



23 November 2017

ASIC Enforcement Review

Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email to ASICenforcementreview@treasury.gov.au

Re: ASIC Enforcement Review - Strengthening Penalties for Corporate and Financial Sector Misconduct

Thank you for the opportunity to make a submission in response to the Taskforce's recommendations around enhancing the Australian Securities and Investments Commission's (ASIC) penalty regime related to breaches of the Corporations Act, ASIC Act, and Credit Act.

It is acknowledged that regulatory authorities need to have an appropriate set of enforcement tools and penalties to provide an effective deterrent to misconduct, to penalise bad behaviour and to instil public confidence in the regulatory regime.

Extending the range of penalty options (criminal, civil, infringement notices, disbursement of profits) can provide ASIC with greater flexibility to apply different penalties to match the seriousness of the particular offences committed. However, new and complex arrangements should be accompanied by clear guidance to firms and the public on when and how the different penalties will be applied.

Having significant maximum criminal and civil penalties available to address the most serious offences is an important feature of any regime. The level needs to not only send a strong message to the industry and general public but also be seen as a credible and reasonable penalty in the context of other criminal offences.

It is difficult to assess the impact that the Taskforce's proposed increases in criminal and civil penalty provisions will have on behaviour. Although there is a case for increasing the financial penalties where they have not been updated for a number of years.

It would be helpful to understand if there is analysis to support the view that the existing penalties are insufficient to provide an effective deterrent. This might include, for example, data on the extent to which the authorities have asked the Court to impose the maximum existing penalty when prosecuting different types of corporate or financial misconduct and the actual penalties that were subsequently imposed by the Court. This would provide an indication if the existing maximum penalties have unnecessarily restricted ASIC's enforcement options.

Without such information it is difficult to form a clear view on the need for the higher maximum criminal and civil penalties proposed. ASX does support some of the other proposals contained in the paper, including:

- introducing an ordinary offence to complement a number of strict and absolute liability offences;
- making disgorgement remedies and infringement notices available to a range of civil penalty proceedings; and
- ensuring any compensatory penalties to be paid to those affected by breaches of the Corporations Act receive priority over civil pecuniary penalties where the firm has insufficient resources to pay both financial claims.

ASX notes the proposal to extend the scope of the civil penalty regime to apply to a broader range of circumstances, including breaches of key licence obligations, where the misconduct is sufficiently serious to warrant a pecuniary penalty but falls short of criminal behaviour. This seems to be a reasonable addition to ASIC's regulatory toolkit, particularly for non-compliance with general licence obligations.

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It is acknowledged that the civil penalties will apply to a wide range of ASIC administered licence holders (AFSL, market licences, CS facilities, credit providers etc) and need to be flexible to accommodate the different types of services provided and potential offences.

For example, the tiered civil penalty regime, ranging from infringement notices through to dollar-based penalties and profit or turnover based penalties makes sense at a conceptual level. We understand that this approach is designed to avoid unacceptable situations where the maximum pecuniary penalties can be lower than the benefits generated by the misconduct.

However, there would be benefit, given the wide range of potential penalties, in having clear guidance on how these different penalties would be applied in practice, particularly as ASIC's licensing regime covers a wide variety of activities. This would include how breaches of general licence obligations would be treated where there is some overlap with more specific regulations (eg ASIC Market Integrity Rules). It would also be helpful to have clear guidance on the determination and application of "turnover" based penalties.

This would provide more clarity about the potential penalties associated with particular breaches, with reduced uncertainty and potentially positive behavioural outcomes.

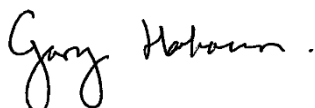
For example, financial market infrastructure service providers are required to hold licences to conduct listing, trading, clearing and settlement activities. Licence holders are subject to annual assessments of their compliance with their general licence obligations.

This rigorous review process provides an opportunity to identify potential areas of concern in advance of any potential breach of a licence obligation. In cases where shortcomings are identified there are processes available for ASIC to recommend remedial actions or, if necessary, to direct the licence holder to undertake certain actions. This provides an effective tool to correct deficiencies, short of licence suspension or cancellation.

While having the option of imposing a civil pecuniary penalty in the event of a serious breach of a licence holder's general licence obligation is a sensible addition to ASIC's penalty regime, the existing intensive regulatory oversight should have the effect that any breaches would be more likely to be at the lower end of the range of available penalties.

ASX would be happy to participate in any industry level discussions with ASIC to work through some of the issues to provide a greater degree of clarity about how the new penalty provisions will work. This would include identifying the circumstances when the civil penalty provisions would be applied (i.e. the nature and seriousness of the breach) and how the penalties would be determined.

Kind regards



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