



ASIC

Australian Securities & Investments Commission

ASIC Enforcement Review

Positions Paper 7— Strengthening penalties for corporate and financial sector misconduct

Submission by the Australian Securities and Investments Commission

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Overview

1 ASIC supports the Government’s commitment to ensuring that we have the powers and regulatory tools we need to proactively address misconduct in the financial services sector.

2 As Australia’s corporate, markets, financial services and consumer credit regulator, ASIC strives to ensure that Australia’s financial markets are fair and transparent and supported by confident and informed investors and consumers. In order to effectively carry out this role, we need a broad and effective enforcement toolkit.

3 We will continue to provide advice and support to the Government and Treasury on the current ASIC Enforcement Review.

Note: See The Hon Kelly O’Dwyer MP, Minister for Revenue and Financial Services, Media Release No. 95, [ASIC Enforcement Review Taskforce](#), 19 October 2016.

ASIC Enforcement Review Taskforce’s positions paper

4 We welcome the release of the ASIC Enforcement Review Taskforce (Taskforce) Positions Paper 7 *Strengthening Penalties for Corporate and Financial Sector Misconduct* (positions paper).

Note: See The Hon Kelly O’Dwyer MP, Minister for Revenue and Financial Services, Media Release [ASIC Enforcement Review Taskforce consults on strengthening penalties](#), 23 October 2017.

5 In this submission we provide observations from our regulatory experience to help the Government consider the key implementation issues for the positions put forward in the paper.

6 The positions paper highlights the importance of ensuring that penalties for contraventions of ASIC-administered legislation are at an appropriate level so as to act as a credible deterrent to misconduct. Further, it is recognised that the penalties available to ASIC should be consistent across ASIC-administered legislation and that the variety of penalties available should be appropriate to address the range and severity of misconduct.

7 In this submission, we provide general support for the positions paper. In our view, the availability of appropriate penalties (and disgorgement) is crucial to an efficient and effective regulatory regime, providing the regulator with flexibility in dealing with varying levels of misconduct.

8 However, we consider that some of the proposals in the positions paper do not go far enough in addressing the gaps in penalties in ASIC-administered legislation and in ASIC’s regulatory toolkit more broadly. There are also

some aspects in the paper that we do not agree with. These are outlined in the submission.

ASIC’s responses to the Taskforce positions

9 The below table outlines our response to each of the positions and additional issues discussed in the positions paper.

Table 1: Summary of ASIC’s responses to the Taskforce positions

Position Number	Description	ASIC’s response
1	The maximum imprisonment penalties for criminal offences in ASIC-administered legislation should be increased as outlined in Annexure B to the positions paper	<p>We support this position. Offences of the kind described in the positions paper have the potential to cause significant detriment to consumers and markets, e.g. defective disclosure, breach of directors’ duties, unlicensed conduct and client money breaches.</p> <p>In particular, we support the elevation of the maximum prison term to 10 years for the most serious class of offences.</p> <p>See paragraphs 30–46 for further discussion</p>
2	<p>The maximum pecuniary penalties for all criminal offences (other than the most serious class of offences referred to in Annexure B to the positions paper) in ASIC-administered legislation should be calculated by reference to the following formula:</p> <p>Maximum term of imprisonment in months multiplied by 10 = penalty units for individuals, multiplied by a further 10 for corporations</p>	<p>We generally agree with this position, acknowledging that higher financial penalties are needed to deter corporate offending. However, we consider that the formula proposed by the Taskforce does not go far enough.</p> <p>We submit that the following formula should adopted:</p> <p style="padding-left: 40px;">Maximum term of imprisonment in months multiplied by 15 = penalty units for individuals, multiplied by a further 15 for corporations</p> <p>We agree that as an exception the maximum pecuniary penalty for the most serious class of offences should be set at the level proposed by the Taskforce.</p> <p>See paragraphs 47–53 for further discussion</p>

Position Number	Description	ASIC's response
3	The maximum penalty for a breach of s184 should be increased to reflect the seriousness of the offence	<p>We agree that the maximum penalty for a breach of s184 should be increased to be the same as that for market misconduct.</p> <p>We also propose the following changes to s184:</p> <ul style="list-style-type: none"> • amendments to clarify that a person commits an offence if they use their position dishonestly to gain an advantage for a corporation • alter s184(1) to appropriately set out the physical and fault elements of the offence <p>We also propose that the penalty for s160D of the National Credit Code be increased in line with the increase to s184.</p> <p>See paragraphs 54–75 for further discussion</p>
4	The Peters test should apply to all dishonesty offences under the Corporations Act	<p>We agree with this position, and note the change will bring consistency.</p> <p>See paragraphs 76–80 for further discussion</p>
5	Remove imprisonment as a possible sanction for strict and absolute liability offences	<p>We disagree with this position. It would send the wrong regulatory message to remove these sanctions from the 190 existing strict and absolute liability offences in the Corporations Act that currently bear imprisonment as a possible sanction.</p> <p>See paragraphs 84–92 for further discussion</p>
6	Introduce an ordinary offence to complement a number of strict and absolute liability offences as outlined in Annexure C to the positions paper	<p>We support this position. The current strict liability offences for failure to comply with the important obligations identified in the positions paper may be an effective deterrent to inadvertent breaches, but it is not adequate to deter wilful non-compliance.</p> <p>These obligations include disclosing directors' interests and substantial holdings in listed entities to the market, keeping proper financial records and adhering to auditing standards.</p> <p>See paragraphs 93–96 for further discussion</p>
7	Maximum pecuniary penalties for strict and absolute liability offences should be a minimum of 20 penalty units for individuals and 200 penalty units for corporations	<p>We support this position and also the proposal to double all other strict and absolute liability offence penalties for corporations, but also propose that the penalties for individuals be doubled as well. We also support the proposal that all non-strict liability offences have a minimum penalty threshold of 30 penalty units for individuals and 300 penalty units for corporations.</p> <p>See paragraphs 97–100 for further discussion</p>

Position Number	Description	ASIC's response
8	All strict and absolute liability offences should be subject to the penalty notice regime	<p>While we propose instead that there be a unified infringement notice regime contained within the ASIC Act rather than reliance upon the penalty notice regime, we do support that all strict and absolute liability offences contained within the Corporations Act be subject to an infringement notice regime of some kind. We propose certain improvements to the penalty notice regime should it be the vehicle adopted for this.</p> <p>See paragraphs 101–109 for further discussion</p>
9	<p>Maximum civil penalty amounts in ASIC-administered legislation should be increased, as follows:</p> <ul style="list-style-type: none"> for the ASIC Act, consumer protection provisions consistent with the Australian Consumer Law,¹ 2,500 penalty units² for individuals, and for corporations, the greater of 50,000 penalty units,³ 3 times the value of benefits obtained or 10% of annual turnover for the Corporations and Credit Act civil penalty provisions, 2,500 penalty units⁴ for individuals, and for corporations, the greater of 12,500 penalty units,⁵ 3 times the value of benefits obtained or 10% of annual turnover 	<p>We agree that maximum civil penalty amounts in ASIC-administered legislation should be increased, but not as proposed by the Taskforce. We submit that penalties should be increased across all ASIC-administered legislation (i.e. the Corporations, ASIC and Credit Acts), as follows:</p> <ul style="list-style-type: none"> for individuals the greater of 5,000 penalty units⁶ or 3 times the value of benefits obtained for corporations, the greater of 50,000 penalty units,⁷ 3 times the value of benefits obtained or 10% of annual turnover <p>See paragraphs 111–151 for further discussion</p>
10	Disgorgement remedies should be available in civil penalty proceedings brought by ASIC under the Corporations, Credit and ASIC Acts	<p>We support this position and view disgorgement as an important addition to our enforcement toolkit, to ensure that wrongdoers do not benefit from their misconduct. However, we also submit that disgorgement should be available not only in civil penalty proceedings but in other civil proceedings brought by ASIC for contraventions of the legislation we administer.</p> <p>See paragraphs 152–167 for further discussion</p>

¹ Apart from offences relating to substantiation notices.

² Currently \$525,000.

³ Currently \$10.5m.

⁴ Currently \$525,000.

⁵ Currently \$2.625m.

⁶ Currently \$1.05m.

⁷ Currently \$10.5m.

Position Number	Description	ASIC's response
11	The Corporations Act should require courts to give priority to compensation	<p>We support this position. It is consistent with the position that currently exists under the ASIC and Credit Acts.</p> <p>See paragraphs 168–169 for further discussion</p>
12	Civil penalty consequences should be extended to a range of conduct prohibited in ASIC-administered legislation	<p>We support this position and further submit that the civil penalty regime should extend not only to the provisions identified in Table 6 of the positions paper, but also to those in Table 7 and others as identified in Annexure D of this submission.</p> <p>We note also that one of the questions asked by the Taskforce is whether s180 of the Corporations Act should be a civil penalty provision. We hold the strong view that s180 should be retained as a civil penalty provision. It acts as a significant deterrent to directors failing to discharge their duties with the requisite degree of care and diligence. We regard its retention as critical to the regulation of directors' conduct.</p> <p>See paragraphs 170–188 for further discussion</p>
13	Key provisions imposing obligations on licensees should be civil penalty provisions	<p>We support this position. A civil penalty for licensees' failure to comply with their general obligations would greatly enhance ASIC's capacity to regulate the conduct of licensees in a range of circumstances, including where action to suspend or cancel a licence may not be warranted.</p> <p>See paragraphs 189–194 for further discussion</p>
14	Civil penalty consequences should be extended to insurers that contravene certain obligations under the Insurance Contracts Act 1984	<p>We support the extension of civil penalties to an insurer's utmost duty of good faith and its obligation to provide a Key Facts Sheet.</p> <p>See paragraphs 199–204 for further discussion</p>
15	Infringement notices should be extended to an appropriate range of civil penalty offences	<p>We support the position that all provisions set out in Annexure D to the positions paper be made subject to an infringement notice regime, but consider that the regime should be harmonised (based on the Credit Act model) and located within the ASIC Act.</p> <p>See paragraphs 213–223 for further discussion</p>

Position Number	Description	ASIC's response
16	Infringement notices should be set at 12 penalty units for individuals and 60 penalty units for corporations for any new infringement notice provisions	<p>We disagree with this position and instead propose that all new infringement notice provisions in the Corporations Act utilise the ratio currently in use under the Credit Act, being one-fortieth of the maximum penalty that a court could impose for civil penalty provisions.</p> <p>We also propose that:</p> <ul style="list-style-type: none"> • the continuous disclosure infringement notice ratio be expressed as one-tenth of the new maximum civil penalty (in terms of penalty units) rather than a dollar figure; • particular penalties for some strict liability infringement notice provisions in the Credit Act should be increased; and • ASIC be given an infringement notice power under the <i>ASIC Supervisory Cost Recovery Levy (Collection) Act 2017</i>. <p>See paragraphs 224–238 for further discussion</p>
Additional issue	Peer Disciplinary Review Panels	<p>This submission responds to the consultation questions raised in the positions paper, having regard to ASIC's establishment of the Financial Services and Credit Panel and public consultation undertaken by ASIC prior to the establishment of that panel.</p> <p>See Section H for further discussion</p>
Additional issue	Amendment to s12DB of the ASIC Act to capture further types of false or misleading representations in relation to financial products and services	<p>The Taskforce has not adopted a position on this issue. However, we support an amendment to the effect discussed in the positions paper.</p> <p>Extending the scope of s12DB to capture the types of false or misleading representations ASIC has encountered in our areas of regulatory responsibility would significantly enhance our ability to seek effective enforcement outcomes in response to such conduct.</p> <p>See Section I for further discussion</p>

A Background

Key points

We agree that our regulatory toolkit should enable us to take a responsive approach to regulation, including enforcement-oriented approaches.

Penalties under ASIC-administered legislation are currently not high enough to be a credible deterrent to misconduct—they should be increased to reflect the gravity of the misconduct. The penalties regime should also be clear and consistent to engender public confidence.

Key principles

- 10 We have long supported reform to the existing penalty regime for breaches of ASIC-administered legislation.
- 11 The community expects ASIC to take strong action against corporate wrongdoers. Effective enforcement is therefore critical for ASIC in pursuing our strategic objectives of promoting investor and consumer trust and confidence and ensuring fair and efficient markets.
- 12 An overarching priority is to ensure that the enforcement regime provides adequate incentives for cooperation with ASIC, whether as a deterrent to misconduct or as an incentive for cooperation after misconduct has occurred (e.g. breach reporting and remediation).
- 13 It is important that we have a range of regulatory and enforcement sanctions and remedies available to us, including punitive, protective, preservative, corrective or compensatory actions, or otherwise resolving matters through negotiation or issuing infringement notices: see [Information Sheet 151](#) *ASIC's approach to enforcement* (INFO 151).
- 14 An essential part of our enforcement toolkit is having access to a broad range of criminal, civil and administrative sanctions that adequately cover the typical range of corporate and financial misconduct, and a corresponding range of penalties that are set at an appropriate level, given the nature of the misconduct and the type of entity likely to be involved.
- 15 Gaps in this toolkit prevent ASIC from making an optimal enforcement response, because the appropriate maximum penalty or remedy is not available. This can risk undermining confidence in the financial regulatory system.
- 16 Central to effective enforcement are penalties set at an appropriate level, and having a range of penalties available for particular breaches of the law.

Having a range of penalties allows us to calibrate our response, applying sanctions of greater or lesser severity commensurate with the misconduct. This aims to deter other contraventions, and promote greater compliance, resulting in a more resilient financial system.

- 17 A stronger penalty regime would allow us to deliver better market outcomes and improve the cost-effectiveness of our enforcement actions by maximising their impact and deterrent effect.
- 18 Penalties in the legislation we administer have been in place for extended periods, and either not reviewed at all since they were enacted, or reviewed only in a piecemeal way. Penalties available to ASIC are also out of step with those available to other international and domestic regulators. This has led to shortcomings in the consistency or size of penalties, which creates gaps between community expectations of the appropriate regulatory response to a particular instance of misconduct and what we can do in practice: see [Report 387 Penalties for corporate wrongdoing](#) (REP 387).
- 19 The Financial System Inquiry (FSI) recommended that penalties available to ASIC should be substantially increased and that ASIC should be able to seek disgorgement of profits earned as a result of contravening conduct.
- 20 We broadly support the key principles set out at part 1.1 of the positions paper. Specific comments are outlined below.

The enforcement regime should be comprehensive and facilitate responsive regulation including enforcement oriented approaches

- 21 We acknowledge and draw upon the model of responsive regulation based on the work of Professors Ayres and Braithwaite in the work that we do. ASIC's enforcement staff adopt an approach consistent with the notion of the 'enforcement pyramid' in responding to misconduct.
- 22 We consider that it is fundamental to our effectiveness that the regulatory tools we have allow us the flexibility to take appropriate regulatory responses to misconduct and enable us to escalate our response commensurate with the seriousness of non-compliance.
- 23 We support a model whereby we have ready access to lower level regulatory responses such as infringement notices and higher level responses such as civil penalty and criminal proceedings.

Penalties should represent a credible deterrent

- 24 We agree with the Taskforce's view that a penalty regime should have a deterrent effect. Presently, the penalties provided for the majority of offences under ASIC-administered legislation are not high enough to deter

misconduct. If penalties are too low, then ASIC's regulated population will see such penalties merely as the cost of doing business.

- 25 We endorse the Taskforce's approach of supplementing penalty unit maximums with amounts calculated by reference to the benefit gained or loss avoided as a result of contraventions and by portion of annual turnover. Such an approach will have a deterrent effect on well-resourced corporate defendants.

Penalties should reflect the gravity of misconduct, as well as the purpose for which they are imposed (relationship of criminal and civil penalties)

- 26 We accept the proposition that penalties should be commensurate with the gravity of misconduct and the purpose for which they are imposed. While the purpose of civil penalties is primarily deterrence, criminal penalties also serve notions of punishment and retribution which requires a different approach.
- 27 We agree that criminal penalty fines should be increased across ASIC-administered legislation by application of a standard formula as suggested by the Taskforce. However, in our view the formula should be: maximum term of imprisonment in months multiplied by 15 = penalty units for individuals, multiplied by a further 15 for corporations.

The penalties regime should be clear and consistent

- 28 We agree that the penalties framework for ASIC-administered legislation should be transparent, consistent and clear in order to engender public confidence. We endorse the Taskforce's approach of developing positions that are simple, standardised and consistent in relation to penalties.

B Criminal penalties

Key points

We generally support the Taskforce's position in relation to increasing criminal penalties, in particular:

- increases in the maximum penalty for a number of serious dishonesty offences to 10 years imprisonment and a pecuniary penalty the greater of 4,500 penalty units or a multiple of 3 times the benefit obtained (for individuals);
- increases in the maximum term of imprisonment for a range of other offences in the areas of misconduct identified by the Taskforce, which include defective disclosure to consumers, unlicensed conduct, breach of licensees' obligations and failure to comply with ASIC requirements;
- increases in pecuniary penalty for all criminal offences, by increasing the penalty unit/ imprisonment ratio; and
- adoption of the Peters test of dishonesty for all dishonesty offences under the Corporations Act.

ASIC's comments on the Taskforce's proposals

- 29 We generally support the Taskforce's proposals. Comments on specific positions are set out further below.

Position 1: Increased maximum imprisonment penalties

Taskforce Position 1

The maximum imprisonment penalties for criminal offences in ASIC-administered legislation should be increased as outlined in Annexure B

- 30 We support the Taskforce's proposed increases to maximum imprisonment penalties for offences in Annexure B to the positions paper. The areas of misconduct identified in the positions paper have the potential to cause significant detriment to financial consumers or to compromise the corporate and licensing regulatory regime.

Defective disclosure/ false or misleading statements to consumers

- 31 Effective disclosure is a fundamental protection provided to consumers of financial products and services. It is imperative that penalties for failure to

provide disclosure or defective disclosure are adequate to ensure that disclosure requirements are adhered to.

