Joint Submission –

Position and Consultation Paper 7: Strengthening Penalties for Corporate and Financial Sector Misconduct

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Background Information

This submission is made on behalf of the Financiers Association of Australia ("FAA") and Min-IT Software clients.

The Financiers Association of Australia ("FAA") and Min-it Software ("Min-IT") welcomes the opportunity to make this submission on the Government's draft National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2017.

The FAA, having been established since the 1930's, is an organisation for individuals and companies involved in the fields of finance and credit provision. The FAA's members are either non-ADI credit providers, providing loans up to $5,000 over terms of up to 2 years, mortgage financiers or business financiers.

Aside from the software produced in-house, specifically by or for franchised organisations, Min-IT Software is a leading loan management software supplier to the micro-lending sector of the Australian market. Additionally, it has a number of clients providing motor vehicle finance as well business loans and consumer leases.

The vast majority of Min-IT's clients are not affiliated with any industry association.

We thank Treasury for providing the slight extension of time that has allowed us to make this submission but make the comment the seriousness of the implications of this consultation are wide-ranging and the amount of time

allowed to make submissions is grossly inadequate. We are very concerned that we may have missed some unintended consequences.

Introduction

Having read the proposed strengthening of penalties paper as ASIC is suggesting occur, we are left with an overwhelming opinion that ASIC wants to reduce the number of operators in the industry by frightening off any new entrant and penalising those already in the industry. These new ASIC powers give no encouragement whatsoever to anyone wanting to grow their business. The increased provisions are clearly aimed at the larger end of the corporate scale and there are no concessions for reduced scale.

This line of thinking is totally in keeping with what the former Government's Minister for Financial Services and Superannuation, the Hon. Bill Shorten, when he said, back in 2012, that he wanted to see no more than a dozen or so credit providers operating in the marketplace.

As stated in the Background heading, our members and clients are generally small to medium sized credit providers and lessors with some of Min-IT Software clients being motor vehicle financiers and business loan lenders. According to the Minister's Media Statement [1] as to the composition of the Taskforce Review members, there was not one representative member from anyone in any financial industry sector. We regard this as a serious oversight.

The Taskforce does not appear to have examined ASIC's record of either choosing not to or failing to take action against insurers, ACL and AFSL holders by using its already widespread powers but simply looked at what additional powers it argues it needs. ASIC can already, for example, vary the terms of an ACL or AFSL, cancel the licence and apply some direction orders. Furthermore, in light of Taskforce

[1] O'Dwyer, Kelly, 2016. ASIC Enforcement Review Taskforce. .Available online http://www.kellyodwyer.com.au/asic-enforcement-review-taskforce/ viewed 19 November 2017.

Paper 8 where we have been asked to submit comments on the use of direction orders, we note these increased penalties are to be used as part of other actions available to ASIC. This is of some concern as we have stated in response to Paper 8 that it becomes easier for the ability of the regulator to bully an entity into submission simply because, although possibly legal, the regulator doesn't like what the entity is doing.

Whilst Paper 7 does contain some analysis tables, we could find not one specifically relating to non-compliance for the provision of credit contracts and consumer leases which are regulated under the National Consumer Credit Protection Act 2009 ("NCCP"), the National Credit Code ("NCC") and the National Consumer Credit Protection Regulations 2010 ("NCCP Regulations"). We therefore question how big an issue this really is. Is this simply a case of the regulator seeking more powers? When it comes to taking action against credit providers operating in the Small Amount Credit Contract ("SACC") and Medium Amount Credit Contract ("MACC") sectors, we have witnessed what can only be described as a three-tier regulatory regime. Anyone found to have dealt with indigenous people have been dealt with in the harshest of manners followed closely by those that are not subsidiaries of or owned by overseas-owned entities or large public companies.

In our view, until ASIC can demonstrate it can use its current powers effectively and act in a more timely and consistent fashion, these additional powers should not be implemented.

