17 November 2017

ASIC Enforcement Review
Financial System Division
The Treasury
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By email only:

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In Word and PDF formats

Dear Colleagues

ASIC Enforcement Review: Position Paper 7: Strengthening Penalties for Corporate and Financial Sector Misconduct (Paper)

The Financial Services Council (**FSC**) has over 100 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies.The industry is responsible for investing more than $2.7 trillion on behalf of 13 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Thank you for the opportunity to provide a submission on the matters raised in the Paper.

For convenience, we will adopt the Positions and Questions outlined in the Paper in our response.

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

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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.

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

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

1. We understand and acknowledge the reasoning and analysis for the position adopted. We do note however that these proposals involve very significant increases. As pointed out in the Paper, the Courts have indicated that it is a matter for the legislature to determine whether the penalties should be modified. We suggest that the legislature give these issues serious and detailed consideration.
2. By way of more general observation, we acknowledge the intent of the proposals and the need for regulators to have a reasonable 'toolbox' to assist in necessary enforcement. We do note however that we have concerns as to the quantum of the proposed increases and suggested modifications to the civil penalty regime (particularly in relation to a life insurer's obligation of utmost good faith). We have addressed these and other issues in more detail in our submission. We also have made comment on the concept of a panel exercising delegated authority from ASIC. This is an area we believe merits further consultation and consideration.

Position 3: The maximum penalty for a breach of section 184 should be increased to reflect the seriousness of the offence.

Question

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

3. We acknowledge and note the reasoning mentioned here.

Position 4: The Peters test should apply to all dishonesty offences under the Corporations Act.

Question

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

4. This seems to be a sensible approach. However, consideration also should be given to the Criminal Code provisions being consistent with the proposed amendments.

Position 5: Remove imprisonment as a possible sanction for strict and absolute liability offences

5. We agree with this Position. We agree with the comments in the Paper that it is inappropriate to provide for imprisonment for breaches of the law where they lack a fault element and offences not requiring a mental element.

Position 6: Introduce an ordinary offence to complement a number of strict and absolute liability offences as outlined in Annexure C

6. We acknowledge the Taskforce's reasoning and analysis in this regard. We also acknowledge the reasoning in relation to the offence provisions adequately reflecting the importance of the specified obligations in maintaining consumer confidence and the integrity of the financial industry.

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

7. Again, we acknowledge the Taskforce's reasoning and analysis in this context.

Position 8: All strict and absolute liability offences should be subject to the penalty notice regime

Questions

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

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?

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?

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

8. The issue here, it seems to us is that an infringement notice or penalty notice regime allows a regulator to issue a fine or penalty without the offence being established in a court and subject to the usual rigours of proof required before a court. We do acknowledge that it is not mandatory to pay any such notice issued by a regulator; however, in a practical sense, the notice often is satisfied to obtain certainty and to forestall any further regulatory action. We also note, to the extent to which it is relevant, the fact that the payment is not an admission of liability rarely is captured in any media or reputational aspects of the matter.
9. Nevertheless, it seems to us that if the Government is to extend the scope of the penalty notice regime by expanding the provisions to which it applies, then consideration needs to be given to the regulator being required to report on its use of such powers, potentially to Parliament. Further, it is important that the rule of law (including natural justice and review and appeal rights) would apply to the use of such powers.

Position 9: Maximum civil penalty amounts in ASIC-administered legislation should be increased

Questions

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

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?

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

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?

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

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?

10. We acknowledge the reasoning and analysis of the Taskforce in relation to these issues. We note that the suggestions are consistent with previous comments from the Minister and ASIC.
11. We also note that there is some merit in various provisions in the Corporations Act or Credit Act being aligned with the proposed increases to the Australian Consumer Law. However, in our view, such alignment should occur only if there is broad policy coincidence between the relevant items of legislation. We also note for completeness that this will result in a significant increase in relevant penalties.
12. Thus, we note the proposal to increase the maximum fine for criminal offences and civil penalties for corporations to the greater of 3 times the benefit gained or loss avoided OR 10% of annual turnover in the preceding 12 months. This is a significant departure *from the existing approach in the Corporations Act and the Competition and Consumer Act 2010 (Cth),* which provide that the 10% of annual turnover sanction applies only when it is not possible to calculate the benefit gained or loss avoided. The Paper does not appear to give any practical or principled justification for such a radical change.
13. The distinction between fines for criminal offences and civil penalties is an important one. In our view, it is not consistent with

that distinction and the philosophy underlying the introduction of civil penalties for the maximum civil penalty to be the same as a maximum criminal sanction.