- 32 The positions paper describes the operation of the following core disclosure obligations in the Corporations Act:
- (a) s1021C—failure to give a PDS when required to do so;
 - (b) s1021D—knowingly give a defective PDS;
 - (c) s946A—failure to give a FSG or SoA when required to do so;
 - (d) s952D and 952F—knowingly give a defective FSG or SoA;
 - (e) s952L—failure by a licensee to direct an authorised representative not to distribute a FSG on becoming aware of a defect and failure by a representative to comply with a direction given by the licensee;
 - (f) s727—offering securities without a prospectus lodged with ASIC;
 - (g) s728—offering securities under a misleading or deceptive prospectus.
- 33 We agree with the view stated in the positions paper that knowingly providing defective disclosure to consumers in relation to the financial products and services being offered to them is comparable with the offence in s1041E of making false or misleading statements likely to induce persons to acquire financial products.
- 34 Failure to give any disclosure can be equally as detrimental to consumers. As observed in the positions paper, selling securities without a prospectus can have the result that substantial funds are raised illegally to the detriment of consumers and for the benefit of those involved in the fundraising.
- 35 We also note an anomaly between the penalties for failure to comply with the different kinds of stop orders issued by ASIC, under s739 in relation to a securities disclosure document (e.g. prospectus) and s1020E in relation to a financial product disclosure document (e.g. PDS). A person who engages in conduct contrary to an order made under s1020E is guilty of an offence carrying a maximum prison penalty of two years, whereas no penalty is prescribed for a failure to comply with an order issued under s739, which appears to mean this is just a 5 penalty unit strict liability offence by default under s1311(5) and (6).
- 36 We submit that the penalty for an offence of failing to comply with a stop order issued under s739 should be the same as that for the analogous conduct under s1020E.

Failure to comply with corporate obligations

- 37 We support the increases proposed in the positions paper to the maximum penalties under s184 for dishonest breach of their duties by company officers and similarly under s601FD, 601FE, 601UAA and 601UAB, for breach of

duty by officers or employees of responsible entities and licensed trustee companies.

38 We also support the proposed increased penalty for the offence against s596AB, of entering arrangements with the intention of avoiding employee entitlements in the case of a company in external administration. We note that the current maximum penalty for this offence is 10 years imprisonment, but that it is proposed to increase the maximum pecuniary penalty to 4,500 penalty units or three times the benefit gained by an individual committing the offence. This increase was also proposed in Australian Government Consultation Paper, *Reforms to address corporate misuse of the Fair Entitlements Guarantee scheme*, May 2017.

39 We further support the proposed substantial increases in the penalties for offences against s344 and 206A, for the reasons expressed in the positions paper. Dishonest financial reporting and the involvement of disqualified individuals in management of corporations require a strong deterrent to ensure the integrity of corporate regulation is maintained.

Unlicensed conduct

40 We support the increases proposed in the positions paper to penalties for unlicensed financial services and credit conduct, such as offences under s911A and 920C of the Corporations Act. The unlicensed provision of these services poses very substantial risks to consumers, as unlicensed providers may operate without regard to the obligations imposed on licensed providers by the licensing regime.

Failure to comply with financial services licensee obligations

41 We support increased penalties for failure to comply with financial market and services licensee obligations. Obligations such as those referred to in the positions paper—to provide information and assistance to ASIC, keep proper financial records and behave properly in dealing with clients—are as the Taskforce observes critical to maintaining the integrity of financial markets and services and protection of consumers.

Failure to comply with client money obligations

42 We support the proposed increase to the penalty for the ordinary offence in s993B(3). The obligation to pay client money into a separate account under s981B (which is taken to be held on trust for the client) is a fundamental requirement in the provision of financial services which involve dealing with clients' money on their behalf.

- 43 The strict liability offence in s993B(1) which provides a sanction against any breach of s981B, whether intended or not, demonstrates the importance of strict adherence to this obligation. However, the ordinary offence in s993B(3) is reserved for intentional and potentially dishonest or fraudulent breaches of the obligation. As observed in the positions paper, such breaches could be motivated by personal gain and cause significant losses to clients. The proposed increased penalty would signal that such conduct will not be tolerated and will be treated as seriously as fraud or theft.

Defective disclosure to ASIC

- 44 We strongly concur with the comments made in the positions paper about the difficulty and complexity of ASIC investigations and enforcement action. The effective exercise of its compulsory powers is essential to ASIC's ability to investigate and take regulatory action for corporate misconduct.
- 45 If in response to the exercise of its compulsory powers ASIC is given false or misleading information, this undermines the utility of these powers and as observed in the positions paper has the potential to derail or delay the course of justice. The case of *R v Chan* cited in the positions paper illustrates the inadequacy of the current maximum penalty for giving false or misleading information to ASIC under s64(1) of the ASIC Act in response to an exercise of ASIC's compulsory powers under that Act.

Additional offences listed in Annexure B

- 46 In addition to those specific offences discussed in the positions paper, Annexure B also proposes increases to the penalties for related and ancillary offences in each of the above categories of misconduct. Our comments on the need for increased penalties for these offences are set out in Annexure A of this submission.

Position 2: Calculation of maximum pecuniary penalties

Taskforce Position 2

The maximum pecuniary penalties for all criminal offences (other than the most serious class of offences—see Annexure B) in ASIC-administered legislation should be calculated by reference to the following formula:

Maximum term of imprisonment in months multiplied by 10 = penalty units for individuals, multiplied by a further 10 for corporations

- 47 We agree with the Taskforce's view that the standard formula in the Attorney-General's Department *A Guide to Framing Commonwealth*

Offences, Infringement Notices and Enforcement Powers (AGD) guide, for calculating maximum pecuniary penalty by reference to the maximum prison term, is not sufficient given the high potential profits from corporate misconduct. The formula proposed in the AGD guide is that for individuals the maximum pecuniary in penalty units be five times the number of months imprisonment and for corporations a further five times that amount. However, as noted by the Taskforce, the potential need for substantially higher pecuniary penalties to deter corporate misconduct is also acknowledged in the AGD guide itself.

48 We accept that an appropriate approach to ensuring adequate pecuniary penalties for corporate misconduct may be to adopt a higher multiple than that proposed in the AGD guide. The Taskforce proposes a multiple of double that in the AGD guide, i.e. for individuals the maximum pecuniary in penalty units be ten times the number of months imprisonment and for corporations a further ten times that amount.

49 However, we consider that a higher multiple than that proposed by the Taskforce would serve as a more effective deterrent. We would support a multiple of three times that in the AGD guide, i.e. for individuals the maximum pecuniary in penalty units be 15 times the number of months imprisonment and for corporations a further 15 times that amount.

50 We support the exception to this standard formula as proposed by the Taskforce in relation to those serious offences carrying a maximum prison term of 10 years. However, in relation to those offences which do not carry a term of imprisonment, we consider that appropriate increases to the pecuniary penalty for those offences should also be determined by applying a multiple to the current maximum (with the exception of strict liability offences, which are considered separately below).

51 We propose that where an offence carries no term of imprisonment, the current pecuniary penalty should be increased by three times for individuals and a further 10 times that amount for corporations (including those offences for which the penalty is a certain number of penalty units for each day the offence continues).

Question 1

Is it appropriate that maximum terms of imprisonment for offences in ASIC-administered Acts be increased as proposed?

52 In ASIC's view, yes.

Question 2

Should maximum fine amounts be set by reference to a standard formula? If so, is the proposed formula appropriate?

53 Yes, maximum fine amounts should be set by reference to a standard formula, however the formula should be for individuals 15 times the

maximum number of months imprisonment and for corporations 15 times the amount for individuals.

Position 3: Increase to maximum penalty for breach of s184

Taskforce Position 3

The maximum penalty for a breach of s184 should be increased to reflect the seriousness of the offence

- 54 We agree with the Taskforce’s position that the maximum penalty for breach of s184 should be increased to 10 years’ imprisonment and/or a fine, being 4,500 penalty units or three times the benefits gained (or loss avoided) for individuals and for corporations, the greater of 45,000 penalty units, or three times the benefit gained (or loss avoided) or 10% annual turnover.
- 55 The maximum penalty for breaches of s184 of the Corporations Act has not changed since it was first enacted in 2001 and the effectively identical offence provisions contained in the precursor Corporations Law (at s232) and the Companies Act 1981 (at s229) also carried a maximum term of five years imprisonment. In the intervening period of over 35 years, only the maximum financial penalty has been amended, from an initial \$20,000 to the current 2,000 penalty units (which currently equates to a maximum fine of \$360,000).
- 56 As of the date the Corporations Act commenced operation (15 July 2001) there was only one provision in the Corporations Act that contained a higher maximum term of imprisonment than s184—the offence of entering into agreements or transactions to avoid employee entitlements contrary to s596AB which carried a 10-year maximum penalty. Accordingly, the maximum penalty attached to s184 offences was, with this one exception, the equal highest available under the Corporations Act.
- 57 In 2010, however, Parliament doubled the maximum term of imprisonment (from 5 to 10 years) applicable to a number of other offences in the Corporations Act.⁸ However, the maximum penalty for an offence under s184 of the Corporations Act remained the same. This created a significant inconsistency as s184 contains obligations that are of a similar level of seriousness to those in relation to which the maximum term of imprisonment was doubled. For example:
- (a) s1041G is concerned with dishonest conduct in the course of carrying on a financial services business, just as s184 is concerned with the dishonest exercise of a director’s powers or use of their position;

⁸ Specifically, ss1041A, 1041B(1), 1041C(1), 1041D, 1041E(1), 1041F(1), 1041G(1), 1043A(1) and 1043A(2) of the Corporations Act.

- (b) s1041F is concerned with inducing dealings in financial products by conduct that involves deception and dishonest concealment; and
- (c) ‘insider trading’, contrary to s1043A, often involves conduct that would satisfy s184(3), as those in possession of inside information have often obtained that information by reason of being directors, other officers or employees and are seeking to gain an advantage for themselves or someone else. It has been referred to by the courts as ‘a form of cheating’.⁹

58 The similarities in the gravamen of breaching these sections and s184 are no longer recognised by way of maintaining the same maximum term of imprisonment. In addition, the maximum fines available for these offences were also significantly increased in 2010, to the greater of 4,500 penalty units for an individual (currently \$810,000) or three times the value of the benefit obtained, and for a body corporate, 45,000 penalty units (currently \$1.8 million), three times the value of the benefit obtained or if that cannot be determined, 10% of the body corporate’s annual turnover during the preceding 12-month period.

59 In sentencing, it has been said that:¹⁰

...the first initial consideration is the statutory maximum prescribed by the legislature for the offence in question. The legislature manifests its policy in the enactment of the maximum penalty which may be imposed ... this reflects a legislative view of the seriousness of the criminal conduct ...

60 The statutory maximum penalty restricts the court’s sentencing discretion because it marks the *absolute limit* of any sentence that may be imposed and is reserved for the *worst category* of offending within the range of offences covered by that offence provision.¹¹ As such, it is important that the maximum reflects the seriousness of the obligations.

61 In addition to affecting the length of any immediate imprisonment to be served by offenders, the maximum penalty will also necessarily influence the gravity of conduct that attracts any period of immediate imprisonment at all. A review of the number of persons convicted of offences under s184 of the Corporations Act between 1 January 2006 and 1 December 2016 indicates that around half of all persons are sentenced to an immediate term of imprisonment.

62 Commentator Vicky Comino has stated that:¹²

⁹ See, for example, *R v Glynatsis* [2013] NSWCCA 131; (2013) 230 A Crim R 99 at [79].

¹⁰ *Oliver* (1980) 7 A Crim R 174 at 177 per Street CJ.

¹¹ *Ibbs v R* [1987] HCA 46; (1987) 163 CLR 447.

¹² Vicky Comino, *Australia’s “Company Law Watchdog”: ASIC and Corporate Regulation*, Thomson Reuters, Australia, 2015, Chapter 8.

The maximum prison term of five years currently available for corporate offences under s184 of the Corporations Act should, therefore, arguably be set higher to ensure that wrongdoers are punished and that the law is credible. The level of fines, with the maximum fine of \$220,000 available for individuals who commit criminal breaches of their duties as directors, should arguably also be increased. Maximum fines set by parliament should reflect the severity of such offences, particularly when such fines are addressing criminal breaches as the worst possible wrongdoing at the apex of the enforcement pyramid and when they are only slightly higher than the maximum civil penalties available for individuals (\$200,000) for civil penalty breaches.

- 63 The recent Victorian case of Nicholls, provides an example of a case in which the original sentencing Judge and the Court of Appeal were both constrained by the five year statutory maximum penalty for a breach of s184.

Case study: Nicholls¹³

Despite upholding Nicholl's appeal (and reducing the sentence to three years and six months imprisonment, to be released after serving two years and six months), the court concluded with the following remarks, directed at the maximum penalty for s184 offences:

We wish to make this additional observation. The assessment of the objective gravity of offending for this offence is necessarily informed and circumscribed in a significant way by the maximum penalty ... It is a matter for the legislature to consider whether sentencing courts should have greater flexibility to impose more substantial sentences for serious breaches of duty involving dishonesty by company directors.

Nicholls was a director of two companies who raised funds from investors and dishonestly obtained approximately \$750,000. Nicholls was charged with and pleaded guilty to, three offences pursuant to s184(2)(a) of the Corporations Act.

The original sentencing Judge imposed a sentence of imprisonment for four years and six months, with three years to be served before release on recognisance. Her Honour expressly stated that the maximum penalty available under s184(2)(a) had '*constrained the length of sentences to be imposed*'. Her Honour also observed the distinction between the five year maximum imprisonment term available under s184 and the 10 year maximum imprisonment term available for Victorian dishonesty offences such as theft and obtaining property by deception.¹⁴

Nicholls appealed the sentence that was imposed to the Court of Appeal. The Court of Appeal's judgment recognised that s184 caters for a vast range of conduct, including cases involving the misappropriation of millions of dollars, it follows that sometimes very serious offending (potentially

¹³ *Nicholls v R* [2016] VSCA 300.

¹⁴ The total effective sentence ultimately imposed by her Honour was imprisonment for four years and six months, with three years to be served before release on recognisance.

involving very large sums of money) will inevitably fall considerably below the worst category of offending within the range of offences covered by s184 and must therefore be sentenced accordingly.

64 It should be noted that many of the State-based fraud offence provisions that are utilised as an alternative to prosecute corporate fraud, include maximum penalties that are significantly higher than the maximum penalty currently prescribed under s184.

Additional problems with s184

65 As alluded to in paragraph 68 of the positions paper, we have identified concerns about the wording of s184.

66 We propose that:

- (a) amendments be made to s184(2) and (3) so that a person commits an offence if they use their position dishonestly to gain an advantage even where it is to the benefit of a corporation; and
- (b) s184(1) be amended to comply with the AGD guide, as presently it does not appropriately set out the physical elements for each fault element, causing difficulties in application.

Consequences of s184 not complying with the Attorney-General's Guide in the way it identifies physical and fault elements

67 In addition to the fundamentally limited reach of the offences in s184, it should also be noted that there are also issues arising from the application of the General Principles of Criminal Responsibility in Chapter 2 of the *Criminal Code* (Cth) (Criminal Code) that introduce uncertainty to the interpretation of these offences.

68 Contrary to the guidance provided in the AGD guide, each physical element of the offences contained in s184 is not placed in a separate paragraph nor otherwise clearly distinguished so that the applicable fault elements can be readily determined. For example, in s184(1) the 'reckless' and 'intentionally dishonest' fault elements do not clearly relate to an identifiable physical element and the physical element(s) themselves are not clearly defined.

Similar problems arise in relation to credit related fraud where often State-based offences are relied upon as the penalty for s160D is lower

69 The above issues concerning the adequacy of the current fraud provisions in the corporations legislation, and the use of the alternate State based criminal provisions, also have relevance to ASIC's regulation of credit under the Credit Act.

- 70 The most common fraud provision used by ASIC to prosecute offenders responsible for submitting false documents in loan applications is s160D of the Credit Act.
- 71 Section 160D states that a person (the giver) must not, in the course of engaging in a credit activity, give information or a document to another person if the giver knows, or is reckless as to whether, the information or document is false in a material particular or materially misleading. The penalty for contravening s160D is imprisonment for up to 2 years and/or a fine of up to 100 penalty units (for an individual).
- 72 It has often been the case that State based criminal offences, such as obtaining property by deception or conspiracy to defraud, have been used to prosecute offenders involved in false loan applications where the offender had knowledge of, or directed the creation of, the false documents, but was not the person who gave the false documents to the financial institution. These offenders often received the benefits of the fraudulent loan applications through fees from consumers and/or commissions from the lender.
- 73 Section 184 of the Corporations Act is also considered as a relevant offence provision, where a bank officer had knowledge of false loan applications, but was the receiver rather than the giver of the false documents.
- 74 State based criminal offence provisions have far higher penalties than s160D of the Credit Act (and s184 of the Corporations Act). For example, s82 (obtaining financial advantage by deception) of the Crimes Act 1958 (Vic) has a maximum penalty of imprisonment of up to 10 years, (cf an offence against s160D of the Credit Act that carries a maximum penalty of imprisonment of up to 2 years).

Question 3

Is it appropriate that the penalty for offences under section 184 of the Corporations Act be increased as proposed?

- 75 In ASIC's view, yes.

Position 4: Application of the Peters test to all dishonesty offences

Taskforce Position 4

The Peters test should apply to all dishonesty offences under the Corporations Act

- 76 We welcome the Taskforce's proposal that the Peters test apply to all dishonesty offences under the Corporations Act.

77 It stands to reason that the legal test for dishonesty be uniform across all provisions of the Corporations Act. As highlighted above, differing tests cause difficulties where multiple contraventions are being run as part of a case, especially in the context of jury trials.

78 As the High Court has confirmed that the *Peters* objective test is the preferred standard for dishonesty with Australia, this is the appropriate test to be adopted across the Corporations Act.

79 We also note that in a recent unanimous decision of the Supreme Court of the United Kingdom the *Ghosh* test of dishonesty, containing a subjective second limb, was criticised and overturned.¹⁵

Question 4

Is the Peters Test appropriate to apply to dishonesty offences across the Corporations Act?