One point that does appear to have been overlooked by the Taskforce members is the effect on industry contributing to ASIC's running costs. Industry has yet to feel the effects of this impost and when looking at other overseas regimes, we are

unaware of any other jurisdiction requiring this type of payment. Many in industry are likely to regard the new levy as a further penalty of doing business anyway.

Just as motorists view the location of speed cameras in no crash zones as being purely for revenue raising, some of these measures appear to be in the same vein.

Finally, as we note in our response to Position 15, Treasury needs to remember knowledge is only gained when mistakes occur. Business owners should not be penalised for every one they make. Potential business owners are likely to assess the risk of doing business at all is too great if they are to be punished continuously. Ultimately, that would mean less jobs all around. Having the ability to use a big stick doesn't necessarily mean it should ever be used. In many circumstances, having had an error of ways pointed out, benevolence may be a kinder teacher.

Position 1:

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

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.

Answers to Questions 1 to 2

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

From what our own membership and client base advise, we believe the fear of being caught and any publicity arising from it is the greatest deterrent. Whilst the size of the penalty undoubtedly may have some impact, our members and clients do actually want to be compliant. As a generalisation, they don't seek to engage in conduct that would attract any attention from the regulator.

From our anecdotal evidence, it is only those that are prepared to take the risks involved when engaging in non-compliant conduct that have a flagrant disregard for both the law and the penalties involved. To date, we have seen little evidence of ASIC being willing to pursue criminal charges and so question whether increasing these at all will have any effect.

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

We are opposed to this. A Court will assess the fact s and the severity of the case and apply what it considers a suitable penalty in all the circumstances. The regulator should be required to do the same.

We would also take this opportunity of reminding Treasury that Legal Aid Victoria made a submission last year to the Victorian Sentencing Advisory Council's review and advocated that "[r]etaining judges' discretion to determine

sentences for serious crimes remains the best way to ensure fairness, consistency and public confidence in sentencing".[2]

Position 3:

The maximum penalty for a breach of section 184 should be increased to reflect the seriousness of the offence.

Answer to Question 3

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

We will make no comment on this.

Position 4:

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

Answer to Question 4

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

Although the High Court has approved the *Peters* test as its preferred test, it has created a complicated concept of dishonesty according to Alex Steel. In his

[2] Victoria Legal Aid, 2016. *Judicial discretion, not mandatory sentences, the key to fair sentencing: read our submission*. Available online https://www.legalaid.vic.gov.au/about-us/news/judicial-discretion-not-mandatory-sentences-key-to-fair-sentencing-read-our-submission viewed 19 November 2017.

article “Describing Dishonest Means: The implications of seeing “dishonesty” as a course of conduct or mental element and the parallels with indecency”[3], Steel states:

> “[i]f one approaches dishonesty as a fundamentally moral concept, it seems inescapable that the knowledge, beliefs and intentions of the accused are fundamental to the concept. It seems implausible that one can be unknowingly immoral. This is the approach that underlies the English version of dishonesty. The moral standard is set by the community, but one can only be immoral if one is aware that one is acting in breach of that standard.
>
> By contrast, if one describes dishonesty as failure to follow rules of behaviour, then it is possible to see dishonesty as an observable behaviour, and an accused can unknowingly act dishonestly.
>
> Under the High Court’s approach to dishonesty in *Peters,* there is a failure to choose between these two conceptions…. In so doing, it creates an offence, the physical elements of which are only determined after the event, and which, in order to constitute the external physical elements of the crime, rely on inferences as to the offender’s state of mind.”

For these reasons, we do not agree this test should be applied.

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[3] Steel, A., 2010. Adelaide Law Review. *Describing Dishonest Means: The implications of seeing “dishonesty” as a course of conduct or mental element and the parallels with indecency*. Available online http://www.austlii.edu.au/au/journals/AdelLawRw/2010/1.pdf viewed 20 November 2017

Position 5:

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

We have always been of the opinion that strict liability offences should not attract any term of imprisonment but paragraphs 14 and 15 suggest the Taskforce wants to retain the ability to imprison for certain classes of offences to protect market integrity. There is some ambiguity in how this will occur but presume the intent is to apply this purely to absolute rather than strict liability offences.

