

CLIFFORD CHANCE

LEVEL 7, 190 ST GEORGES TERRACE
PERTH, WA 6000
AUSTRALIA

TEL +618 9262 5555
FAX +618 9262 5522

www.cliffordchance.com

By Email:
ASICenforcementreview@Treasury.gov.au

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

Direct Dial: +61 8 9262 5555
E-mail: Jenni.Hill@cliffordchance.com
Kirsten.Scott@cliffordchance.com
Lara.Gotti@cliffordchance.com

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Dear Sir/Madam

ASIC Enforcement Review - Positions Paper 7 - Strengthening Penalties for Corporate and Financial Sector Misconduct

On 19 October 2016, the Australian Securities and Investments Commission (**ASIC**) Enforcement Review Taskforce was announced. The Taskforce was established to review the existing enforcement regime and identify areas where ASIC may benefit from a strengthening of legislative powers.

On 23 October 2017, Positions Paper 7 – Strengthening Penalties for Corporate and Financial Sector Misconduct (**the Positions Paper**) was released for public comment, identifying the Taskforce's 16 positions as to legislative reform.

Clifford Chance welcomes the opportunity to comment on the Positions Paper.

Clifford Chance

We are one of the world's pre-eminent law firms, with more than 3,300 lawyers across five continents, led by a single integrated partnership. In Australia, we have offices in Perth and Sydney.

We have extensive experience working with clients globally regarding corporate compliance and have represented numerous clients in Australia in their interactions with regulators, in particular ASIC.

Our views contained in this letter are confined to the Australian commercial and jurisprudential context and do not constitute legal advice.

We do not propose to address each of the 16 positions the Taskforce has taken in the Positions Paper. Rather we have addressed specific areas relevant to some of the positions taken by the Taskforce.

General comments regarding the proposed increase in penalties

Much of the Positions Paper outlines proposed increases in financial penalties or maximum terms of imprisonment. In considering any increase in penalties, consideration ought to be given to the period of time generally taken for investigations to be completed in Australia and for criminal briefs to then be assessed by the Commonwealth Director of Public Prosecutions. It is not unusual to see complex white collar criminal trials take place between seven to ten years after the alleged wrongdoing. Over this period, it is not unusual for ASIC to make a number of public statements as to the fact of its investigation (in matters of significant public interest) or the progress of the matter through criminal courts. While the long process does not always result in a criminal conviction or financial settlement, corrective media is rarely issued.

Whilst corporate crime must be addressed, for general and personal deterrence to have an effect, punishment must be both relevant and responsive. Where an accused faces a criminal trial so long after the alleged wrong-doing, deterrence is often difficult to quantify. Corporate and financial misconduct offences, by their nature, are generally alleged against professional individuals, with multiple business ventures, significant standing in the business community, and no previous convictions. For this reason, media attention can have a devastating effect on an individual's reputation. The involvement of business associates in any investigation impacts working opportunities and relationships.

In our submission, any increase in penalties, whilst maintaining the same level of investigatory and prosecution resources, and also resources to proactively engage with the regulated population (e.g. providing guidance, considering feedback, etc), is unsatisfactory and is unlikely to achieve the desired effect. Our position is consistent with submissions we have made to Treasury on other regulatory reforms, including recently in relation to the Banking Executive Accountability Regime.

The Taskforce's positions in increasing penalties for a significant number of provisions ought to only be considered if accompanied by an increase in the efficiency in which proceedings (criminal or civil) are brought against a defendant.

Comments regarding strict and absolute liability offences (*Positions 5, 6, 7 and 8*)

Clifford Chance welcomes the proposal to efficiently deal with matters of strict and absolute liability. Financial penalties are a sufficient and appropriate penalty in circumstances where fault elements do not need to be proven. In our view, it is appropriate to remove imprisonment as a potential sanction.

The introduction of penalty notices for all strict and absolute liability offences appears to be a more efficient and cost effective manner of dealing with minor offences, on a no admissions basis. However, we submit that the Taskforce's proposal that penalty notices be issued for up to half the maximum pecuniary penalty is too high for what are inadvertent breaches of the law. In our view, the maximum penalty should be consistent with the Attorney-General's Department Guide, which states that penalty type notices should be set at one-fifth of the maximum pecuniary penalty of the underlying offence. There is no sufficient reason to deviate from this policy.

Comments regarding *Position 9 – maximum civil penalty amounts in ASIC-administered legislation should be increased*

We reiterate our submission above regarding the need for improved timeliness.

The Taskforce proposes that a penalty of 10% of annual turnover be added to the options available to courts as an alternative to a penalty calculated by reference penalty units or tied to the benefit obtained from the offending conduct. In our submission, this alternative should only be available where calculation of the benefit from the offending conduct is not possible. Penalties should be linked to the offending behaviour as closely as possible. Further, in calculating the annual turnover, this should be limited to the turnover of the particular business unit that was involved in the conduct and carried on in Australia.¹

We support the proposal that any changes to civil penalties be tied to penalty units and not to set figures. As noted in the Positions Paper, this will reduce the need for further legislation if penalties become out of touch with inflation and/or community expectations.

¹ The definitions of "annual turnover" in the *Competition and Consumer Act 2010* (Cth) and *Corporations Act 2001* (Cth) are alike and this was the interpretation given in the recent case of *ACCC v Yazaki Corporation (No 3)* [2017] FCA 465. This case is currently subject to appeal.

Comments regarding Position 10 – Disgorgement remedies should be available in civil penalty proceedings brought by ASIC under the Corporations, Credit and ASIC Acts

Clifford Chance supports the proposal that disgorgement remedies form part of the penalty regime. This approach is consistent with the proceeds of crime legislation which is already available in criminal proceedings. However, disgorgement should not be an additional penalty to compensatory penalties. To do so, would, in our view, equate to double jeopardy.

We support the proposal that the courts determine the appropriate penalty in the circumstances of the case and the recipient of any funds to be paid. In certain circumstances, financial penalties ought to be directed to funds to the compensation of victims. This approach is consistent with the ASIC's current approach in enforceable undertakings.

In relation to compensation specifically mentioned in Position 11, any direction as to the use of funds ought to be a matter for the courts to decide on a case by case basis. Any order must be considered in the circumstances of the case, taking into account the impact of any potential order on creditors or employees of the company.

Comments regarding infringement notices (Positions 15 and 16)

In our submission, any proposals which increase efficiency in the way ASIC handles enforcement matters are appropriate. Infringement notices allow for matters to be dealt with expeditiously where an individual or corporate seeks to admit low level breaches of the legislation. The process by which an infringement notice is issued and the matters resolved in a notice provides corporate and individuals with a significant degree of certainty. Avenues for challenging ASIC's position in relation to failures to comply with legislative requirements should remain available to parties.

Thank you for the opportunity to comment on these significant proposed developments.

If you have any questions in relation to our submission, please contact Jenni Hill, Partner, Angela Pearsall, Partner, Kirsten Scott, Counsel, Liam Hennessey, Senior Associate or Lara Gotti, Associate.

Yours faithfully



Clifford Chance