80 In ASIC's view, yes.

¹⁵ *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67.

C Strict and absolute liability offences

Key points

We consider that imprisonment should not be removed as a possible sanction for strict and absolute liability offences where it is currently in place, as this would send a confusing regulatory message.

A number of current strict liability offences (for example, offences relating to poor audit quality) should be complemented by ordinary offences to address serious misconduct.

In our view, a minimum threshold for strict and absolute liability offences of 20 penalty units for individuals and 200 penalty units for corporations is appropriate. Similarly, we consider doubling the penalties for all other strict and absolute liability offences for corporations is appropriate—however, we also propose that the penalties be doubled for individuals.

Further, we support the notion of a minimum penalty threshold of 30 penalty units for individuals and 300 penalty units for corporations for all non-strict liability offences.

We support the proposal that all strict and absolute liability offences should be subject to an infringement notice regime, but suggest that rather than utilising the penalty notice mechanism in the Corporations Act, ASIC's various infringement notice regimes be harmonised and located in the ASIC Act (with certain exceptions).

ASIC's comments on the Taskforce's proposals

- 81 Strict and absolute liability offences form an important part of the regulatory regime that ASIC administers.
- 82 From a deterrence perspective, these offences signal obligations that are straightforward, yet of such importance that ASIC need not prove *mens rea* in order to successfully prosecute breaches. Ordinary offences that require proof of a mental element represent a higher bar in terms of proof for the regulator. Strict and absolute liability offences are only appropriate where there is a legitimate reason for penalising the conduct itself without the mental element.
- 83 That is not to say, however, that such offences are of lesser importance than ordinary offences, or, in ASIC's view, that imprisonment is inappropriate in terms of sanction. As recognised in the positions paper, it is expected that individuals in the roles governed by ASIC-administered legislation take active steps to fulfil their obligations.

Position 5: No imprisonment

Taskforce Position 5

Remove imprisonment as a possible sanction for strict and absolute liability offences

- 84 We do not support the Taskforce’s Position 5 which proposes to remove imprisonment as a possible sanction for strict and absolute liability offences.
- 85 The prosecution of strict and absolute liability offences forms an important part of ASIC’s enforcement work.
- 86 While it is acknowledged that the AGD guide stipulates that strict and absolute liability offences should not be punishable by imprisonment, this is a guideline only, and we consider that it would be inappropriate to remove existing imprisonment sanctions from absolute and strict liability offences.
- 87 We consider that to remove imprisonment as a possible sanction from strict liability provisions would undermine the important work that we do in prosecuting these offences. A key consideration for ASIC in our activities is deterrence and the removal of these sanctions would undermine that objective.
- 88 This is not to say that ASIC seeks custodial sentences against those who have breached strict and absolute liability provisions lightly. However, in particular cases where it is warranted, we will seek such remedies against wrongdoers. Custodial sentences are most often not appropriate in an isolated case, however, their presence and limited use, forms an important part of ASIC’s regulatory toolkit.
- 89 There are approximately 190 strict liability offences within the Corporations Act that bear imprisonment as a penalty, with varying maximums ranging from three months to one year. Notwithstanding the usual position as expressed in the AGD guide, Parliament clearly intended that various corporate strict liability offences were of such importance as to warrant a potential custodial sentence.
- 90 This same legislative intention is evident in numerous other Commonwealth statutes that also contain strict liability offences punishable by terms of imprisonment.¹⁶
- 91 While in many cases, ASIC must refer a brief to the Commonwealth Director of Public Prosecutions (CDPP) in order to prosecute strict liability offences, we have an important and significant track record of prosecuting a number of summary regulatory cases internally by agreement with the

¹⁶ See, for example, section 135L *Competition and Consumer Act 2010* (120pu/2 years), sections 3 and 6AB *Royal Commissions Act 1902* (\$1000/6 months), section 127 *Health Insurance Act 1973* (10pu/3 months),

CDPP. Presently, we have active prosecutions in two programmes with cases against over 100 persons, involving over 200 charges.

- 92 The two programmes that ASIC has on foot are:
- (a) Liquidator Assistance Program (LAP): this program responds to requests for assistance from external administrators where individuals fail to assist them by not completing a report as to affairs or providing reasonable assistance with respect to, amongst other things, the delivery of or access to books and records; and
 - (b) Annual Financial Reports (AFR): AFRs must be prepared and lodged with ASIC by disclosing entities, public companies, large proprietary companies and registered schemes, amongst others. If an entity fails to comply, ASIC may issue it with a notice requiring lodgement. If the entity fails to comply, civil proceedings to order the enforcement of the notice may be initiated. If an entity fails to comply with a civil court order obtained by ASIC in this regard, ASIC may take criminal action for failing to lodge reports and comply with the court order.

Position 6: Complementary ordinary offences

Taskforce Position 6

Introduce an ordinary offence to complement a number of strict and absolute liability offences as outlined in Annexure C

- 93 We support this position.
- 94 As noted in the positions paper, where the Corporations Act currently prescribes a strict liability and ordinary offence for the same conduct (such as in s952C), the strict liability offence maintains the integrity of the regulatory regime by ensuring strict compliance while the ordinary offence punishes intentional or reckless failure to comply. The latter may be motivated by personal gain and may cause significant detriment to consumers. For example, under s952C, wilful failure by a licensee or authorised representative to give a client a FSG or SoA may be motivated by a desire to circumvent disclosure requirements and take advantage of the lack of information (or misinformation) provided to clients about the products or services being offered or recommended to them.
- 95 We support the Taskforce's proposal that an ordinary offence be introduced to complement each of the strict liability offences identified in Annexure C to the positions paper. These are important provisions, strict adherence to which is critical, but which should also carry a significant penalty for serious cases of non-compliance. An example is the obligation of an auditor to conduct an audit in accordance with auditing standards.

96 The need for an ordinary offence in addition to a strict liability offence for each of the provisions identified by the Taskforce is further explained in Annexure C to this submission.

Position 7: Maximum pecuniary penalties

Taskforce Position 7

Maximum pecuniary penalties for strict and absolute liability offences should be a minimum of 20 penalty units for individuals and 200 penalty units for corporations

97 We support Position 7 that pecuniary penalties for strict and absolute liability offences under the Corporations Act should be a minimum of 20 penalty units for individuals and 200 penalty units for corporations.

98 There are approximately 200 strict and absolute liability offences with penalties below the proposed threshold. We consider that such penalties are too low to have a deterrent effect on wrongdoers and that raising the minimum threshold as proposed, will give the right signal as to the importance of the obligations concerned and will have a deterrent effect.

99 We also support the proposals that:

- (a) all other strict or absolute liability offence penalties for corporations be doubled; and
- (b) all non-strict liability offences have a minimum penalty threshold of 30 penalty units for individuals and 300 penalty units for corporations.

100 However, we propose further to paragraph 99(a) above, that the penalties for individuals also be doubled. There is no reason in our view why the penalties for individuals should not increase by the same ratio as that for corporations.

Position 8: Penalty notice regime

Taskforce Position 8

All strict and absolute liability offences should be subject to the penalty notice regime

101 We agree that the ability to issue penalty notices or infringement notices should be extended to all strict and absolute liability offences under the Corporations Act.

102 The regime set out in s1313 of the Corporations Act governs the use of penalty notices, which are a type of infringement notice. As set out in more detail below, we suggest that the Taskforce should consider whether, rather than using s1313 in this way, all of ASIC's infringement notice regimes

(with certain exceptions) be harmonised into one regime contained in the ASIC Act rather than have a number of disparate regimes with minor differences.

103 If it is the case that s1313 is to be used as the relevant infringement notice mechanism for these provisions, it is recommended that the section be amended to include additional things that are present in the infringement notice regime contained in the Credit Act. This includes adding the following:

- (a) an ability to pay by instalments;
- (b) an ability to seek an extension of time for payment;
- (c) provision for an application for withdrawal to be made; and
- (d) time for compliance to run from service date.

104 We support the proposal that infringement notice penalty amounts for strict and absolute liability offences be half the maximum penalty of the headline offence.

105 As set out more fully below, ASIC has had success with its existing infringement notice regimes and finds them to be a valuable and expeditious regulatory tool, at the lower end of the ‘enforcement pyramid’.

Question 5

Should imprisonment be removed from all strict and absolute liability offences in the Corporations Act (such as sections 205G and 606)?

106 In ASIC’s view, no.

Question 6

Should all pecuniary penalties for Corporations Act strict and absolute liability offences have a 30 penalty unit minimum for individuals and 300 penalty unit minimum for corporate bodies?

107 In ASIC’s view, yes.

Question 7

Is it appropriate to introduce the new ‘ordinary’ offences as outlined in Annexure C? Are there any other strict/absolute liability offences that should be complemented by an ordinary offence?

108 In ASIC’s view, yes.

Question 8

Should all Corporations Act strict and absolute liability offences be subject to the proposed penalty notice regime? Is the proposed penalty appropriate?

- 109 Yes, however, we consider the option of harmonising all of ASIC’s infringement notice regimes under the ASIC Act (with certain exceptions) should be considered.

D Civil penalties

Key points

We agree with the Taskforce's preliminary position that maximum civil penalty amounts in ASIC-administered legislation should be increased.

However, we do not agree with the Taskforce's approach to determining appropriate maximum civil penalty amounts. In our view the proposed increases do not go far enough. We submit that the maximum civil penalties under the Corporations Act, ASIC Act and Credit Act should be as follows:

- for individuals: greater of 5,000 penalty units (currently \$1.05 million) or three times the value of benefits obtained or losses avoided; and
- for corporations: greater of 50,000 penalty units (currently \$10.5 million) or three times the value of benefits obtained or losses avoided or 10% of annual turnover in the 12 months preceding the contravening conduct.

ASIC's comments on the Taskforce's proposals

110 Our comments on specific positions are set out below.

Position 9: Civil penalty amounts

Taskforce Position 9

Maximum civil penalty amounts in ASIC-administered legislation should be increased

111 We agree that the maximum civil penalty amounts in ASIC-administered legislation should be substantially increased.

112 However, we do not agree with the approach taken by the Taskforce to determining the quantum of this increase. Specifically, we do not agree that:

- (a) the increase proposed to civil penalties under the Australian Consumer Law (arising out of the Australian Consumer Law Review) should be used by the Taskforce as a benchmark for increases to ASIC civil penalties;
- (b) there is any basis on which to apply a lower increase to civil penalties under the Corporations Act and Credit Act than to those under the ASIC Act.

113 ASIC submits that for civil penalties in the Corporations, ASIC and Credit Acts, maximum civil penalties should be as follows:

- (a) for individuals, the greater of 5,000 penalty units (currently \$1.05m), or three times the value of benefits obtained or losses avoided;
- (b) For corporations, the greater of 50,000 penalty units (currently \$10.5m) or three times the value of benefits obtained or losses avoided or 10% of annual turnover in the 12 months preceding the contravening conduct.

114 ASIC considers that penalties for contraventions of the laws it administers should be considered in the context of the critical sectors of the economy regulated by those laws. In ASIC’s submission it is vital that penalties be adequate to deter misconduct in the corporate and financial sectors, thereby maintaining the integrity of Australia’s financial markets and the confidence of investors and consumers in the products and services that support their financial security and well-being.

115 Our submission is further set out in response to the Taskforce’s specific questions below.

Question 9

Should maximum civil penalties be set in penalty units in the Corporations Act, ASIC Act and Credit Act?

116 Yes. We agree that maximum civil penalty for contravention should be set in penalty units in the Corporations Act, ASIC Act and Credit Act.

Question 9(a)

Should the maximum civil penalty for contravention of the consumer protection provisions in the ASIC Act be aligned with proposed increases to the Australian Consumer Law, although set by reference to penalty units?

117 No. We disagree that the maximum civil penalty for contraventions of the consumer protection provisions of the ASIC Act should be aligned with proposed increases to the Australian Consumer Law. We agree that for corporations an appropriate maximum penalty is, as proposed by the Taskforce, the greater of 50,000 penalty units (currently \$10.5m) or three times the value of benefits obtained or losses avoided or 10% of annual turnover. However, we submit that for individuals the maximum civil penalty under the ASIC Act should be the greater of 5,000 penalty units (currently \$1.05m) or three times the value of benefits obtained or losses avoided.

118 In our view, the increases in the ASIC Act should not be limited by the proposed increases to civil penalties in the Australian Consumer Law. We submit that, when considering increases to the civil penalty provisions in the ASIC Act, the Taskforce should not be influenced or constrained by recommendations made by Consumer Affairs Australia and New Zealand (CAANZ) following its review of the Australian Consumer Law. The Australian Consumer Law and ASIC Act regulate different areas of conduct.

In particular, the provisions of Pt 2 of the ASIC Act can apply more broadly than consumer protection as understood in its application under the Australian Consumer Law. For example, in the BBSW proceedings ASIC relied on various provisions in Pt 2 of the ASIC Act, such as s12CA, 12CB and 12CC. ASIC claimed relief under s12CA of the ASIC Act regarding unconscionable conduct in relation to counterparties who were listed public companies. Accordingly, the scope of Pt 2 is potentially broader than the scope of the Australian Consumer Law and should therefore not be constrained by the proposed increases to the Australian Consumer Law.

119 We consider that the maximum civil penalties for individuals should be consistent across the ASIC Act, Corporations Act and Credit Act. Consistency and clarity in maximum civil penalties across ASIC-administered legislation will engender public confidence. As set out below in response to questions 9(c) and 10, we submit that the increase for individuals under the Corporations Act and Credit Act should be 5,000 penalty units (currently \$1.05m) or three times the value of benefits obtained or losses avoided. We submit that this maximum civil penalty for individuals should also apply to the ASIC Act.

Question 9(b)

Should the maximum civil penalty in the Corporations Act and Credit Act be increased as outlined above?

120 We submit that the maximum civil penalty in the Corporations Act and Credit Act should not be increased in the manner proposed by the Taskforce, because the proposed increases are inadequate. Instead, we consider that the increases should go further. Our submission in relation individuals is set out in response to questions 9(c) and 10 below. Our submission in relation corporations is as follows.

121 The Taskforce's preliminary position is that the maximum civil penalty for corporations under the ASIC Act should be the greater of 50,000 penalty units (currently \$10.5 million) or three times the value of benefits obtained or losses avoided or 10% of annual turnover in the 12 months preceding the contravening conduct. However, its preliminary position in relation to the maximum civil penalty for corporations under the Corporations Act and Credit Act is that it should be the greater of 12,500 penalty units (currently \$2.625 million) or three times the value of benefits obtained or losses avoided or 10% of annual turnover in the 12 months preceding the contravening conduct. In other words, the maximum penalty units under the ASIC Act would be 50,000 penalty units (currently \$10.5 million), while the maximum penalty units under the Corporations Act and Credit Act would only be 12,500 penalty units (currently \$2.625 million).

122 In our submission, the maximum civil penalty under the Corporations Act and Credit Act should be consistent with that under the ASIC Act.

Civil penalties for corporations under the Corporations Act

- 123 Considering the seriousness of contraventions of the Corporations Act, we submit that there is not a strong rationale for increasing the maximum penalty units in the ASIC Act to 50,000 penalty units (currently \$10.5 million), yet increasing the maximum penalty units in the Corporations Act to only 12,500 penalty units (currently \$2.625 million).
- 124 Contravention of civil penalty provisions in the Corporations Act are at least as serious as the contravention of civil penalty provisions in the ASIC Act. In fact, in many instances, a contravention of a civil penalty provision in the Corporations Act could be more serious than a contravention of a civil penalty provision in the ASIC Act.
- 125 In contrast to provisions concerning consumer protection, the conduct regulated by the Corporations Act can potentially have more significant consequences because it can affect markets and the broader economy. For example, the Corporations Act contains a number of civil penalties for market misconduct, such as: insider trading (s1043A); market manipulation (s1041A); continuous disclosure (s674) and false statements to the market (s1041E). As has been emphasised by the Corporations and Markets Advisory Committee in its *Report: Aspects of Market Integrity*,¹⁷ the market misconduct provisions play a vital role in delivering confidence in the integrity of markets.
- 126 In *Heath v R*¹⁸ the NSW Court of Appeal commented that market misconduct has ‘the capacity to unravel the public trust which is critical to the viability of the market’. Events in recent times in global financial markets have also highlighted the critical importance of market confidence to the stability of financial markets, and the potential for market instability to adversely affect the broader economy. Failure to sufficiently safeguard market confidence can have widespread and serious consequences for both participants in capital markets as well as the economy more broadly.
- 127 It is important that the level of penalties reflects the seriousness of the contravention. As contraventions of the Corporations Act can be extremely serious, it is necessary that the maximum penalties available reflect the ‘cost’ of contravention. Even if the penalties for corporations are increased to \$2.625m, they would still not be sufficiently serious to send a strong deterrent message.

¹⁷ Corporations and Markets Advisory Committee, *Aspects of Market Integrity*, report, Australian Government, June 2009, www.camac.gov.au.

¹⁸ [2016] NSWCCA 24.

- 128 For example, in the case *Australian Securities and Investments Commission v Hochtief Aktiengesellschaft*¹⁹ the Federal Court held that a ‘penalty should be sufficiently large to send a strong message to large multinational companies, like Hochtief, that have operations in Australia, that they should ensure that they have established suitable and effective compliance systems, and conducted appropriate training, concerning Australia’s insider trading prohibition. In that sense, at least, general deterrence is an important consideration’. In our submission, increasing the maximum penalty units for corporations to 50,000 penalty units (currently \$10.5m) would result in an appropriate level of deterrence.
- 129 Given the size and financial position of corporations, we consider that a maximum penalty of 12,500 penalty units (currently \$2.625m) will not be an effective punishment or deterrent. For example, in *Australian Securities and Investments Commission v Newcrest Mining Ltd*²⁰ despite imposing one of the largest monetary penalties imposed in an ASIC civil penalty case, Middleton J commented that the current level of penalties may not be a sufficient deterrent for large entities with substantial financial positions. He noted that it ‘could be argued that even a \$1,000,000 penalty for each contravention (the maximum this Court could impose) may not be sufficient specific deterrence, in view of Newcrest’s size and financial position’.
- 130 Accordingly, the maximum civil penalty for a corporation under the Corporations Act should be at least the same level as the maximum civil penalty under the ASIC Act.