We note that the Paper 7 only makes mention of the number of strict liability offences contained in the Corporations Act. It is silent as to the number of strict liability offences currently contained in the Credit Act and omits any reference to the additional 9 proposed in the draft NCCP Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2017 ("the draft Bill"). Neither the NCCP nor the new draft Bill contains any reference to an absolute liability offence, merely strict liability offences.

In principle, we have no issue with this, providing that most current strict liability offences have any criminal offence provisions removed or offer, in the alternative, as suggested by Position 6, the strict liability offence would become an absolute liability offence for which no defence is available and the creation of a new "ordinary offence" would presumably carry only a civil penalty.

Position 6:

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

We agree with the Taskforce at paragraph 13 that creating "a strict or absolute liability offence and an ordinary offence for the same conduct allows a tailored and flexible response to the conduct, depending on the circumstances in which the offence is committed."

Paragraphs 14 and 15 suggest that for certain offences, the Taskforce want to retain the ability to imprison for certain classes of offences. These are those listed in Annexure C for breaches or the Corporations Act. As no mention is made to any penalty being proposed for a breach of the Credit Act, we will not comment on further as to whether the penalties stated in Annexure C are appropriate or otherwise.

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.

We are of the opinion that just as a Court has discretion as to the size of the penalty it may deem fit in all the circumstances, the application of a minimum penalty size is inappropriate.

Position 8:

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

We note that this position applies solely to strict liability offences under the Corporations Act and does not extend as far as the Credit or ASIC Acts. We will therefore make no comment other than to say that we disagree with the Taskforce's proposal at paragraph 22 (on page 34) to issue penalty notices for half the maximum pecuniary penalty of the strict liability offence. There is no guarantee a Court would impose the maximum penalty. This kind of tactic allows ASIC to bully the offender into submission, particularly when the regulator still has the ability to pursue other measures for contravention of the underlying offence and seek higher penalties.

Answers to Questions 5 to 8

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

Yes, unquestionably but we can also see that there may be some offences where it would be desirable to retain a term of imprisonment. As a general proposition, we believe the number of offences that should carry any term of imprisonment will be very few.

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?

We are of the belief that any minimum penalty limits a Court's sentencing options just as applying a mandatory one does. For that reason, we do not agree with this option.

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?

As stated above, we can see the need for this provision but will not make comment as it does not affect our members or clients.

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

No comment as it does not affect our members or clients.

Position 9:

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

It is disappointing that Paper 7 contains no academic research that shows whether or not the current penalty provisions are effective and offer the right amount of deterrence. On that basis, what proof is there that shows the maximum penalty provisions need to be increased at all?

Comparing overseas jurisdictions to Australia is inappropriate because other important provisions are likely omitted. We oppose selective cherry-picking as it's important that apples are compared to apples and not Nashi pears. Just

because one or more overseas regulator has another provision in its regulatory arsenal doesn't make it better; it's merely different. Best practice is not necessarily created by copying and pasting everyone else's legislation or regulatory ideas.

In our opinion, ASIC needs to act much quicker than it has demonstrated to date and be willing to use all the legislation it has at its disposal. Prosecutions and investigations are taking years, as demonstrated by a recent example of an Enforceable Undertaking being created for offences occurring over 2 years after the event. [4]

At paragraph 18, we note the statement that "[i]n some cases the current maximum civil pecuniary penalties can be lower than the potential benefits of the misconduct. As a result a wrongdoer may profit from their conduct even after paying a substantial penalty. Accepting that the probability of detection of a contravention is less than 100%, a pecuniary penalty that amounts to less than the profit or benefit arising from the contravention will often not be an effective deterrent, especially where the contravener is a corporation." The paper presents no similar evidence this applies equally to individuals.

