absolutely necessary to ensure that licensees who presented risks were billed appropriately for the strain that

they placed upon scarce regulatory resources. This recommendation, which we reiterated in submissions to Treasury in 2016 and 2017 called for more appropriate reflection of the risks posed by different Australian Financial Services (AFS) Licensees.

We welcomed the inclusion of criteria that considered the relative riskiness of different industry sector when setting levies. However as we noted at the time, there are still manifest differences in risk between subsectors of the superannuation (and other) sectors of the financial services industry. We continue to recommend that the APRA groupings of funds be used in order to better gauge the resourcing of industry funding.

In the absence of appropriate funding models which better recover costs from riskier financial enterprises, AIST supports the provision of the stronger regulatory tools that allow ASIC to better deal with misconduct in the financial services industry. We agree with the Taskforce's diagnosis of the problems identified in relation to the current penalties regime. We also agree with the principles identified, in particular, the principle where penalties should better reflect the gravity of the conduct.

However, we also consider that flexibility discussed in this paper, where the Regulator is able to utilise multiple different types of penalty is able to ensure that serial breaches for the same conduct would extend the effectiveness of the penalties framework.

As such, AIST generally supports the positions taken in this paper. We believe that stronger penalties provides appropriate deterrence. We also applaud the care taken to ensure that the consistency of penalties in financial services law are brought into line with penalties regimes elsewhere.

We do, however, have some reservations regarding some of the positions. The remainder of this submission is intended to provide a brief exploration of these reservations rather than responding directly to all the points raised in the Positions Paper.

**Position 1:** AIST supports the increases to maximum imprisonment penalties, as raised in Annexure B of the Positions Paper.

**Position 2:** We support the standardisation of penalty formulae in line with the *Crimes Act 1914*. Parity with this act underlines the seriousness of corporate and financial services breaches.

**Position 3:** AIST wholeheartedly supports increases in the maximum penalty for breaches of section 184. Fraudulent conduct should be subject to penalties commensurate with the seriousness of the action.

**Position 4:** AIST respects the consistency that the test in Peters<sup>1</sup> applies to the Corporations Act. We also recognise the High Court's preference for Peters' test and therefore support the use of this test in relation to dishonesty offences.

**Position 5:** AIST supports the removal of imprisonment as a possible sanction for strict and absolute liability offences.

**Position 6:** AIST supports the introduction of ordinary offences to complement strict and/or absolute liability offences, but only where this is appropriate.

**Position 7:** AIST supports the certainty and consistency that setting the maximum penalty for strict and absolute liability offences at 20/200 penalty units would provide, however we express no opinion in relation to its appropriateness.

**Position 8:** AIST supports the extension of the penalty notice regime to strict and absolute liability offences.

**Position 9:** AIST supports increases to maximum civil penalty amounts.

**Position 10:** Although AIST supports disgorgement remedies in principle, care needs to be taken to ensure that there are no adverse downstream impacts of such penalties. Profits being disgorged must be appropriately defined. There must be no possibility that members of profit to member funds will foot the bill for the proceeds of civil penalties.

**Position 11:** As misconduct in the financial sector most often involves misallocation and/or deprivation of financial resources specifically, it follows that penalties which rectify financial losses should be of highest priority. AIST therefore supports priority being given to compensation by courts in the Corporations Act.

**Position 12:** AIST supports civil penalty consequences being extended to conduct outlined in the table on pages 51-52 of the Positions Paper. We would also support

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<sup>1</sup> *Peters v R* (1998)192 CLR 493

consultation regarding the extension of civil penalty provisions to the matters contained in the table on page 58 of the Positions Paper.

**Position 13:** AIST would support provisions imposing obligations on licensees should be civil penalty provisions.

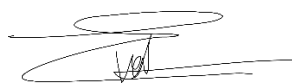
**Position 14:** AIST provides no comment in respect of this position.

**Position 15:** AIST supports the extension of infringement notices to an appropriate range of civil penalty offences.

**Position 16:** AIST supports the certainty and consistency that setting the maximum penalty for infringement notices at 12/60 penalty units would provide, however we express no opinion in relation to its appropriateness.

For further information regarding our submission, please contact Richard Webb, Policy & Regulatory Analyst at 03 8677 3835 or at [rwebb@aist.asn.au](mailto:rwebb@aist.asn.au) .

Yours sincerely,



Eva Scheerlinck  
**Chief Executive Officer**

*The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.*

*As the principal advocate and peak representative body for the \$700 billion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.*

*AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.*