Civil penalties for corporations under the Credit Act

- 131 The Credit Act and the National Credit Code (set out in Schedule 1 to the Credit Act) contain the requirements for credit providers, lessors and others such as finance brokers to be licensed and also to comply with responsible lending requirements. They also contain requirements relating to the entry into, terms and enforcement of consumer leases and credit contracts. Accordingly, much like the Corporations Act, contraventions of the Credit Act and National Credit Code can seriously affect the broader economy, through their impact on lending practices.
- 132 Many of the provisions of the Credit Act and National Credit Code are however concerned with consumer protection. The Taskforce proposes increasing the maximum civil penalties for contravention by corporations of the consumer protection provisions in the ASIC Act. It follows that the maximum civil penalties for contravention by corporations of the Credit Act,

¹⁹ [2016] FCA 1489 at [153]

²⁰ [2014] FCA 698; (2014) 101 ACSR 46 at [73]

to the extent that it is also directed at the protection of consumers, should be increased in line with the increases in the ASIC Act.

Question 9(c)

Should the maximum penalty for an individual be greater than 2,500 penalty units? If so, would \$1 million (or equivalent penalty units) be an appropriate penalty?

- 133 We submit that the maximum civil penalty for an individual under the Corporations Act and Credit Act should be 5,000 penalty units (currently \$1.05m).
- 134 The Taskforce’s approach has been to apply the same increase in penalties as proposed for contraventions of the Australian Consumer Law to contraventions of the Corporations Act and Credit Act. In our submission, this is not a valid approach.
- 135 The civil penalty provisions in the Corporations Act and Credit Act cover a broad range of conduct that goes well beyond consumer protection as understood in the Australian Consumer Law. Accordingly, there is not a particularly strong rationale for limiting increases of the maximum civil penalty in the Corporations Act and Credit Act by reference to the proposed increases in the Australian Consumer Law.
- 136 Individual contraventions of the Corporations Act and Credit Act can have significant impacts. In the context of directors’ duties, the actions of even a small number of directors and officers can profoundly affect many shareholders and creditors, highlighting the far-reaching effects of misconduct. For example:
- (a) a breach of the insolvent trading provision in s588G(2) of the Corporations Act may cause enormous losses to creditors and have a substantial effect on confidence in financial markets; and
 - (b) compliance with the obligations in s344 of the Corporations Act, to keep financial records and prepare financial reports, is critical for keeping investors informed and for creating confidence in the integrity of financial markets.
- 137 ASIC has taken action against individuals involved in failed companies that owe or have been involved in large consumer losses. While it is important that ASIC takes action in cases such as these, even if the courts were to order the increased maximum civil penalty of \$525,000 proposed by the Taskforce, such an amount would often be dwarfed by the size of investor losses.
- 138 The courts have also recognised that breaches of duty by responsible entities and their officers and employees can lead to significant losses by retail investors, and damage the reputation of the managed funds industry. In

Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (recs and mgrs apptd) (in liq) (controllers appointed),²¹ Murphy J considered the purpose behind Pt 5C of the Corporations Act:

The question of penalties must be considered in the context that managed investment schemes are an important part of the Australian investment market, and for example, in 2012 the total funds under management in such schemes exceeded \$850 billion. The inevitability of conflicts of interest between responsible entities operating managed investment schemes and the members of the schemes has long been recognised. The members are vulnerable to the responsible entity and its officers, and require protection against the obvious conflict between their interests and those of the responsible entity....

The primary objective of the civil penalties regime is protection of the public, including by personal and general deterrence. The need to facilitate the adherence of other directors, particularly directors of responsible entities, to the required standard of conduct is essential to my decision.²²

- 139 We submit that the proposed increase of the maximum civil penalty to \$525,000 would be unlikely to raise significantly the penalties that courts order for breaches of the Corporations Act and Credit Act, since the civil penalties ordered by courts are often far below the maximum available penalties. For example, an empirical analysis of public enforcement of directors' duties found that historically the average penalty imposed by courts for a breach of directors' duties was well below the maximum of \$200,000. The analysis found that the 'median civil pecuniary penalty imposed on defendants who had engaged in a single contravention of a directors' duties provision was \$25,000, which is only 12.50% of the statutory maximum'.²³
- 140 The proposed increase to \$525,000 would also continue to be out of proportion to the potential reward a director could receive from an entity that they failed to serve properly. The adequacy of this maximum penalty must be assessed in the context of the annual fees and benefits available to the directors and officers of large entities for acting as a director or senior executive, which can be very substantial.
- 141 The predominance of civil penalty proceedings taken by ASIC, under the Corporations Act in particular, is against individuals, eg for breaches of directors duties. It is imperative that penalties be an adequate deterrent to those individuals who might otherwise profit from their position in the

²¹ [2014] FCA 1308; (2014) 322 ALR 45 although note that Murphy J's findings as to whether the relevant officers had contravened their duties were overturned on appeal. His Honour's comments in relation to the purpose of Part 5C of the Corporations Act were not disapproved of by the Full Court of the Federal Court.

²² [2014] FCA 1308; (2014) 322 ALR 45 at [23]-[25].

²³ Jasper Hedges, Helen Bird, George Gilligan, Andrew Godwin and Ian Ramsay, 'An Empirical Analysis of Public Enforcement of Directors' Duties in Australia: Preliminary Findings', Working Paper No. 3, Centre for Corporate Law & Securities Regulation, The University of Melbourne, 31 December 2015, p. 1.

corporate or financial sector, notwithstanding or as a consequence of their own failure to have regard to the important obligations imposed upon them for the protection of financial markets and consumers.

142 In the context also of ASIC’s own existing powers to make rules imposing penalties of \$1,000,000, we submit that a maximum civil penalty for individuals of \$1.05m should not be seen as excessive.

143 ASIC already has the power to make rules under the Corporations Act which attract a maximum civil penalty of up to \$1,000,000. For example, ASIC has made the *ASIC Client Money Reporting Rules 2017* (Client Money Rules) under s981J of the Corporations Act, introduced as part of the Government’s client money reforms. These rules will commence on 4 April 2018, imposing a range of record-keeping, reconciliation and reporting obligations on Australian financial services licensees that hold derivative retail client money (not related to a derivative traded on a licensed financial market such as the ASX). For breach of an obligation set out in the Client Money Rules, ASIC has set a standard maximum penalty of \$1,000,000. These obligations include, for example, rule 2.1.1 to keep accurate records, rule 2.2.1 to perform an accurate daily reconciliation, rule 3.1.1 to report certain matters to ASIC and rule 4.1.1 to establish and implement policies and procedures designed to ensure compliance with the Rules.

144 Similarly, ASIC has made the *ASIC Market Integrity Rules (ASX Market) 2010* (Market Integrity Rules) under s798G of the Corporations Act, which gives ASIC power to make rules that deal with the activities or conduct of licensed markets and persons in relation to those markets. These Rules impose a range of obligations on market participants, carrying maximum penalties of between \$20,000 and \$1,000,000.

Question 10

Should the maximum penalty for an individual be the greater of a monetary amount or 3 times the benefits gained or losses avoided?

145 Yes. We disagree with the Taskforce’s preliminary position, which is that the maximum penalty for an individual should not include an amount determined as a multiple of benefits gained or losses avoided, as an alternative to the amount fixed in penalty units.

146 The harm caused by a contravention of the Corporations Act, ASIC Act or Credit Act can be significant. For example, people who obtain financial advantages by exploiting information asymmetries between well-informed ‘insiders’ and less well-informed market participants (including retail investors) undermine confidence and trust in the fairness of our markets and discourage participation in them.

147 From a regulatory perspective, we do not consider that there is a strong basis for distinguishing between a corporation and an individual where they profit

as a result of contravening the Corporations Act, ASIC Act or Credit Act. The courts have recognised that a pecuniary penalty not only has a punitive character, but also is a personal and general deterrent to abuse of the corporate structure or other misconduct. Therefore, the primary purpose of imposing civil penalties is to ensure compliance by deterring future contraventions, both by other would-be contraveners and the defendants. The penalty (of a monetary amount or three times the value of benefits obtained or losses avoided) is intended to deter corporations from profiting from contraventions of the Corporations Act, ASIC Act or Credit Act. We submit that it is equally necessary to deter an individual from similarly profiting from such a contravention. In fact, the need to deter an individual may be higher than a corporation, as the individual personally profits while it is the corporation's shareholders that ultimately benefit.

148 In circumstances where an individual obtains a financial benefit as a result of a contravention, it is important that the penalty provision is sufficiently serious to deter such conduct. A penalty which includes a monetary value of three times the value of the benefits obtained or losses avoided, would achieve this deterrent objective.

149 Current maximum civil pecuniary penalties are substantially lower than the potential benefits that can be derived from, or losses avoided by, the misconduct. For example, market participants are more likely to be prepared to incur the risk of undertaking contravening activity because the rewards for doing so will far outweigh the cost if their wrongdoing is detected. Accepting that the probability of detection of a contravention is substantially less than 100%, a pecuniary penalty that amounts to less than the profit arising from the contraventions will often not be an effective deterrent, especially where the contravener is a corporation.²⁴ In *Australian Securities and Investments Commission v Vizard*,²⁵ Finklestein J remarked that a contravention of a civil penalty provision 'holds great potential for profit and may cause much harm' and suggested that 'Parliament should increase the maximum' if the penalty imposed was considered too low. At the time of this judgment, the civil penalty amount had been in place for 13 years and Finklestein J noted that the amount 'may require review'.

Question 11

Should any provisions of the Corporations Act or Credit Act be aligned with the proposed increases to the Australian Consumer Law? In particular, should civil penalty provisions in Part 7.7A of the Corporations Act be so aligned?

²⁴ See the discussion in Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95, 2003, at [26.81] – [26.99].

²⁵ [2005] FCA 1037; (2005) 145 FCR 57.

- 150 We do not agree that there is a basis for distinguishing between the civil penalty provisions in Pt 7.7A from other civil penalty provisions in the Corporations Act and on that basis only increasing the Pt 7.7A provisions in line with the proposed increase to the Australian Consumer Law and ASIC Act consumer protection civil penalty provisions.
- 151 We consider that the Corporations Act and Credit Act civil penalty provisions should be increased as outlined in its responses to the above questions.

Position 10: Disgorgement remedies

Taskforce Position 10

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

- 152 We support the Taskforce's position that disgorgement remedies should be available in civil penalty proceedings brought by ASIC.
- 153 The Senate inquiry into the performance of ASIC and the Financial System Inquiry also concluded that ASIC should be able to seek disgorgement remedies.²⁶ As noted in the positions paper, overseas regulators have access to disgorgement remedies.
- 154 Incorporating a disgorgement function would provide greater flexibility in the non-criminal penalty regime, in line with overseas jurisdictions where civil and administrative penalties include disgorgement either separately or as a consideration built into the penalties regime.
- 155 'Disgorgement' is the removal of financial benefit (such as profits illegally obtained or losses avoided) that arises from wrongdoing, or the act of paying these monies, on demand or by legal compulsion. Disgorgement is a vehicle for preventing unjust enrichment. This means that disgorgement orders can offer significant deterrence by reducing the likelihood that wrongdoers can consider penalties to be merely a business cost. Presently there is no clear and straightforward mechanism for ASIC to seek disgorgement of financial benefits in non-criminal proceedings.
- 156 In a criminal context, the Australian Federal Police (AFP) and CDPP are empowered to bring civil proceedings under the *Proceeds of Crime Act 2002*

²⁶ See Senate Standing Committee on Economics, 'Final Report: Performance of the Australian Securities and Investments Commission', 26 June 2014, pp. 367 – 368.

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/index and Australian Government, Financial System Inquiry Final Report, November 2014, p. 252.

(Cth) (Proceeds of Crime Act) to recover the proceeds or benefits from alleged criminal offences, even in the absence of a criminal conviction. However, they would be unlikely to bring such proceedings in the absence of a criminal investigation and the prospect of a criminal conviction. Actions under the Proceeds of Crime Act must be run separately from the actions seeking to penalise the misconduct itself.²⁷ Further, the Act is unsuitable for situations where compensation orders may follow, because the forfeited money goes into a ‘confiscated assets account’ and cannot be restrained for the benefit of the victims.

157 There is no such similar process in relation to non-criminal proceedings. The Corporations Act currently provides for the following:

- (a) compensation orders; and
- (b) orders that the court sees fit under s1101B.

158 Neither of these avenues is a satisfactory method of disgorging profits or the avoidance of losses from wrongdoers.

159 Disgorgement and compensation orders under the Corporations Act are quite different. ASIC may seek compensation orders under, for example, ss1317H, 1317HA, 1317HB, 1101B and 1325 of the Corporations Act, s50 of the ASIC Act and s275 of the Credit Act.²⁸ A compensation order involves identifying the party who has suffered the loss and, once the damage has been quantified, returning this to the injured party. This is difficult where parties suffering loss cannot be easily identified, which is, for example, the case in the substantial majority of market misconduct matters.

160 It has also been noted that ‘[t]he decision to make a compensation order at all is in the Court’s discretion’.²⁹ In *Grimaldi v Chameleon Mining NL (No 2)*,³⁰ the court highlighted the complexity of the wording in the provisions for compensation (despite s1317HA allowing compensation to be paid based on profits made).³¹ The sections under which ASIC may seek compensation orders do not require the court to include profits when determining compensation and do not go so far as to enable all profits to be removed and, if necessary, paid to the Government or a compensation fund for consumers. Further, the provisions do not enable a court to order a contravener to pay back the money for losses avoided by contravening the law.

²⁷ The Proceeds of Crime Act’s civil regime is directed to confiscating unlawfully acquired property independently from the prosecution process. The civil stream provides for the forfeiture of property on the basis of a court being satisfied to the civil standard that the person has committed a serious offence.

²⁸ Section 1325 of the Corporations Act and s50 of the ASIC Act require written consent.

²⁹ *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296.

³⁰ *Ibid.*

³¹ *Ibid.* The Court noted at [626] specifically that s1317H(2) ‘is a poorly executed drafting contrivance’.

- 161 Under s1101B of the Corporations Act, if there is a breach of Ch 7 of the Corporations Act, the court may make any order it considers fit. The court will only make an order if it is satisfied that the order does ‘not unfairly prejudice any person’. Section 1101B provides a non-exhaustive list of orders that a court may make. While the non-exhaustive list does not include payment of profits; s1101B is broadly worded and does not expressly prohibit an order for payment of profits, therefore theoretically such an order could be applied for. However, there is no precedent for such an order being made.³² Further, seeking an order for the payment of profit needs to consider who the profit will be paid to. For example: should the profit be paid to those who have suffered loss from the contravening conduct and if so can they be identified?
- 162 Vicky Comino made the following comments about the findings in ASIC’s [Report 387 Penalties for corporate wrongdoing](#) (REP 387):³³
- ... such findings emphasise the need for parliament to increase the range of civil penalties to include ‘disgorgement’ and raise the level of penalties set under the Corporations Act (the \$200,000 upper limit for individuals and the \$1 million limit for bodies corporate) ... By making ‘disgorgement’ penalties available and increasing these civil penalties, this will enable penalties to be more responsive to corporate and financial misconduct, with ‘multiple of gain’ penalties considered. The availability of higher penalties might also encourage ASIC to consider pursuing civil penalties more than it does presently so as to lift their profile as a more viable enforcement option.
- 163 Comino further commented that the availability of disgorgement will allow ASIC to address wrongdoing efficiently and effectively:³⁴
- Accordingly, the availability of ‘disgorgement’ would ‘up the ante’ for ASIC in dealing with companies and individuals who face maximum civil penalties of \$1 million and \$200,000 respectively under the Corporations Act for corporate and financial misconduct, ‘regardless of how much profit is made on the dubious transactions.
- 164 We agree with the suggestion made in the positions paper that the court should take into account any disgorgement remedy sought or granted when making a decision on penalty. Further, it is appropriate that the court should retain the discretion to determine whether any payment is appropriate and how it should be applied – particularly where there are parallel compensation proceedings on foot. Making disgorged funds available to satisfy

³² Under s1101B, ASIC has sought the appointment of a receiver and restraining orders including restraining orders to carry on a financial business for a certain number of years: *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd, in the matter of Monarch FX Group Pty Ltd* [2014] FCA 1387; (2014) 103 ACSR 453. The effect of such orders has been to disqualify a person from dealing in financial products for a certain number of years; *In the matter of Idylic Solutions Pty Ltd - Australian Securities and Investments Commission v Hobbs* [2013] NSWSC 106; (2013) 93 ACSR 421.

³³ V Comino, ‘The adequacy of ASIC’s toolkit to meet its obligations under the corporations and financial services legislation’, *Company and Securities Law Journal*, vol. 34(5), 2016, pp. 383 – 384.

³⁴ *Ibid* p. 383.

compensation orders would be appropriate in certain cases provided certain requirements were met.

165 However, we also submit that disgorgement should be available as a remedy not only in civil penalty proceedings, but in other civil proceedings brought by ASIC seeking declarations of contravention and consequential orders. Contravention of non-civil penalty provisions may nevertheless result in substantial gains to the contravenor. A current example is contravention of section 912A of the Corporations Act (which the Taskforce has proposed become a civil penalty provision), breaches of which by a financial services licensee should not be allowed to result in gains to the licensee.

Question 12

Should ASIC be able to seek disgorgement remedies in civil penalty proceedings under the Corporations Act, ASIC Act and/or Credit Act?

166 In ASIC's view, yes and disgorgement remedies should be available in other civil proceedings brought by ASIC for contraventions of this legislation.

Question 13

If so, should the making of the payment and where it is to be paid be left to the court's discretion?

167 In ASIC's view, yes.

Position 11: Priority for compensation

Taskforce Position 11

The Corporations Act should require courts to give priority to compensation

168 We endorse the Taskforce's position that the Corporations Act should require courts to give priority to compensation. As under the ASIC and Credit Acts,³⁵ this should occur where the person the subject of the order has insufficient financial resources to pay a fine and compensation.