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[4] For example, see ASIC Media Release 17-344MR - *ASIC concerns see Web Moneyline Pty Ltd stop offering loan product* – where Web Moneyline entered into an EU for breaches that occurred between 21 August 2014 and 26 May 2105. Available online http://www.asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-344mr-asic-concerns-see-web-moneyline-pty-ltd-stop-offering-loan-product/ viewed 19 November 2017

Answers to Questions 9 to 11

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

1. ***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?***
2. ***Should the maximum civil penalty in the Corporations Act and Credit Act be increased as outlined above?***
3. ***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?***

Until businesses have to start paying levies to the Australian Competition and Consumer Commission ("ACCC") in the same way financial institutions are to be levied by ASIC, we do not consider any consideration should be given to aligning the penalties under the Australian Consumer Law with those in the Credit Act. These levies are an additional impost and have created an uneven playing field.

In considering whether a maximum civil penalty of $1 million is appropriate, we are left wondering what consideration was given as to whether any individual would actually have the financial resources to pay such a penalty. It is all very well ASIC being awarded huge penalties by the Courts but if the guilty party has no means of paying it, it becomes academic. A classic example of this is *Australian Securities and Investments Commission (ASIC) v Cash Store Pty Ltd (in liq) [2014] FCA 926*. The penalties awarded by the Court for breaching the Credit Act were $17.875 million but the company had already ceased trading in

Australia and was in liquidation. Some would argue this was a waste of taxpayer's funds and it was hardly a deterrent for the company, given its financial situation. It chose not to defend its actions, so the Court found entirely in ASIC's favour. That said, it has established case law for ASIC to regulate those remaining in the industry.

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

Given the Taskforce has produced no substantive evidence that would warrant the need for this, we are of the opinion a maximum penalty for an individual is still a sufficient deterrent.

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?

No, for the reasons outlined above.

Position 10:

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

To our knowledge, there are 2 levels of disgorgement orders that may apply to a credit provider:

1. making the credit provider pay restitution to consumers of the amount of gross income (generally interest, fees and charges) that was obtained,

leaving borrowers in a position of no unjust enrichment. The situation becomes more complex for leased goods depending on the amount that has been paid to date but providing the initial cost of the goods has been recovered by the lessor, in some circumstances, it may not be unreasonable to have to refund all lease costs paid over and above the purchase cost; and

2. making the credit provider pay the consumer the difference between what it was legally able to apply and collect as opposed to what it did ultimately collect.

Neither of these two alternatives is discussed in any detail in Paper 7, though there is some implied greater use of option 2 than of option 1. We have no issue with disgorgement orders but believe option 2 is the more preferable.

The Credit Act has a preference for compensation and we are of the opinion that must be maintained but there have been several occasions where we note ASIC, as a result of a limited area of investigation, has not required an errant credit provider to reimburse all affected consumers even though the same breaches may have occurred in other areas.

One example of this that occurred last year was where ASIC entered into an EU with listed ASX credit provider Cash Converters in regard to some SACC loans processed online. See ASIC Media Release 16-380MR[5]. For those consumers that may have been similarly affected via instore processing, ASIC merely advised consumers "[i]f you think you may have entered into a loan contract

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[5] ASIC Media Release , 2016. *16-380MR Cash Converters to pay over $12M following ASIC probe* Available online http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-380mr-cash-converters-to-pay-over-12m-following-asic-probe/ viewed 20 November 2017.

with Cash Converters (either in-store or online) that was unsuitable, you are encouraged to lodge a complaint with the Credit and Investments Ombudsman."

From the author's discussions with some consumer advocates, the general consensus was they were unimpressed by this course of action. If ASIC is so concerned at protecting consumers, then we question why it did not expand its investigation and looked at all of the company's operations when there was sufficient evidence for it to require an EU for the online operation.

In our view, ASIC's primary consideration should be to ensure any affected consumers are properly refunded and then consider if any further penalty is warranted after that.