Question 14

Should the Corporations Act expressly require courts to give preference to making compensation orders where a defendant does not have sufficient financial resources to pay compensation and a civil pecuniary penalty?

169 In ASIC's view, yes.

³⁵ Section 12GCA of the ASIC Act and s181 of the Credit Act.

Position 12: Expanding the civil penalty regimes

Taskforce Position 12

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

- 170 We support this position. The prospect of a substantial civil pecuniary penalty provides an effective deterrent against conduct that may not necessarily be criminal, but nevertheless has the potential to cause significant detriment to financial markets and consumers, possibly to the benefit of the wrongdoer.
- 171 The availability of a civil penalty is a significant addition to ASIC's enforcement capability, as part of a broad spectrum of potential enforcement responses, which also include negotiated outcomes or infringement notices for less serious contraventions and administrative action, such as licence cancellation, disqualification or banning, and criminal prosecution for the most serious misconduct.
- 172 As such, in ASIC's submission civil penalties should be available across a broad range of contraventions of the legislation it administers. This would facilitate a more calibrated and proportionate response to the specific circumstances of the contravening conduct in each case.
- 173 We support not only the inclusion of those provisions in Table 6 of the positions paper, but also the provisions in Table 7 and other provisions which deal with related or ancillary misconduct.

Question 15

Should the provisions in Table 6 be civil penalty provisions?

- 174 Yes. We support the Taskforce's view that the provisions in Table 6 should be civil penalty provisions, for the reasons expressed by the Taskforce in the positions paper.

Question 16

Should there be an express provision stating that where the fault elements of a provision and/or the default fault elements in the Criminal Code can be established the relevant contravention is a criminal offence?

- 175 We are not persuaded that there is a need for such a provision. As framed in the Taskforce's question, the proposed provision would appear to be no more than a restatement of the requirement in a criminal prosecution to prove the fault elements of the relevant offence. In the case of civil proceedings for a contravention of the Corporations Act, as observed in the positions paper, the decision of the Full Federal Court in *ASIC v Whitebox Trading Pty Limited* has confirmed that the Commonwealth Criminal Code is not generally engaged in such proceedings.

Question 17*Should any of the provisions in Table 7 be civil penalty provisions?*

176 Yes. We submit that each of the provisions in Table 7 of the positions paper should be civil penalty provisions. We address each of the sections in Annexure C.

Question 18*Should any other provisions of ASIC-administered Acts be civil penalty provisions?*

177 Yes. The positions paper notes at paragraph 80 that ASIC also considers contraventions relating to misconduct in a range of areas should be civil penalty provisions. We set out the relevant provisions in Annexure D, noting that many of these provisions are related or ancillary to provisions in Tables 6 and 7 of the positions paper.

178 Our intention in submitting that the provisions in Annexure D also be civil penalty provisions is to ensure that for those areas of misconduct where a civil penalty is an appropriate alternative enforcement outcome to criminal prosecution, the civil penalties regime applies consistently across related conduct.

179 For example, in Table 6 of the positions paper the Taskforce proposes that the prohibition against carrying on a financial services business without a licence be a civil penalty provision (s911A).

180 In Table 7 the Taskforce consults on whether the prohibitions against providing financial services on behalf of another person (e.g. as an authorised representative) without authority (s911B) and holding out (s911C) should be civil penalty provisions. In Annexure D to this submission, we propose that the prohibitions against operating a managed investment scheme without a licence (s601ED), giving void authorisations (s916A) and sub-authorisations (s916B) and engaging in conduct in breach of a banning order (s920C), also be civil penalty provisions. This would ensure that ASIC is able to pursue civil penalty action as an alternative to criminal prosecution across the range of potential unlicensed financial services conduct prohibited by the Corporations Act.

181 As a further example of the importance of civil penalties being available for the provisions outlined in Annexure D, ASIC refers to sections 307A and 989CA of the Corporations Act. These provisions impose obligations on auditors to conduct audits in accordance with the auditing standards.

182 Breach of these provisions is currently a strict liability offence only. The Taskforce has proposed an ordinary offence for both provisions, which is supported by ASIC as explained in Annexure B of this submission. However, a civil penalty would provide an important additional enforcement

outcome for serious contraventions that are inadequately dealt with by an infringement notice or strict liability prosecution, but are not truly criminal in nature such as to warrant prosecution for the ordinary offence.

183 A civil penalty would act as a significant financial disincentive to careless conduct by auditors, who might be ‘cutting corners’ on auditing standards and in doing so gaining fees from the additional audit work they are able to obtain as a result.

184 Given also that criminal prosecution for failing to comply with audit standards is likely to be extremely difficult, ASIC considers there would be merit in introducing additional administrative remedies. These might include a power for ASIC to issue a show cause notice to an individual auditor about whom ASIC has concerns, preventing the person from undertaking further work until those concerns are addressed. Such a measure has recently been introduced for insolvency practitioners. Alternatively, the types of conditions ASIC can impose on auditors could be expanded.

Question 19

Should section 180 of the Corporations Act be a civil penalty provision?

185 We submit that s180 of the Corporations Act should continue to be a civil penalty provision.

186 Section 180 sets out one of the four basic directors’ duties. It requires a director to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise in the role.

187 The section imposes critical duties and responsibilities on directors. It is essential to ensuring that directors fulfil their duties and responsibilities in governing a company and that the company’s shareholders are ultimately protected. The fact that s180 is a civil penalty provision acts to deter directors from exercising their power and discharging their duties without the requisite level of care and diligence. Section 180 has played a central role in many of the leading decisions on directors’ duties, such as the James Hardie and Centro cases.

188 If there is not a sufficient deterrent, there is a risk that directors may be more likely to exercise their powers and discharge their duties without the requisite level of care and diligence. We submit that the Taskforce should avoid taking a position that may ultimately result in the weakening of the regulation of directors’ duties, particularly where it could result in serious consequences for the management of companies and the protection of shareholders.

Position 13: Civil penalty provisions for licensee obligations

Taskforce Position 13

Key provisions imposing obligations on licensees should be civil penalty provisions

- 189 We support this position. We agree with the Taskforce’s comment that the general obligations imposed on financial market, financial services and credit licensees are central to the effectiveness of the licensing regimes. ASIC relies significantly on these obligations in regulating the conduct of licensees and their representatives.
- 190 As observed by the Taskforce, currently the only enforcement remedy is administrative action, through suspension, cancellation or imposition of conditions on a licence. The case studies included in the Positons Paper demonstrate that notwithstanding a serious breach by a licensee of its general obligations, administrative action may not necessarily be warranted or desirable.
- 191 In those circumstances, the availability of a civil penalty would act as a significant deterrent against conduct falling short of the standards required of licensees and greatly enhance ASIC’s enforcement toolkit.
- 192 However, we also acknowledge the Taskforce’s qualification that it may not be appropriate that all of the general obligations be civil penalty provisions. Identification of those specific obligations to which a civil penalty attaches may therefore be necessary.
- 193 For example, the obligation imposed on financial services licensees to do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly is critical to the regulation of licensees’ conduct. Availability of a civil penalty for breach of this provision would enable ASIC to better calibrate its enforcement response across the spectrum of potential breaches, without necessarily having to take administrative action against the licensee.

Question 20

Should the provisions that impose general obligations on licensees be civil penalty provisions? If so, should this only apply to some obligations?

- 194 Yes, some of the general obligations imposed on licensees should be civil penalty provisions.

E Credit Code provisions

Key points

Introduction of civil penalties for s23A(1), 32A(2), 39B(1), 154 and 179U of the Credit Code would appropriately enhance ASIC's regulatory toolkit.

ASIC's comments on the Taskforce's proposals

- 195 The Taskforce has indicated that it proposes to consult on introducing civil penalties for the provisions that deal with the following:
- (a) prohibited monetary obligations for small amount credit contracts (s23A(1));
 - (b) prohibitions relating to credit contracts (s32A);
 - (c) breach of the limit on the amount that may be recovered if there is a default under a small amount credit contract (s39B(1)); and
 - (d) prohibitions on false or misleading representations under the Credit Code (sections 154(1) and 179U(1)).
- 196 We agree with the Taskforce's explanation in the positions paper of the justification for attaching civil penalties to these prohibitions. Availability of civil penalties would enhance ASIC's ability to take appropriately tailored regulatory action and supplement its regulatory toolkit.

Question 21

Should sections 23A(1), 32A(2), 39B(1), 154 and 179U of the Credit Code be civil penalty provisions?

- 197 In ASIC's view, yes.

F Insurance Contracts Act

Key points

Introducing civil penalties for an insurer's breach of the duty of utmost good faith and its obligation to provide a Key Facts Sheet would appropriately enhance ASIC's regulatory toolkit and ability to take action in relation to insurer misconduct.

ASIC's comments on the Taskforce's proposals

198 Our comments on specific positions are set out below.

Position 14: Extension of civil penalty consequences

Taskforce Position 14

Civil penalty consequences should be extended to insurers that contravene certain obligations under the *Insurance Contracts Act 1984*

199 We support the Taskforce's proposals to introduce civil penalties for an insurer that breaches the duty of utmost good faith and its obligation to provide a Key Facts Sheet.

The duty of utmost good faith

200 While the duty of utmost good faith in s13(1) of the Insurance Contracts Act is a financial services law, failure to comply with which is a ground upon which ASIC can take administrative action to vary, suspend or cancel an insurer's Australian Financial Services Licence, making s13 of the Insurance Contracts Act a civil penalty provision, would enhance ASIC's use of the provision as an enforcement tool.

201 Such a tool would be useful in circumstances where administrative or representative action may not be appropriate, but action is needed in response to conduct by an insurer which is not consistent with its duty of utmost good faith. Civil penalties would be available as an enforcement outcome for contraventions of the duty, not only in relation to insurance claims handling, but also potentially in relation to pre-contractual and post-contractual conduct by insurers.

202 We consider that the introduction of a civil penalty would enhance ASIC's ability to take enforcement action that would act as a deterrent to inappropriate conduct by insurers and thereby protect consumers from

egregious insurer conduct. This would mean that ASIC could take action against breaches of the duty by insurers where the conduct is not systemic, but nonetheless warrants an enforcement response.

Section 33C: Insurer’s obligation to provide Key Facts Sheet

203 We also support the proposal that there should be civil penalty consequences for an insurer that breaches its obligation to provide a Key Facts Sheet.

204 As noted in the positions paper, the requirements to provide Key Facts Sheets pursuant to ss133AD and 133BC of the Credit Act are civil penalty provisions as well as offence provisions. Providing ASIC with the option of civil penalty action in relation to such breaches would be a useful extension of ASIC’s existing regulatory toolkit.

G Infringement notices

Key points

We support the proposal to extend infringement notices to the range of civil penalty offences contained in Annexure D to the positions paper. We further propose that our various infringement notice regimes (with certain exceptions) be harmonised and located within the ASIC Act.

We propose that the Credit Act's ratio of one-fortieth of the maximum civil penalty that a court could impose, rather than 12 penalty units for individuals and 60 penalty units for corporations, be used for any new infringement notice penalties. We also propose that the continuous disclosure infringement notice penalties be expressed as one-tenth of the maximum civil penalty, rather than by way of dollar figures.

In order to increase the deterrent effect of certain Credit Act infringement notices, it is proposed that in a number of cases, the infringement notice penalty attaches to the civil penalty provision rather than the applicable strict liability offence.

ASIC seeks an infringement notice power under the *ASIC Supervisory Cost Recovery Levy (Collection) Act 2017*.

ASIC's comments on the Taskforce's proposals

- 205 Effective regulation depends on achieving enforcement outcomes that act as a genuine deterrent to misconduct. There is a need for ASIC to be able to impose sanctions that are both graduated and flexible, allowing it to respond in a proportionate manner to different levels of seriousness of misconduct.
- 206 ASIC is currently able to issue infringement notices for less serious contraventions of certain consumer protection provisions in the ASIC Act, for breaches of strict liability offences and less serious breaches of certain civil penalty provisions of the Credit Act and the Corporations Act as well as for breaches of the Market Integrity Rules (MIR), the Derivative Transaction Rules (DTR) and the Derivative Trade Repository Rules (DTRR) (collectively the Rules). As noted above, ASIC also has the ability to issue penalty notices under s1313 of the Corporations Act.
- 207 According to the Australian Law Reform Commission (ALRC), infringement notices are:³⁶
- an administrative device to dispose of a matter that involves a criminal or non-criminal breach. When such a breach is committed, the relevant

³⁶ ALRC, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, ALRC 95, 2002, at [2.67].

agency may prosecute or take civil proceedings, or may issue an infringement notice offering the offending party the chance to discharge or expiate the breach through payments of a specified amount.

- 208 ASIC cannot take action against an offending party for failing to pay an infringement notice. Instead, we can prosecute or commence proceedings against the offending party for the underlying contravention. In this way, infringement notices do not constitute the imposition of a penalty by ASIC as such, but rather a way for a party to avoid criminal or civil proceedings by opting to pay a lower penalty. As such, they are a form of ‘settlement’ with the regulator. Similarly, the payment of an infringement notice does not amount to an admission of guilt or liability by the party who pays it. The payment of an infringement notice does not affect third party rights against the payer.
- 209 We agree with all of the advantages of infringement notices referred to in paragraph 11 of Part 7 of the positions paper, and in particular, that infringement notices have the advantage of avoiding the time and cost of litigation. Both civil and criminal litigation can take years to complete, with the potential for appeals. ASIC litigates often and while some matters are relatively straightforward and swift court outcomes ensue, many cases involve a significant length of time to run their course.
- 210 ASIC has issued infringement notices under the ASIC Act and Credit Act on many occasions and has seen a very high compliance rate. Similarly with those notices issued in relation to continuous disclosure and breaches of the Rules. To date, ASIC has issued an average of 13 infringement notices per year under the ASIC Act and 38 per year under the Credit Act.
- 211 Further, the time taken from the commencement of an investigation into the payment of an infringement notice is generally much shorter than to reach an outcome for civil and criminal litigation.
- 212 Considering the success of ASIC's existing infringement notice regimes, the extension of the ability to issue infringement notices provides ASIC with an effective lower level regulatory tool which enables it to respond quickly and efficiently to misconduct.

Position 15: Extension of infringement notices

Taskforce Position 15

Infringement notices be extended to an appropriate range of civil penalty offences

- 213 We welcome the proposal of the Taskforce to extend infringement notices to a range of civil penalty offences in the Corporations Act and Credit Act. The list of current and proposed civil penalty provisions that ASIC considers are

suitable for infringement notices is contained in Annexure D of the positions paper and, to the extent not contained in that Annexure, in Annexure D of this submission.

- 214 ASIC is currently able to utilise infringement notices as a regulatory tool in relation to only a limited amount legislative provisions that it administers. While the consumer protection provisions in the ASIC Act and relevant provisions of the Credit Act have the benefit of infringement notices being part of ASIC's regulatory toolkit, that power is largely absent from the Corporations Act, which comprises the largest part of ASIC's regulatory remit.
- 215 This means that while ASIC is able to conduct its regulatory work with the full complement of regulatory tools within the enforcement pyramid in relation to the ASIC Act, Credit Act, continuous disclosure and Rules breaches, this advantage is not able to be leveraged in relation to other parts of the Corporations Act that would benefit from their use.
- 216 Further, if ASIC wishes to take enforcement action in relation to relatively straightforward provisions and less serious contraventions of the Corporations Act, it is limited to criminal and/or civil penalty proceedings which are costly, time consuming and for provisions such as these, disproportionate in many cases. While in certain cases it will be reasonable and appropriate for ASIC to commence proceedings for breaches a civil penalty provision, this may not always be the most appropriate regulatory response. While it is open to ASIC to issue warning letters or enter into an enforceable undertaking, having the ability to issue an infringement notice in relation to the conduct would provide an additional flexible tool to ASIC and enhance its ability to take action in circumstances where the contravention is of a less serious nature.
- 217 It is not ideal that ASIC's powers and regulatory tools are inconsistent across the legislation that we administer. We are better equipped to target a proportionate response to misconduct under the ASIC Act and Credit Act than under the Corporations Act. Comparable powers and regulatory tools would allow us to appropriately calibrate our enforcement response to the circumstances that arise under all of the legislation that we administer, so there is consistency between breaches of similar magnitude.

Proposal to harmonise

- 218 ASIC's various infringement notice regimes are inconsistent with one another as they have been introduced at various times. While the regimes in place for the Rules and continuous disclosure are different in structure and style to those contained in the ASIC Act and Credit Act, there is good reason for this, and those regimes should not be changed as they are particularly suited to the relevant obligations.

219 There are, however, a number of aspects of ASIC’s other infringement notice regimes that are inconsistent and are also fairly inflexible and cause practical difficulties. Further, the fact that there are numerous regimes can cause difficulties in administration by ASIC and understanding by recipients. Some particular issues are outlined below.

220 We propose that the various infringement notice regimes, save for those that relate to the Rules and continuous disclosure, be harmonised within the ASIC Act.

No ability to pay by instalments

221 The infringement notice provisions under the ASIC Act do not allow entities to apply to pay the infringement notice penalty by instalments, unlike the regime contained in the National Credit Regulations. Under those regulations, within 28 days after receiving an infringement notice, the recipient may apply in writing for permission to pay by instalments.³⁷ ASIC then has 14 days to grant or refuse the application.³⁸

Timing of applications for withdrawal

222 Under the ASIC Act, entities may apply for withdrawal of an infringement notice at any time before the compliance period expires.³⁹ What this means is that parties can apply for a withdrawal at the very end of the compliance period, leaving ASIC with very little time to make a decision in relation to the withdrawal application and issue a notice of withdrawal or refusal in response. By comparison, under the National Credit Regulations ASIC has 14 days to make a decision upon receipt of an application for withdrawal.⁴⁰ The position is similar for infringement notices in relation to the Rules.⁴¹

Time for compliance runs from the ‘issue date’ not the service date

223 The ASIC Act provides that the timeframe for the compliance period and extensions relate to the ‘issue date’ of the infringement notice rather than the service date.⁴² Any delay between the issue date and the date of service negatively impacts on the time remaining in the compliance period, which could cause problems for recipients. This should be compared with the position under the National Credit Regulations where time runs from the

³⁷ Regulation 43(1) of the National Credit Regulations.

³⁸ Regulation 43(3) of the National Credit Regulations.

³⁹ Section 12GXG of the ASIC Act.

⁴⁰ Regulation 46 of the National Credit Regulations.

⁴¹ Regulations 7.2A.11 and 7.5A.111 of the Corporations Regulations.

⁴² Section 12GXB of the ASIC Act.

date that the infringement notice is given to the recipient.⁴³ The position is similar for infringement notices in relation to the Rules.⁴⁴

Position 16: Amount of infringement notices

Taskforce Position 16

Infringement notices should be set at 12 penalty units for individuals and 60 penalty units for corporations for any new infringement notice provisions

Credit Act ratio should be used

224 We disagree with Position 16 taken by the Taskforce and instead propose that all new infringement notices utilise the ratio currently in use under the Credit Act, being one-fifth of the maximum penalty that a court could impose for strict liability provisions and one fortieth of the maximum penalty that a court could impose for civil penalty provisions.

225 Inconsistency in infringement notice penalties can result in injustice and regulatory arbitrage. The baseline position should be that like conduct should be subject to like infringement notice penalties. As such, there should be consistency in ASIC's various infringement notice regimes where appropriate.

Continuous disclosure

226 We confirm our position that the existing infringement notice regimes under the Corporations Act should remain unchanged, save for the infringement notice penalty for continuous disclosure.

227 Currently, the penalties available for continuous disclosure infringement notices are graduated, being \$33,000, \$66,000 or \$100,000, depending on whether the entity is a Tier 1, 2 or 3 entity in terms of market capitalisation and whether it is the entity's first contravention.⁴⁵ As the penalty is currently set by reference to dollar figures rather than penalty units, the amount erodes over time. Presently, the dollar figure for Tier 3 represents 10% of the maximum civil penalty and we consider that this ratio should be preserved (and so to with Tiers 1 and 2), such that if the maximum civil penalty for continuous disclosure breaches is increased as a result of this review, so too should the infringement notice penalty.

⁴³ Regulation 44(1) of the National Credit Regulations.

⁴⁴ Regulations 7.2A.08 and 7.5A.108 of the Corporations Regulations.

⁴⁵ Section 1317DAE of the Corporations Act.

Particular penalties for some strict liability infringement notice provisions should be increased

228 The AG Guide recommends that where there is a civil penalty provision and a strict liability offence in relation to the same obligation, the infringement notice provision should relate to the strict liability offence. However, the existing application of this approach to the Credit Act means that the infringement notice penalties are fairly low—see the following examples:

- (a) Section 133BE of the Credit Act prohibits credit providers from making credit limit increase invitations, except where there is express consent. A breach of this prohibition can either be a criminal offence (with a maximum of 100 penalty units), a strict liability offence (with a maximum of 10 penalty units) or be subject to a civil penalty (with a maximum of 2,000 penalty units). The strict liability offence is subject to the infringement notice regime with the maximum infringement notice amount for a body corporate also being 10 penalty units, or \$2,100—too low to have any deterrent effect or utility.
- (b) Section 52 of the Credit Act deals with a basic disclosure obligation for licensees to cite their Australian credit licence number. This is an important and fundamental obligation. The obligation in s52 is a strict liability offence (with a maximum penalty of 10 penalty units) as well as a civil penalty provision (with a maximum of 2,000 penalty units). As with all Credit Act provisions of this nature, the strict liability offence is subject to the infringement notice regime and so the infringement notice penalty is \$2,100 for a body corporate, which does not reflect the gravity of the obligation—even for less serious breaches.

229 We propose that the infringement notice power instead attach to the Credit Act civil penalty provisions set out below, notwithstanding that there is an existing strict liability offence:

- (a) s49(6);
- (b) s50(2);
- (c) s52(2);
- (d) s53(1) and (4);
- (e) s71(1), (2) and (4);
- (f) s113(1);
- (g) s120(1) and (3);
- (h) s126(1);
- (i) s127(1);
- (j) s132(1), (2) and (4);
- (k) s133BE(1);
- (l) s133BO(1);

- (m) s136(1);
- (n) s143(1) and (3);
- (o) s149(1);
- (p) s150(1);
- (q) s155(1), (2) and (4);
- (r) s158(1);
- (s) s160(1) and (2);
- (t) s218(5); and
- (u) s220(3).

230 Making these existing civil penalty provisions subject to the infringement notice regime, and therefore subject to higher infringement notice amounts, would ensure that ASIC is able to take proportionate action in relation to less serious breaches of the civil penalty provisions. This would increase the deterrent effect of infringement notices that relate to certain obligations, and enable ASIC to take more regulatory action with the resources it has. It is noted that we have suggested the same approach in relation to the certain of the small amount credit contract reforms currently being considered by Treasury.

Infringement notice power under the *ASIC Recovery Collection Act 2017*

231 The *ASIC Supervisory Cost Recovery Levy (Collection) Act 2017* (Collection Act), and related Acts necessary to implement an industry funding model (IFM) for ASIC, were passed by Parliament on 15 June 2017.

232 The first invoices under the IFM will be issued in January 2019 and will recover costs for regulatory services in the 2017–18 financial year. The invoices will be based on the information provided by regulated entities in a return lodged with ASIC.

233 The failure to lodge a return with ASIC is a strict liability offence under s11 of the Collection Act, carrying a maximum penalty of 10 penalty units.

234 The timely lodgement of the return is a critical element of the IFM. It is essential that entities comply with the obligation to provide this information on a timely basis or the integrity of the calculation of all levies will be compromised.

235 The information provided in the return will be used to determine each entity's share of ASIC's regulatory costs. If this information is not provided then all entities in the same subsector will be levied a different amount than they otherwise would be. The timely lodgement of the return also protects

the public finances by ensuring that the calculations of entities' levy liabilities are based on the appropriate amounts.

- 236 We consider that an infringement notice power would make it better equipped to target compliance in the most effective and proportionate manner for less serious breaches. Therefore, ASIC should be able to issue an infringement notice in relation to failure to lodge a return would assist it in its ability to take enforcement action to ensure entities provide a return.

Question 22

Which current and new civil penalty provisions are suitable for infringement notices (see Annexure D)?

- 237 The provisions contained in Annexure D are suitable for infringement notices.

Question 23

Are the 12 penalty unit (individuals) and 60 penalty unit (corporations) default levels for infringement notices appropriate? Is the Credit Act model of a default proportion of the maximum penalty more appropriate for all ASIC-administered Acts?

- 238 No, the Credit Act model of a default proportion of the maximum penalty is more appropriate for all ASIC-administered Acts.

H Peer disciplinary review panels

Key points

ASIC has now established the Financial Services and Credit Panel (FSCP) following public consultation.

In our consultation we had asked for feedback on the types of matters to be referred to the panel and the composition of each sitting panel.

We have released regulatory guidance setting out the principles and processes relevant to the operation of the FSCP.

ASIC's comments on the Taskforce's proposals

Financial Services and Credit Panel (FSCP)

239 ASIC has established the Financial Services and Credit Panel (FSCP) following a public consultation process.

240 The majority of respondents to the consultation process agreed to the establishment of the FSCP and that it should only be responsible for determining whether ASIC should make certain banning orders for misconduct by financial services participants and participants in the credit industry.

241 ASIC has released [Regulatory Guide 263](#) *Financial Services and Credit Panel* (RG 263) setting out the principles and processes relevant to the operation of the FSCP.

Note: RG 263 should be read in conjunction with regulatory guides and information sheets we have published on our administrative decision-making process and how we will administer the financial services provisions of the *Corporations Act 2001* and the *National Consumer Credit Protection Act 2009*.

242 We consider that establishing a peer review based model such as the FSCP may assist with improving regulatory outcomes by:

- (a) ensuring that ASIC's administrative decisions are based on a thorough understanding of current industry practice and standards; and
- (b) bringing a broader range of experiences and perspectives into the decision-making process.

243 We note there are some potential disadvantages of a peer based model however these concerns will be mitigated by:

- (a) including an ASIC staff member on the FSCP who is specialised and trained in making these types of decisions; and

- (b) the FSCP only making decisions on a subset—rather than all—of ASIC’s administrative decisions.

Background

244 Our powers to take administrative action, including holding hearings, are exercised by specialised ASIC staff members with relevant training and expertise with delegated power under the ASIC Act and the National Credit Act.

Note: Delegates have all the powers given to ASIC under Div 6 of Pt 3 of the ASIC Act and Div 2 of Pt 6-5 of the National Credit Act, and are guided by the principles set out in [Regulatory Guide 8: Hearings practice manual](#) (RG 8).

245 In April 2017, ASIC released [Consultation Paper 281 Financial Services Panel](#) (CP 281). We consulted on a proposal to establish a panel to sit alongside our existing administrative processes and make a subset of ASIC’s decisions.

246 We had consulted on how the proposed panel would enhance the impact of ASIC’s administrative decisions; the types of matters that would be referred to the each sitting panel; and the optimal composition of each sitting panel.

About the FSCP

247 The FSCP will exist alongside ASIC’s current processes for undertaking administrative action against participants in the financial services industry and those engaged in credit activities.

248 Members of the FSCP are appointed by ASIC and comprise a pool of industry participants with relevant expertise in the financial services or credit fields.

Note: Media release ([17-381MR](#)) *ASIC announces the initial members of the Financial Services and Credit Panel*, 10 November 2017.

249 We draw upon the FSCP to form sitting panels of three to decide whether we will make banning orders against individuals for misconduct in the course of providing retail financial services and/or engaging in credit activities where the matter is appropriate for peer review.

250 Sitting panel consist of three members to ensure that an outcome is achieved if there are differences of views among the members.

Types of matters to be referred to the FSCP

251 Most respondents to the consultation agreed that not all banning matters should be referred to the FSCP and that the criteria proposed by ASIC is appropriate as they considered it to be where external members would be able to provide most value.

252 Therefore, a matter may be referred to the FSCP where ASIC considers it appropriate for peer review because of its significance, complexity or novelty. When deciding whether the banning matter is appropriate, ASIC will consider the following relevant factors:

- (a) current areas of ASIC regulatory priority;
- (b) potential impact of the banning on industry practices;
- (c) legal or factual complexity; and
- (d) new areas of market practice or regulatory oversight for ASIC.

Question 24

Would it be appropriate for ASIC to delegate to a peer review panel additional administrative functions in relation to financial services and credit sectors (apart from banning individuals from these industries as currently proposed by ASIC)?

253 Different or additional considerations may apply to other decisions of ASIC. For example, decisions to issue infringement notices and accept enforceable undertakings, involve questions of strategy. These decisions require regulatory experience and knowledge.

254 Therefore, making such decisions may be better placed with the regulator through our existing processes and may not appropriate to be delegated to a peer review panel. See paragraphs 259-263 below for further discussion.

255 Further, in CP 281 we did not propose to delegate our other administrative powers to the FSCP however we did seek feedback on what additional administrative powers we could delegate to the FSCP now or in the future, including:

- (a) issuing infringement notices;
- (b) refusing AFS or Australian credit licence (credit licence) applications;
- (c) imposing conditions on AFS or credit licences; and/or
- (d) cancelling or suspending AFS or credit licences.

256 Respondents to the consultation indicated that an expanded decision making scope for the FSCP may create challenges.

257 It was also noted that the scope of matters referred to the panel should not be expanded until it is evident that regulatory outcomes have improved as a result of establishing the panel.

258 In the future, we may conduct further consultation with industry to consider whether the scope of the matters to be referred to the FSCP should be expanded.

Note: See [Report 551](#) *Response to submissions on CP 281 Financial Services Panel* (REP 511).

Question 25

If so, should the Panel be able to exercise powers, such as the power to issue infringement notices and/or the power to accept enforceable undertakings?

- 259 As mentioned above, different or additional considerations may apply to other decisions of ASIC.
- 260 As acknowledged in the positions paper, an infringement notice and an enforceable undertaking are distinct from a banning power. These decisions should not be mistakenly equated with a banning order.
- 261 Decisions to issue infringement notices and/or accept enforceable undertakings are essentially decisions about strategy and choice of regulatory tool. If the FSCP decided we should not issue an infringement notice or accept an enforceable undertaking, ASIC would still be left with the rest of the decision, i.e. whether or not to take other civil or administrative proceedings. Thus, decisions in relation to infringement notices and enforceable undertakings cannot be separated from the broader decision about what action to take.
- 262 Further, enforceable undertakings involve significant negotiation between the parties. We consider that if such decisions were to be made by a peer review panel this would involve substantial impracticalities.
- 263 In addition, a decision to issue an infringement notice is not of the same legally binding character as a banning order and the legal impact of an enforceable undertaking is more contractual in nature than the legal character of a banning. A banning decision is also subject to appeal of legally binding effect.

Question 26

Should the Panel be comprised of industry and non-industry participants (e.g. lawyers or academics) only or should members of ASIC be included?

- 264 In CP 281 we had consulted on the composition of the FSCP. We proposed three options that could form the basis for selecting members of each sitting panel and asked which option would be most suitable for the panel's purpose and whether there are other options for each sitting panel's composition that we could consider.
- 265 We proposed that up to two of the three sitting members would be industry participants and/or non-industry participants, and the remaining member(s) would be ASIC staff.
- 266 Respondents to the consultation acknowledged the importance of carefully selecting qualified and experienced panel members given the nature of the matters they would be considering.

267 Most respondents considered Option 1 in CP 281 to be the most suitable approach for selecting members of the sitting panel—that is, up to two members drawn from a pool of industry participants with the third being an ASIC staff member. Respondents agreed that this may ensure that non-ASIC panel members would have current experience and expertise relevant to the matter being heard.

Note: See [Report 551](#) *Response to submissions on CP 281 Financial Services Panel* (REP 551).

268 Further, although we did not consult on the matter of who would chair a sitting panel, it was acknowledged in the consultation that the chair should be an ASIC staff member to ensure procedural fairness.

FSCP sitting panels

269 As mentioned in RG 263, in forming each sitting panel of the FSCP, we take into account the nature of each matter and the relevant expertise and experience of the available pool of FSCP members.

270 Each sitting panel will include two members from the FSCP (external members) and an ASIC staff member (internal member).

271 Internal members are specialised and trained in the types of decisions each sitting panel makes, but are not from the areas of ASIC that investigate an affected person’s misconduct.

272 Including an ASIC staff member will ensure that a member of the sitting panel is familiar with the law and ASIC’s policy and guidance. Further, an ASIC staff member will be able to make a substantive contribution to the deliberations of a sitting panel, particularly in relation to ensuring consistency and that the regulatory context is taken into account. As mentioned previously this would also mitigate the potential disadvantages of a peer-based model.

273 The internal member acts as chair of a sitting panel. The chair deals with procedural fairness issues (e.g. applications for adjournment) in line with ASIC policy.

Question 27

Should the Panel be subject to minimum procedural standards? And, if so, what procedural standards are appropriate? For example, should publication of panel decisions be automatically stayed if an appeal is lodged?

Minimum procedural standards

274 In relation to minimum procedural standards, there are specific sections of the Corporations Act and Part 3 Division 6 of the ASIC Act that set out

procedural requirements for hearings. In addition, the common law administrative law rules, including procedural fairness, apply.

275 The chair of the FSCP will also deal with procedural fairness issues (e.g. applications for adjournment) in line with the law and with ASIC policy.

276 ASIC will advise affected persons of their rights of review on the decisions made. Decisions of sitting panels of the FSCP are reviewable by the Administrative Appeals Tribunal (AAT).

277 These procedural standards are appropriate.

278 In relation to the question of whether publication of panel decisions be automatically stayed if an appeal is lodged, it is unclear as to what this would mean in practice.

279 We consider that there may be complications if this were to mean that the effect of the decision is automatically stayed if an appeal is lodged. Given that the Administrative Appeals Tribunal (AAT) is a no costs jurisdiction this may mean that affected persons may be encouraged to appeal and would therefore result in more delays.

280 Further, ASIC is not the only body that can make decisions to impose a stay—the AAT registrar has the power to stay the effect of the order if an application is made.

Publication of FSCP decisions

281 The sitting panel of the FSCP will give reasons for its final decision when it tells the affected person what that decision is. However, we will not publish the reasons of a sitting panel (as per our current policy).

282 If a banning order is made, ASIC is currently required to publish a notice in the *ASIC Gazette*.

283 Where we have made a banning order against a person, we are also required to add that person to our AFS banned/disqualified persons register or credit banned/disqualified persons register. Where the banning order is made under the National Credit Act, we are also required to publish notice of the action on ASIC's website.

284 In addition to publishing the orders in the *ASIC Gazette*, on ASIC's website, or on ASIC's banned and disqualified registers, we will publish a media release.

285 We do not usually publicise a hearing at an early stage, as it may significantly disadvantage the affected person because the issues leading to the hearing have not been discussed and determined.

I Additional issue: False or misleading statements

Key points

Amending the scope of the prohibition on false or misleading representations in s12DB of the ASIC Act, to include specific types of representations made in relation to financial products and services, would significantly enhance ASIC's ability to take action to deter this kind of misconduct.