Answers to Questions 12 to 13

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

Absolutely. Our preference would be for option 2 above to apply in the majority of instances and only apply option 1 in the most serious of cases. In a number of cases, given the adverse publicity ASIC would undoubtedly publish, we could envisage this being sufficient deterrent in itself than applying a civil penalty.

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

If a matter is taken to Court and a disgorgement order awarded, then it would be acceptable for the Court to decide where and when payment is to be made. Given this review, it is probably an appropriate opportunity to consider whether the Credit Act should be amended to ensure the priority for payments paid as a

result of ASIC's actions is legislated, with disgorgement orders taking priority over civil penalties.

Position 11:

The Corporations Act should require courts to give priority to compensation.

We fully agree with this statement.

Answer to Question 14

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?

Yes.

Position 12:

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

We note at paragraph 49 that "ASIC sets out its approach to enforcement in information sheet 151 (INFO 151). It states, among other things, that it pursues the regulatory and enforcement sanctions and remedies best suited to the circumstances of a case depending on the seriousness and consequences of the corporate wrongdoing. ASIC will generally consider criminal action for offences involving serious conduct that is dishonest, intentional or highly

reckless, even where there is a civil remedy available for the same breach (for example, insider trading) and may seek civil financial penalties where the circumstances warrant significant punitive action."

We consider this approach needs modification. Other than publicity, the taxpayer gains little benefit from ASIC pursuing an errant credit provider through the Courts, particularly if the credit provider is to be left in a position of being unable to pay any substantive fine. We consider that from an initial standpoint, an EU, civil penalties and loss of ACL or AFSL should be pursued in the first instance.

We must disagree with the Taskforce's position stated in paragraph 52 that "a civil penalty should not be available for contraventions where one of the elements of the offence is dishonesty. Conduct of this nature is truly criminal in character and warrants a criminal sanction." As we have stated in our response to the question of whether the Peter's test should be applied, without being able to ascertain the *mens rea* of the offender, arguing dishonesty is criminal all the time is fundamentally incorrect.

At paragraph 53, we do not totally agree that there is any need for expansion of the civil penalty regime unless it provides as an alternative to existing criminal penalties.

We note at paragraph 79 that "[t]he Taskforce further considers that the provision of a civil penalty remedy may also be appropriate for the matters set out in Table 7 [below]. The Taskforce proposes to consult on whether these

provisions should be civil penalty provisions and will make recommendations after considering submissions received."

Surely, if the submissions recommend no further action, why would there be a need for further consultation?

Answers to Questions 15 to 19

15. Should the provisions in Table 6 be civil penalty provisions?

Given the Taskforce's stance that the ACL and AFSL penalty provisions be harmonised, the provisions in Table 6 that would apply to AFSL holders for unlicensed conduct would be warranted.

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?

As this is unlikely to apply to any member or client, we will make no comment.

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

In regard to the Credit Act provisions, we consider the Credit Act already has far too many penalty provisions and this does not take into account those further new penalties proposed under the draft Bill. However, given the actions of a number of lenders and lessors previously, we would have no substantive objection to applying civil penalties to those sections stated.

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

As we have already stated, we consider the Credit Act already has far too many penalty provisions and will make no comment on this.

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

We will make no comment on this.

Position 13:

Key provisions imposing obligations on licensees should be civil penalty provisions.

We agree with the Taskforce's preliminary position stated in paragraph 83 "that provisions imposing general obligations on licensees should be civil penalty provisions".

Notwithstanding the operational impact technology failures can have on consumers, the Taskforce's proposal to impose civil penalties for such failure is extremely harsh in our view. The position shows a total lack of understanding of technology and business. Such systems may be outsourced and attempts to impose penalties are likely to become a 'blame-game'. It would not necessarily act as an effective deterrent against licensees failing to adopt systems and processes that ensure their licensed facilities are operated under their licence in accordance with the applicable licensing regime and may create catastrophic disturbance in business-to-business relationships.