ASIC's comments on the Taskforce's proposals

- 286 The positions paper cites numerous examples of false or misleading statements that may be made in relation to financial product and services, but which do not necessarily fall within the scope of any of the kinds of representations listed in s12DB of the ASIC Act. These examples include the kind of statements that have the potential to cause significant detriment to consumers, by inducing them to make misinformed decisions about financial products or services in circumstances where they subsequently suffer substantial losses.
- 287 As illustrated by the case study included in the positions paper, ASIC investigations not uncommonly encounter representations made to consumers that constitute misleading or deceptive conduct within the meaning of s1041H of the Corporations Act and s12DA of the ASIC, but which are not clearly captured by the prohibition in s12DB.
- 288 In those circumstances, leaving aside the possibility of administrative action against a licensee or its representatives, the only potential enforcement action is criminal prosecution for offences such as s1041E and 1041F in the Corporations Act and then only if all the physical and fault elements of those offences are satisfied.
- 289 The availability of a civil penalty for the types of statements referred to in the Taskforce's examples would operate as a significant deterrent against the making of these types of statements without taking adequate steps to verify their accuracy. Amendment to include such statements within the scope of the prohibition in s12DB of the ASIC Act would tailor the prohibition to better address misconduct of this kind where it arises in relation to the provision of financial products and services.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001 (Cth)</i>
Corporations Act	<i>Corporations Act 2001 (Cth)</i>
Corporations Regulations	Corporations Regulations 2001 (Cth)
CP 281	An ASIC consultation paper (in this example numbered 281)
Credit Act	<i>National Consumer Credit Protection Act 2009 (Cth)</i>
Credit Code	National Credit Code
Credit Regulations	<i>National Consumer Credit Protection Regulations 2009 (Cth)</i>
Crimes Act	<i>Crimes Act 1914 (Cth)</i>
Insurance Contracts Act	<i>Insurance Contracts Act 1984 (Cth)</i>
RG 185	An ASIC regulatory guide (in this example numbered 185)
positions paper	Taskforce, Position and Consultation Paper 7, Strengthening Penalties for Corporate and Financial Sector Misconduct , 23 October 2017
Taskforce	ASIC Enforcement Review Taskforce

Annexure A: Proposed increases to imprisonment penalties

Table 2: Defective disclosure/false or misleading statements to consumers

Offence	Current penalty	Proposed penalty	ASIC Comment
670A	1 year	5 years	Prohibits giving a misleading or deceptive takeover document and currently carries a maximum penalty for an individual of only 1 year imprisonment and/or 50 penalty units. However, this prohibition is fundamental to ensuring that proper disclosure is provided to holders of the relevant securities in relation to takeovers and compulsory acquisitions and buyouts of publicly listed entities.
708AA	6 months	2 years	For rights issues of quoted securities not needing disclosure, imposes an obligation to correct a defective cleansing notice on becoming aware of the defect, breach of which currently carries a maximum penalty for an individual of only 6 months imprisonment and/or 25 penalty units. Compliance with this obligation ensures that the information required to be given to investors in relation to offers of quoted securities under a rights issue is not defective. The current penalty does not reflect the importance of the obligation.
708A	6 months	2 years	For sale offers of quoted securities that do not need disclosure, imposes an obligation to correct a defective cleansing notice on becoming aware of the defect, breach of which currently carries a maximum penalty the same as s708AA.
1012DAA and 1012DA	6 months	2 years	Correspond to sections 708AA and 708A but apply to rights issues and sale offers of quoted financial products other than securities. A breach currently carries the same low maximum penalty.
1017E(3) and (4)	2 years	5 years	Impose obligations on a product provider in relation to dealing with money paid into an account and held on trust for a person in accordance with s1017E(2) (in circumstances where the person has paid money to the provider for a product that has not yet been issued or transferred). To that extent the obligations are comparable to the client money provisions and a breach should carry a significant penalty. Breach of the requirement in s1017E(2) to pay money into an account can be both a strict liability and ordinary offence under s1021O, with the ordinary offence carrying a maximum penalty for an individual of 5 years imprisonment and/or 200 penalty units.

Offence	Current penalty	Proposed penalty	ASIC Comment
1021J(2) and (3)	2 years	5 years	Impose obligations on a regulated person to comply with a direction by the preparer of a PDS not to distribute the PDS (similar to the obligation on an authorised representative under s952L to comply with a direction by a licensee not to distribute a defective FSG) and to notify the preparer upon becoming aware of a defect in the PDS. The penalty for these offences should be increased in the same way as proposed for s952L(2). ASIC also considers that the penalty for an offence under s1021J(1), by the preparer of a PDS who becomes aware the PDS is defective but fails to direct regulated persons not to distribute the PDS, should be increased in the same way as proposed for s952L(1).

Table 3: Failure to comply with corporate obligations

Offence	Current penalty	Proposed penalty	ASIC Comment
1307	2 years	5 years	Prohibits conduct by a company officer or employee resulting in the falsification of books relating to the affairs of the company. Such conduct has the potential to cause serious detriment to those concerned in the affairs of the company, including shareholders and creditors. A significant penalty is important to ensure that accurate and complete records of a company's business are maintained.
1309(2)	2 years	2 years	The reference to a current imprisonment penalty of 1 year in Annexure B of the positions paper is an error. The current penalty is 2 years, accordingly no increase is proposed.

Table 4: Unlicensed conduct

Offence	Current penalty	Proposed penalty	ASIC Comment
905A	500pu	2 years	Requires any class of derivative trade repository identified by the regulations to be licensed. Failure to comply with this requirement currently carries a maximum penalty for individuals of 500 penalty units but no term of imprisonment. This is in contrast to the maximum penalties for operating a financial market without a licence (s791A) and operating a CS facility without a licence (s820A), which both include 5 years imprisonment. The same custodial penalty should apply to offences against s905A.
907A	500pu	2 years	Prohibits holding out that a derivative trade repository is licensed if that is not the case. The penalty is the same as that for s905A and again is in contrast to the penalties for holding out in relation to a financial market (s791B) and a CS facility (s820B).

Offence	Current penalty	Proposed penalty	ASIC Comment
911B	2 years	5 years	Prohibits a person from providing a financial service on behalf of another person (the principal) unless the service is authorised under a licence held by the principal. This section is an important ancillary provision to s911A, as it prohibits unlicensed provision of financial services as a representative of another person. The maximum penalty should be increased as proposed for s911A.
911C	1 year	2 years	Prohibits holding out that financial services are provided under a licence if that is not the case. Again this is an important ancillary provision to sections 911A and 911B, but currently carries a maximum custodial penalty for individuals of only 1 year imprisonment. The proposed increase to 2 years imprisonment will provide a greater deterrent to this misconduct.
82 (Credit Act)	2 years	5 years	Prohibits engaging in credit activity in breach of a banning order. This misconduct is as serious as providing financial services in breach of a banning order and the maximum penalty should be increased in line with the proposed increase for an offence against s920C of the Corporations Act, i.e. to 5 years imprisonment.

Table 5: Failure to comply with financial services licensee obligations

Offence	Current penalty	Proposed penalty	ASIC Comment
912D	1 year	2 years	Imposes an obligation on financial services licensees to report significant breaches of their obligations to ASIC. The Taskforce has consulted on various proposed changes to the operation of this provision, including an increased penalty for breach of the obligation: Positions Paper 1 <i>Self-reporting of contraventions by financial services and credit licensees</i> (Position 4: Increase penalties for failing to report as and when required). ASIC supports an increase in the maximum custodial penalty for individuals from 1 year to 2 years imprisonment as a more credible deterrent against failure to comply with this important reporting obligation.
991B	6 months	1 year	Imposes an obligation on licensees to give priority to clients' orders for dealings in financial products, over their own interest in dealing in the same products. The same observation may be made about breach of this obligation as is made in the positions paper about s991E(1), that it has the potential to do significant harm, and undermines the integrity of the financial services profession. ASIC supports a comparable increase in penalty.
991E(3)	6 months	1 year	Applies where a licensee is dealing on their own behalf and in this case obliges the licensee not to charge a fee in connection with the transaction. This obligation operates in conjunction with s991E(1) to ensure that licensee's dealings with clients are conducted properly. ASIC supports a comparable increase in penalty.

Offence	Current penalty	Proposed penalty	ASIC Comment
1101E	1 year	2 years	Prohibits concealing, destroying or altering records of a financial services business or that are required to be kept by a financial market or services licensee. Maintaining accurate and complete records of a financial services business is critical to the effective operation of the licensing regime and protection of clients. ASIC supports the proposed increase to the maximum custodial penalty for individuals from 1 year to 2 years imprisonment.
1101F	1 year	2 years	Prohibits engaging in conduct that results in the falsification of a book required to be kept by a market or financial services licensee. The above comments in relation to s1101E apply equally to this prohibition.
792D, 821C, 821D and 912E	6 months	2 years	Impose obligations on financial market, CS facility and financial services licensees to provide reasonable assistance to ASIC. Failure to comply with these obligations currently carries a maximum penalty for individuals of imprisonment for 6 months and/or 25 penalty units. The same observation may be made about these obligations as made by the Taskforce about s912C, that they are fundamental to the licensing regime, in particular to ensure ASIC's ability to conduct effective surveillance of licensees' compliance with their obligations. ASIC supports the proposed increase to the maximum custodial penalty for individuals to 2 years imprisonment.
821E(2)	50pu	2 years	Accompanies the obligation imposed on a CS facility licensee by s821E(1) to give ASIC an annual report on the extent to which it has complied with its obligations. Section 821E(2) requires the licensee to ensure that the annual report is accompanied by any information prescribed by the regulations. Regulation 7.3.04 prescribes this information, which includes an analysis of the extent to which the licensee considers the activities undertaken and resources used by it have resulted in full compliance with its obligations. Whereas s821E(1) carries a maximum penalty for individuals of 2 years imprisonment and/or 100 penalty units, s821E(2) carries a penalty of only 50 penalty units. ASIC supports the proposed custodial penalty for an individual of 2 years for an offence against s821E(2).
1310	5 penalty units	2 years	Prohibits obstructing or hindering ASIC in the performance or exercise of a function or power under the Corporations Act. This is currently a strict liability offence carrying a penalty of 5 penalty units by application of s1311(5) and (6). A similar offence in s240 of the Credit Act carries a maximum penalty for an individual of 2 years imprisonment and/or 100 penalty units. ASIC supports the proposed increase in the maximum custodial penalty for s1310 to 2 years imprisonment.

Offence	Current penalty	Proposed penalty	ASIC Comment
65(2) (ASIC Act)	6 months	1 year	Prohibits an occupier of premises intentionally or recklessly failing to provide all reasonable assistance to a person who enters the premises under an ASIC Act warrant. This offence currently carries a maximum penalty of 6 months imprisonment and/or 25 penalty units. ASIC supports the proposed increase, which would enhance the exercise of ASIC's search warrant powers. The offence under s65(1), of prohibiting a person from engaging in conduct that results in the obstruction or hindering of a person exercising a power under Part 3 of the ASIC Act, or executing an ASIC Act warrant, carries a maximum penalty of 2 years imprisonment and/or 100 penalty units.
66(1) (ASIC Act)	1 year	2 years	Prohibits a person from engaging in conduct that results in the obstruction or hindering of ASIC in the performance of any of its functions or powers or that result in the disruption of a hearing. This offence currently carries a maximum penalty of 1 year imprisonment and/or 50 penalty units. ASIC supports the proposed increase, which would enhance ASIC's enforcement capability. The corresponding offence under the Credit Act carries a maximum penalty of 2 years imprisonment and/or 100 penalty units.

Table 6: Failure to comply with client money obligations

Offence	Current penalty	Proposed penalty	ASIC Comment
982D	6 months	2 years	Operates in conjunction with s982B, which requires that a licensee pay money loaned from a client into a separate account, and s982C, which requires that a licensee give the client a statement setting out the terms of the loan and the manner in which the money is to be used by the licensee. Section 982D requires that the licensee only use the money in the manner set out in the statement given to the client, or as otherwise agreed in writing with the client. The maximum penalty for an offence against this section is currently 6 months imprisonment and/or 25 penalty units, compared with the penalty for an offence against s982C, which is 2 years imprisonment and/or 100 penalty units. The penalty for failure to use loan money in accordance with the statement given to the client should be increased to reflect that this obligation is just as important as the obligation to give the statement itself.

Offence	Current penalty	Proposed penalty	ASIC Comment
993C(3)	2 years	5 years	Operates in conjunction with s993B, which as referred to above and in the positions paper, obliges a licensee to pay client money into a separate account where it is taken to be held on trust for the client. Section 993C makes it an offence for the licensee to contravene a requirement in the regulations made for the purpose of s981C, which provides that the regulations may deal with such matters as the circumstances in which payment may be made out of the account, the minimum balance to be maintained in the account and how interest on the account is to be dealt with. Regulation 7.8.02 prescribes various requirements for the purpose of s981C. The same reasons as warrant an increase in the penalty for the ordinary offence under s993B(3) warrant a corresponding increase in the penalty for an ordinary offence under s993C(3). The penalty for failure to use money paid into a client account in accordance with the prescribed requirements should reflect that this obligation is just as important as the requirement to pay client money into the account itself.

Table 7: Defective disclosure to ASIC

Offence	Current penalty	Proposed penalty	ASIC Comment
64(2) (ASIC Act)	2 years	5 years	Prohibits a person giving false or misleading evidence at an ASIC hearing, the current maximum penalty for which is only 3 months imprisonment or 10 penalty units. This penalty is manifestly inadequate to deter such conduct. ASIC supports the proposed increase to 2 years imprisonment.
1308(4)	5/25pu	2 years	Prohibits a person making or authorising a statement that is false or misleading in a document lodged with ASIC or required for the purpose of the Corporations Act. This is currently only a strict liability offence carrying a penalty of 5 penalty units by application of s1311(5) and (6) of the Act. The Taskforce proposes an increase to 2 years imprisonment for an individual. ASIC supports this proposed increase. The imposition of a substantial penalty for failure to take reasonable steps to ensure the veracity of statements made in documents lodged with ASIC or required for the purpose of the Corporations Act is necessary to hold properly accountable those responsible for the preparation of such documents.
1308(8)	5/25pu	5 years	Prohibits a person knowingly making a false or misleading statement in connection with a licence application. The inconsistency between the currently penalty for this offence and the penalty for offences against s1308(2) of the Corporations Act and s225 of the Credit Act has been noted in the Taskforce's Position and Consultation Paper 3 <i>Strengthening ASIC's Licensing Powers</i> . ASIC supports the proposed increase to 5 years imprisonment for an individual, for the reasons previously noted by the Taskforce.

Offence	Current penalty	Proposed penalty	ASIC Comment
291(1) and (3) (Credit Act)	2 years	5 years	Corresponds to section 64(1) and (3) of the ASIC Act, but applies to false or misleading information given under the Credit Act. ASIC supports the same proposed increases in penalty as for sections 64(1) and (3) of the ASIC Act. Annexure B refers only to s291(1), but the same increase should apply to s291(3) as applies to s64(3) of the ASIC Act.

Annexure B: Proposed new ordinary offences based on strict liability offences

Table 8: Part 2D.5— Public information about directors and secretaries

Section	Current strict liability offence penalty	Proposed ordinary offence penalty	ASIC Comment
205G(1)	10pu and/or 3 months 50pu	240pu and/or 2 years 2400pu	Requires a listed company director to notify the market operator of their relevant interests in the company. Section 205G is an important obligation which, together with the insider trading prohibition and the continuous disclosure requirements, helps to maintain an informed market. A director's interests in their company must be disclosed to ensure that the market is fully informed.
205G(3)	10pu and/or 3 months 50pu	240pu and/or 2 years 2400pu	Requires a listed company director to notify the market operator of their relevant interests in the company within 14 days of their appointment as a director or listing of company. Timely disclosure of a director's interests is critical to the performance of the obligation under s205G(1).
205G(4)	10pu and/or 3 months 50pu	240pu and/or 2 years 2400pu	Requires a listed company director to notify market operator of relevant interests and contracts within 14 days of any change. Again, timely disclosure of a director's interests is critical to the performance of the obligation under s205G(1).

Table 9: Part 6.1— Prohibited acquisitions of relevant interests in voting shares

Section	Current strict liability offence penalty	Proposed ordinary offence penalty	ASIC Comment
606(1)	25pu and/or 6 months 125pu	600pu and/or 5 years 6000pu	Prohibits acquisition of a relevant interest in voting shares increasing a person's voting power above 20%. Section 606 is of fundamental importance to the takeovers regime as it sets the level at which 'control' is defined in the Australian market. It does this by prohibiting the acquisition by a person of more than 20% voting power in a company's shares, as well as prohibiting further increases above that 20% threshold.
606(2)	25pu and/or 6 months 125pu	600pu and/or 5 years 6000pu	Prohibits acquisition resulting in acquisition by someone else of a relevant interest in voting shares increasing their voting power above 20%. This sub-section operates in conjunction with sub-section 606(1).

Section	Current strict liability offence penalty	Proposed ordinary offence penalty	ASIC Comment
606(4)	25pu and/or 6 months 125pu	600pu and/or 5 years 6000pu	Prohibits an offer or invitation that would contravene s606(1) or (2) if accepted This sub-section operates in conjunction with sub-section 606(1).

Table 10: Chapter 6C—Information about ownership of listed companies and managed investment schemes

Section	Current strict liability offence penalty	Proposed ordinary offence penalty	ASIC Comment
671B(1)	25pu and/or 6 months 125pu	240pu and/or 2 years 2400pu	Requires a person to give information about their substantial holdings in a listed company or managed investment scheme to the company or responsible entity and relevant market operator. As with s606 above, this obligation is fundamental to the operation of the takeovers regime. The current strict liability penalty does not reflect the important of ensuring that the market is kept properly informed of substantial holdings in listed entities.

Table 11: Chapter 2M—Financial reports and audit

Section	Current strict liability offence penalty	Proposed ordinary offence penalty	ASIC Comment
286	25pu and/or 6 months 125pu	240pu and/or 2 years 2400pu	Obligation to keep correct financial records that enable true and fair financial statements to be prepared and audited. The obligation to keep proper financial records is fundamental to the financial reporting requirements in Chapter 2M. The current penalty is not an adequate deterrent against failure to comply with this obligation.
307A	50pu 250pu	240pu and/or 2 years 2400pu	Audit to be conducted in accordance with auditing standards. The current strict liability penalty does not adequately reflect the fundamental importance of maintaining the integrity of the audit function. The proposed penalty increase is that an ordinary offence be added to the strict liability offence for serious cases of wilful or reckless non-compliance.