One could argue that the mere loss of power or a telecom failure is of equal significance. Risks are managed and unless there is an intentional and blatant disregard of, say, impending hardware failure by a provider, any failure is unintentional and may be hard to detect.

As an analogy, given the Australian Taxation Office's on going failure to provide the ability of accountants and tax agents to logon to its portal, would ASIC seek to impose a civil penalty if the ATO were the holder of an ACL or AFSL? This has caused serious issues for those affected but none have received any form of compensation even though the ATO itself has done so from a third party provider.

With regard to the Case Studies shown on page 61 and 64, we disagree that ASIC did not have any other tools available to it. We would argue both credit providers had engaged in misleading and deceptive conduct and ASIC could have taken action for this under either the Credit or ASIC Acts.

Answer to Question 20

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

We are of the opinion that as the licence obligations are general in nature, only civil penalties should ever be considered. Aside from the couple of case studies provided, unless ASIC has a great deal more it can offer, we believe no change is warranted.

Credit Code Provisions

We note at paragraph 7 on page 63 that the Taskforce states [i]nterest and fee caps are an essential component of credit regulation. The availability of a civil penalty for breaching these caps in small amount credit contracts would allow ASIC to adopt a more flexible and proportionate response to the misconduct", we would argue this is incorrect. Loss of earnings through disgorgement orders would have a far greater effect.

In regard to paragraph 8 (on page 64), few, if any brokers, would not know whether or not the Annual Cost Rate of a proposed credit contract would exceed 48%. The criminal offences under s.32A should all be replaced by a civil penalty in our opinion in accordance with the Taskforce's preliminary standpoint.

We note with great interest the view expressed in paragraph 11 (on page 65) about the maximum amount that may be recovered. To our knowledge, Min-it Software has been the only third-party software provider providing software to SACC lenders that has not stopped the amount able to be collected by a credit provider at the Twice Adjusted Credit Limit cap ("TACL Cap"). We remind Treasury the Taskforce has failed to have regard to s.39B (3) which states:

> "This section does not apply to enforcement costs."

By limiting the amount able to be collected to the TACL, it would appear that ASIC wants to deny credit providers this legal right.

We have processes in place to alert our clients when the TACL Cap is approaching and they have the tools available to control their actions. If the

credit provider does collect more than the TACL Cap, we disagree that a sanction that only results in return of funds wrongfully charged is largely ineffective in terms of providing a meaningful deterrent and that a civil penalty provision to this prohibition would enable ASIC to take more effective action to deter credit providers from engaging in this kind of misconduct.

There are sound operational reasons as to why this argument lacks merit. Here are just three examples of when s.39B (1) will be breached:

- if enforcement costs are collected and then subsequently waived at a later date;
- if a consumer advises a payment has or will fail but the credit provider's bank has yet to confirm the dishonour and the amount paid to date is just under the TACL Cap, should the consumer ask the credit provider to re-debit the account or the credit provider accepts payment over the counter or into an account and the total amount then showing as paid to date will exceed the TACL Cap;
- if a consumer deposits payments into the credit provider's account in excess of the TACL Cap, whether having received an advice of the maximum amount payable or otherwise.

Our members and clients have experienced all three and not irregularly. In none of these cases should the credit provider warrant a civil penalty. In regard to the latter example, the credit provider has no control whatsoever to even prevent it occurring.

The processes and procedures we have in place for our clients already protects the consumers and we see no validity in denying the ability of the SACC

provider the ability to recover Enforcement Costs as other software providers have done. Just because some ASIC officers may not like it because we haven't followed what other software providers have done doesn't mean it doesn't work or is non-compliant.

In our opinion, if there is to be an offence under s.39B (1), it should be where the credit provider fails to reimburse the consumer for any amount collected in excess of the TACL amount within a reasonable time.

Answer to Question 21

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

If these sections are to have offences created, all the penalties should be civil penalties. As noted above, any offence under s.39B (1) should be for failing to reimburse the funds, not for exceeding the TACL amount.