Table 12: Part 7.8—Other provisions relating to conduct

Section	Current strict liability offence penalty	Proposed ordinary offence penalty	ASIC Comment
989CA	50pu 250pu	240pu and/or 2 years 2400pu	<p>Audit to be conducted in accordance with audit requirements.</p> <p>As for s307A, the current strict liability penalty does not adequately reflect the fundamental importance of maintaining the integrity of the audit function. The proposed penalty increase is that an ordinary offence be added to the strict liability offence for serious cases of wilful or reckless non-compliance.</p>

Annexure C: Positions paper Table 7—Proposed civil penalty provisions

Table 13: Corporations—acquisitions and disclosure of interests

Section	Why it should be a civil penalty provision
205G	<p>Section 205G is an important section which helps to maintain an informed market. A director's interest in the company they are a director of must be disclosed to ensure that the market is fully informed. Timely disclosure of a director's interest allows the market to be informed of situations where a director may put their personal interests ahead of the interests of the company.</p> <p>Despite the importance of directors complying with s205G, the available penalty for non-compliance is minimal. It is a strict liability offence carrying a maximum penalty of 10 penalty units and/or imprisonment for three months. A civil penalty would provide a further alternative enforcement option, where the circumstances of the contravention warrant substantial deterrent action, but do not perhaps justify criminal prosecution.</p>
606 671B	<p>Sections 606 and 671B are both important provisions. When ASIC considers that there has been a breach of s671B, ASIC has two possible avenues open to it, either through the Takeovers Panel or criminal prosecution.</p> <p>If criminal prosecution is pursued, a breach of s606 or s671B is a strict liability offence only, the maximum penalty for an individual being 25 penalty units and/or imprisonment for 6 months and for a corporation 125 penalty units.</p> <p>The Takeovers Panel has relatively little power when it finds that someone has breached s606 or s671B.</p> <ul style="list-style-type: none"> • When the Takeovers Panel finds that someone has breached s606, the primary order usually made by the Panel is for a divestment of the shares above 20%. The proceeds of this divestment go to the offending shareholder, and as such, in some cases the offender makes a profit from their offending behaviour. • Where the Takeovers Panel has to consider a failure to lodge substantial holding information, or to lodge sufficient information regarding a substantial holding, the consequences of being found by the Panel to have contravened s671B can be minimal, and consequently the deterrence effect is low. This result is a direct function of the fact that the Takeovers Panel is precluded from making punitive orders <p>Accordingly, a civil penalty would provide a further alternative enforcement option that would have a greater deterrent effect in circumstances where a criminal prosecution may not be justified.</p>

Table 14: Financial services and markets—unlicensed conduct

Section	Why it should be a civil penalty provision
911B 911C	<p>The Taskforce's preliminary position is that s911A should be a civil penalty provision. On the basis that s911B and s911C are also prohibitions against unlicensed conduct, ASIC submits that they should also be civil penalty provisions.</p>

Section	Why it should be a civil penalty provision
791B	If these provisions were civil penalty provisions, it would provide more flexibility in enforcement options. This would include where an entity through negligence or inadvertence conducts business that constitutes operating a financial market, CS facility or derivative trade repository in this jurisdiction without a licence, exemption or (in the case of trade repositories) a prescription that covers the operation of those facilities. In those circumstances it may be difficult to establish the elements of a criminal offence and a criminal sanction may in any event be disproportionate to the misconduct. An adequate deterrent is nevertheless required to avoid the potential risks to consumers – and in some cases potential risks to financial system stability – of persons operating market infrastructure without a licence to do so.
820B	
907A	

Table 15: Financial services and markets—disclosure

Section	Why it should be a civil penalty provision
941A	The obligation to provide a FSG in s941A and s941B is analogous to the obligation on credit licensees to provide a credit guide under s113, 126, 127 and 136 of the Credit Act. Contravention of those sections is a strict liability offence carrying a maximum penalty for an individual of 50 penalty units. They are also civil penalty provisions, with a maximum penalty of 2000 penalty units. In ASIC's submission, it follows that s941A and 941B should therefore be civil penalty provisions.
941B	
946A	The Taskforce's preliminary provision is that s1012A, 1012B and 1012C should be civil penalty provisions. These provisions concern financial services disclosure. ASIC submits that civil penalties should also be applied to s946A, which is another disclosure obligation, namely, the obligation to give a client a statement of advice.
952E	<p>An offence against sections 952E(1) or (3) carries a maximum penalty for an individual of 100 penalty units or imprisonment for 2 years or both. The offences created by this section are to be contrasted with those created by s952D, where the offending licensee or authorised representative knows the disclosure document given to another person is defective. A person can commit an offence under s952E without knowing the disclosure document is defective, but it is a defence if they took reasonable steps to ensure the disclosure document would not be defective. It is a further defence for an authorised representative if the disclosure document or defective information in it was provided to them by their licensee.⁴⁶</p> <p>If s952E were a civil penalty provision, this would allow ASIC greater flexibility in responding to the particular circumstances in which a defective disclosure document may have been distributed, including where this is due to negligence or oversight on the part of a licensee or its representatives. Imposition of a civil penalty could act as a significant deterrent to such misconduct.</p>
1021E	Section 1021E makes it an offence for a person to prepare a defective disclosure document, or statement giving the document or statement (whether or not known to be defective). This is currently a criminal offence with a maximum penalty of 100 penalty units or imprisonment for two years, or both. ASIC submits that the imposition of a civil penalty could act as a significant deterrent to such misconduct.
1017BA	Requires trustees of regulated superannuation funds to make their product dashboard publicly available.

⁴⁶ Section 952E(5) and (6).

Table 16: Credit Code obligations

Section	Why it should be a civil penalty provision
13(6) 155 156(1) 172(6) 174(3)	<p>Each of these sections is a criminal penalty provision. The maximum penalties are set out below:</p> <ul style="list-style-type: none"> • s 13(6): 100 penalty units, or two years imprisonment, or both • s 155: 100 penalty units • s 156(1): 100 penalty units • s 172(6): 100 penalty units, or two years imprisonment, or both • s 174(3): 100 penalty units • s 179V: 100 penalty units <p>ASIC submits that if these were civil penalty provisions, they would provide a further alternative enforcement option, where the circumstances of the contravention warrant substantial deterrent action, but do not perhaps justify criminal prosecution.</p>

Table 17: Compliance with ASIC requirements

Section	Why it should be a civil penalty provision
912C(3) Corps Act 63(1) ASIC Act 290 NCCP	<p>Each of these provisions concern requirements to comply with ASIC notices or directions. Each provision is a criminal penalty provision, with the following maximum penalties:</p> <ul style="list-style-type: none"> • s 912C Corporations Act: 25 penalty units, or 6 months imprisonment, or both • s 63(1) ASIC Act: 100 penalty units, or two years imprisonment, or both • s 290 NCCP Act: 10 penalty units, or three months imprisonment, or both <p>ASIC submits that if these were civil penalty provisions, they would provide a further alternative enforcement option, where the circumstances of the contravention warrant substantial deterrent action, but do not perhaps justify criminal prosecution.</p>

Annexure D: Proposed additional civil penalty provisions

Table 18: Corporate obligations with respect to financial statements, conducting audits and provision of false or misleading information relating to the affairs of a corporation

Section	Proposed civil penalty
286	Obligation to keep correct financial records that enable true and fair financial statements to be prepared and audited
307A	Audit to be conducted in accordance with auditing standards
1309(2)	Officer, employee, etc. giving false or misleading information relating to affairs of company to directors etc., without taking reasonable steps to ensure not false or misleading

Table 19: Entering into agreements or transactions to avoid employee entitlements

Section	Proposed civil penalty
596AB	Entering into agreements or transactions to avoid employee entitlements

Table 20: Prohibition against offering securities in a body that does not exist

Section	Proposed civil penalty
726	Prohibition against offering securities in a body that does not exist

Table 21: Unlicensed conduct in respect of managed investment schemes, conduct in breach of banning orders and authorisations and sub-authorisations of authorised representatives of AFS licensees

Section	Proposed civil penalty
601ED(5)	Need for managed investment scheme to be registered
916A(3A)	Prohibition against void authorisation
916B(2A)	Prohibition against void sub-authorisation
916C(3)	Prohibition against void authorisation as representative of two (2) or more licensees
916D(2A)	Prohibition against void authorisation of another licensee
920C(2)	Engaging in conduct in breach of a banning order
1020A(1)	Prohibition against offers relating to managed investment schemes that need to be registered

Table 22: Specific financial markets licensee obligations in Part 7.2 to Part 7.5A of the Corporations Act

Section	Proposed civil penalty
792B(2)	Obligation to notify ASIC of certain matters
792B(3)	Obligation to notify ASIC of matters concerning market participant
792B(4)	Obligation to notify ASIC of matters concerning overseas market
792B(5)	Obligation to notify ASIC of change of voting power in licensee
792C(1)	Obligation to give ASIC information about a listed disclosing entity
792E	Obligation to give ASIC access to a market facility
792F(1)	Obligation to provide an annual report and audit report
792F(2)	Obligation to ensure that annual report contains information and statements prescribed by regulations
792F(3)	Obligation to ensure annual report is accompanied by any audit report required by Minister
792G(2)	Obligation to notify people about termination of the market's clearing and settlement arrangements for certain categories of transactions
792I	Obligation to make information about compensation arrangements publicly available (if required to have compensation arrangements)
793D(3)	For domestic licensees, obligation to notify ASIC of change in operating rules
794B(3)	Obligation to comply with Minister's direction to provide a special report
794D(3)	Obligation to comply with an ASIC direction
794E(2)	For related CS facility operators, obligation to comply with an ASIC direction (ASIC may issue a direction to such CS facility operators if it has already issued a direction to the market operator)
798C(3)	For listing entities and market licensees, obligation to comply with arrangements that are required by ASIC to address conflicts of interest or to ensure the integrity of trading in listed products
798C(6)	For listing entities and market licensees, obligation to comply with arrangements that are required by ASIC to address conflicts of interest or to ensure the integrity of trading in the listed products
798D(4)	For self-listed entities and related bodies corporate, obligation to comply with the conditions of any exemptions or modifications issued by ASIC
798DA(4)	Participants must comply with requirements imposed by ASIC when participating in markets that are in competition
821B(2)	Obligation to notify ASIC of certain matters

Section	Proposed civil penalty
821B(3)	Obligation of overseas CS facility to notify ASIC of certain overseas matters
821B(4)	Obligation to notify ASIC of changes of office and voting power in CS facility licensee
821BA(1)	Obligation to notify the Reserve Bank of certain matters
821E(1)	Obligation to provide an annual report and audit report
821E(2)	Obligation to provide prescribed information or statements along with the annual report
822D	Obligation to notify the Minister before changing operating rules
823B	Obligation to comply with a Minister's direction to provide a special report
823D(5)	Obligation to comply with ASIC direction protecting dealings in financial products and ensuring fair and effective provision of services by CS facilities
823E(3)	Obligation to comply with ASIC direction for reduction of systemic risk
850C	Prohibition on share acquisition that would result in unacceptable control situation in relation to a widely held market body
851D(8)	Obligation to notify ASIC of any breach of conditions on approval to exceed a 15% limit on shareholding in widely held market body
852B(2)	Obligation to comply with the Minister's direction to cease having voting power that exceeds the 15% limit
853F(2)	Obligation on disqualified individual to take reasonable steps to ensure that ceases to be involved in licensee
854A(4)	Prohibition against making or keeping record relating to voting power in a widely held market body or disqualified individuals that is false or misleading
892B(1)	Obligation to keep regulated funds in separate account
892B(4)	Obligation to keep other funds in separate account
892H(1)	Obligation to keep written financial records
892H(3)	Obligation to appoint auditor to audit account of regulated fund
892K	Obligation to comply with the Minister's direction to provide a special risk assessment report
904B(1)	Obligation to use or disclose derivative trade data for permitted purposes
904B(6)	Obligation to comply with request from ASIC and other bodies for derivative trade data
904C(1)	Obligation to notify ASIC of inability to meet general obligations
904C(3)	Obligation to notify ASIC of changes to directors, secretaries or senior managers
904D(2)	Obligation to provide reasonable assistance to ASIC, APRA and the Reserve Bank

Section	Proposed civil penalty
904E	Obligation to give ASIC access to trade repository facilities
904G	Obligation to comply with ASIC direction to promote compliance with obligations
904H(3)	Obligation to comply with ASIC direction requiring a special report
904K(4)	Obligation to comply with ASIC's direction relating to derivative trade data, if the entity ceases to be licensed

Table 23: Specific AFS licensee obligations in Part 7.6 to Part 7.12 of the Corporations Act

Section	Proposed civil penalty
912F	Obligation to cite AFS licence number in documents
916F(1)	Obligation to lodge written notice of authorisation of representative with ASIC
916F(2)	Obligation to give written notice to licensee of sub-authorisation
916F(3)	Obligation to lodge written notice of change in authorisation of representative or revocation with ASIC
916G(2)	Restriction on use of information given to licensee by ASIC
916G(3)	Restriction on use of information by person to whom given under s916G(2)
923A(1)	Prohibition of use of restricted word or expression in financial services business
923B(1)	Prohibition on use of restricted word or expression not authorised by licence conditions
988A(1)	Obligation of licensee to keep financial records
989B(1)	Obligation of licensee to prepare financial statements
989B(2)	Obligation of licensee to lodge auditor's report with ASIC
989B(3)	Obligation of licensee to lodge financial statements with ASIC
989CA	Audit to be conducted in accordance with audit requirements
990B(1)	Obligation to appoint auditor within one month of holding licence
990B(2)	Obligation to appoint auditor within 14 days of vacancy in office
990F(a)	Obligation to remove auditor who becomes ineligible to act
990I(3)	Failure to allow auditor access to financial records
990K(1)	Obligation of auditor to report certain matters
991B(2)	Failure to give priority to clients orders

Section	Proposed civil penalty
991E(1)	Obligation of licensee in dealings with non-licensees to disclose that acting on own behalf
991E(3)	Obligation of licensee in relation to dealings on own behalf with non-licensees – obligation not to charge fee
1101G	Obligation to take reasonable precautions against falsification of records

Table 24: Financial services disclosure relating to document provided to and by authorised representatives of AFS licensees

Section	Proposed civil penalty
952G(2)	Offence of licensee providing disclosure material to an Authorised Representative (AR) (whether or not known to be defective)— providing defective disclosure material where defect unrelated to representative also being the AR of another licensee
952G(4)	Offence of licensee providing disclosure material to an AR (whether or not known to be defective) – providing information causing defect in disclosure document or statement
952G(6)	Offence of licensee providing disclosure material to an AR (whether or not known to be defective) – where insufficient information provided causes defective document or statements
952H	Offence of licensee failing to ensure AR gives disclosure documents or statements as required

Table 25: Additional financial services client money obligations

Section	Proposed civil penalty
982C(1)	Licensee to give client statement setting out terms of loan etc.—obligation to give client a statement
982C(2)	Licensee to give client statement setting out terms of loan etc.—obligation to keep money in account until receive acknowledgement of receipt of statement
982D	Obligation to only use the money for the purpose set out in the s982C(1) statement or as otherwise agreed in writing with the client
984B(1)	Obligation to deal with client property only in accordance with requirements in the regulations, or terms and conditions on which or instructions given by client.
993D(3)	Obligation of licensee to pay loan money into an account
1021O(3)	Offences of issuer or seller of financial product failing to pay money into an account as required— ordinary offence

Table 26: Additional financial services disclosure obligations

Section	Proposed civil penalty
1016D(1)	Condition about ability to trade on a market must be fulfilled before issue or sale – Conditions of issue or sale
1016D(2)(d)	Condition about ability to trade on a market must be fulfilled before issue or sale issue or transfer void if quotation condition not fulfilled
1017B(1)	Ongoing disclosure of material changes and significant events – issuer to notify holders of changes
1017BB(1)	Trustees of registrable superannuation entities - obligation to make superannuation investment information publicly available
1017E(3)	Dealing with money received for financial product before the product is issued- Conditions for withdrawing money from account
1017E(4)	Dealing with money received for financial product before the product is issued - Obligations of product provider after withdrawing
1017G(1)	Certain product issuers and regulated persons must meet appropriate dispute resolution requirements – where dispute resolution system required
1020AI(5)	Requirement to give information statements for CGS depository interest if recommending acquisition of interest – Ordinary offence of failing to give statement
1020AI(7)	Requirement to give information statements for CGS depository interest if recommending acquisition of interest – Offence of failing to ensure AR gives statement
1020AJ	Information statement given must be up to date
1021C(3)	Offence of failing to give etc. a disclosure document or statement – Ordinary offence
1021E(1)	Offence of preparer of defective disclosure document or statement giving the document or statement (whether or not known to be defective) – preparing and giving defective disclosure
1021FA(2)	Paragraph 1012G(3)(a) obligation – offences relating to communication of information – Offence whether or not information known to be defective
1021FB(3)	Paragraph 1012G(3)(a) obligation offences relating to information provided by product issuer for communication by another person – Product issuer provides information that results in information required by paragraph 1012G(3)(a) being defective
1021FB(6)	Paragraph 1012G(3)(a) obligation offences relating to information provided by product issuer for communication by another person – Product issuer does not provide all the required information
1021G	Offence of financial services licensee failing to ensure AR gives etc. disclosure documents or statements as required
1021L(1)	Offences of giving, or failing to withdraw, consent to inclusion of defective statement
1021NA(3)	Trustees of regulated superannuation funds—information on product dashboard misleading or deceptive

Section	Proposed civil penalty
1021NB(3)	Offences relating to obligation to make superannuation investment information publicly available – Offence whether or not information known to be defective
1021NC(4)	Offences relating to obligations under s1017BC, 1017BD and 1017BE – information provided defective

Table 27: Failure to comply with ASIC requirements

Section	Proposed civil penalty
792D(1)	Obligation to provide reasonable assistance to ASIC
821C(1)	Obligation to provide reasonable assistance to ASIC
821C(3)	Obligation to provide reasonable assistance to the Reserve Bank
821D	Obligation to give ASIC access to a CS facility
912E(1)	Obligation to give reasonable assistance to ASIC
ASIC Act 66(1)	Contempt of ASIC—person must not engage in conduct that results in obstruction of ASIC in exercise of functions/ powers or disruption of a hearing