Position 14:

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

We have never understood why the Corporations Regulations have never been amended to include the ability to penalise an insurer, particularly in light of how insurers dealt with many of the flood claims in Queensland.

However, we take issue with paragraph 10 and the application of the Financial Ombudsman Service ("FOS")'s position on the duty of utmost good faith. As an External Dispute Resolution ("EDR") provider, FOS is not a Court. If the complainant does not like FOS's determination, it has the option of taking the

matter to Court anyway and we would argue a Court would not necessarily accept the EDR's position.

In light of the penalties already faced by credit providers for failing to provide a Fact Sheet, it appears incongruous that a similar penalty does not apply to insurers.

Position 15:

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

Whilst it may be appropriate in some circumstances, we have concerns with this ideology because the way in which infringement notices can be issued may not properly reflect the offence. For example, in recent days, Red Balloon Pty Ltd has been fined by the ACCC a total of $43,200 for alleged breaches of the new excessive payment surcharges laws in the Competition and Consumer Act 2010. [6] According to a SmartCompany article on this matter, "[f]our customers were charged a 1.5% surcharge instead of the accepted 1.2% surcharge, says [Naomi] Simson, reinforcing the incident was an honest mistake, rather than the company "trying to get an extra 20c from each customer".[7]

[6] ACCC, 2017. Media Release 17 November 2017. *Red Balloon pays penalty for excessive payment surcharges. Available online https://www.accc.gov.au/media-release/red-balloon-pays-penalty-for-excessive-payment-surcharges viewed 20November 2017.*

[7] Powell, D, 2017. Smartcompany, 210 November 2017. *Naomi Simson's Red Balloon fined $43,200 by consumer watchdog: "It's a very expensive lesson" Available online https://www.smartcompany.com.au/finance/naomi-simsons-red-balloon-fined-43200-consumer-watchdog-expensive-lesson/ viewed 20 November 2017.*

In our opinion, fining this company $43,200 for 4 breaches totalling $0.80 overcharge is a gross over-reach. An infringement of $10,200 was still more than sufficient to send the right message. Industry needs certainty and in Red balloon's case, the issue was apparently caused by the different definitions of "small business" with the various pieces of legislation.

Allowing ASIC to issue infringement notices will be seen as nothing more than a cash-strapped Government seeking additional ways of gaining revenue. Massive infringement fines will not necessarily bring errant businesses to heel. For small and medium sized businesses, it's more likely to reduce entrepreneurship and increase unemployment. It's hard enough running a business without constantly having to seek legal advice as to whether or not what you're doing is compliant.

Unless the offences are committed deliberately, in which case, it may be appropriate to issue per incident infringement notices, fines for infringements should not be cumulative. We would not want to see the infringement notice amounts exceed those currently applicable as in many cases, a $12,600 infringement notice could well exceed any gain the errant entity made.

Treasury needs to remember knowledge is only gained when mistakes are made but business owners should not be penalised for every one they make.

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

We believe the current penalties available to ASIC, being 12 penalty units for individuals (currently $2,520), 60 penalty units for corporations (currently $12,600) or a specified proportion of the maximum penalty that could be levied by a Court should allow for reduced penalty units to be imposed. In other words, these amounts should be the maximum ones available so that the fine fits the offence.

Answers to Questions 22 and 23

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

Given the limited amount of time this consultation has allowed for submission and the wide-ranging scope of its contents, we believe industry needs far more time to properly consider the ramifications and unintended consequences of whether the sections listed in Annexure D are suitable. We recommend further consultation and industry be allowed at least 6 weeks to consider this.

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?

As stated above, the current penalty units should be the maximum able to be used and the legislation should allow ASIC to reduce the penalty so it more accurately fits the offence.

Peer Review Panels

Given ASIC has only recently issued the Regulatory Guide covering the Financial Services and Credit Panel's operation, we have not yet had the time to review this. Consequently, we will not respond to questions 24 to 27.