14. The effect of the proposal appears to be that the maximum sanction for an offence or contravention would no longer be objective, reflecting the legislature's evaluation of the gravity of particular wrongdoing. Instead, it would become subjective, reflecting the wrongdoer's capacity to pay. That approach in our view, is wrong in principle.

15. The proposal might also be seen to confer wide discretion in the absence of inadequate guidance to courts called upon to impose penalties. An example may be a situation where a wrong resulted in a benefit of $1 million and the wrongdoer had annual turnover of $500 million. There does not appear to be any prescribed objective standard by which the court is to determine whether the maximum sanction should be $3 million or $50 million? The position is compounded where there are two wrongdoers in substantially the same position, but one with annual turnover of $500 million and the other with turnover of $550 million. Is the maximum sanction for one to be $50 million dollars and for the other, $55 million? Other complications may exist, for example-

(a) The conduct of the party with the lower turnover is objectively worse – how is the court to weigh that party's greater culpability against the other party's greater turnover?
(b) A party's turnover in the past is not a reflection of its capacity to pay in the present.

These types of questions presumably will need to be answered in due course through judge-made law and precedent-which does not assist in certainty of outcomes in a new substantive regime.

16. By way of general observation, in our view, in order to inform the debate it would be useful if ASIC were to publish on a regular basis details of all breaches where penalty action has been taken and the fine imposed. Ideally, this should be done in tabular format and at least annually. We anticipate that this may well indicate that there are a number of dormant civil penalty provisions that are rarely used over time (as well as providing insight into the range of penalties). In relation to this latter aspect, we also would be interested to understand the number of times ASIC has sought and obtained penalties of a higher order under the existing regimes. The increased financial penalties are in the order of double the current maxima. If ASIC has not sought and/or been successful before the Courts in seeking the maximum penalties, it must be asked if there is now a justification for such an increase. If this is the case, then

the approach as a deterrent does not seem justifiable. We do accept however that there is much to be said for there to be a graduated regime for penalties or sanctions in order to deal to the level of risk or damage and in this regard infringement notices and a hierarchy of penalties is reasonable.

17. As a general observation, our membership broadly supports the overall principle mentioned at paragraph 10 of the Executive Summary; however, the "minor contraventions" to be subject to the infringement notice regime do need to be identified. The Paper argues for consistency and expresses the view that the infringement penalty notice should be half the maximum pecuniary penalty- in this regard we note that the AGD guide for other offences is generally one-fifth of the maximum pecuniary penalty.
18. In relation to the concepts of civil penalties being set in penalty units, we do have some reservations. For example, penalty units are reviewed and increased regularly and will most likely lead to increases to penalties more often. Thus, it may well be fairer not to adopt the concept of penalty units in this context.
19. As to the quantum of penalties, again, we acknowledge the reasoning and analysis of the Taskforce in this regard. We do note however that the penalties proposed represent a substantial increase and we do have issues with this approach as outlined above. It seems to us that the imposition of such significant penalties in respect of individuals, at the least, should be reconsidered.
20. We also question whether an increase in penalties actually acts as a deterrent. For example, how many times has the current maximum penalty been applied to a breach?

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

Questions

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

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

21. This approach seems to us to be appropriate as a matter of principle. However, ultimately the ***court*** should have power to determine whether any payment is appropriate and how it should be applied in all of the circumstances. Thus, we agree with the concept that the making of the payment and where it is to be paid should be left to the court's discretion.
22. Despite this, there are a number of practical issues which do need to be considered and resolved. For example, there needs to be consistency in approach across the different forms of legislation and initiatives, Thus, BEAR will have the potential to reduce short-term incentives which may overlap with penalties and fines and the proposed disgorgement power for profits earned as a result of contravening conduct. It also may be difficult to quantify the benefits gained or losses avoided for many breaches.
23. It is not clear how a new disgorgement regime would apply in practice. A breach of one regulatory requirement will often have a knock-on effect (and involve ancillary breaches), and it may prove difficult if not impossible to determine whether the source breach (or ancillary breaches) resulted in a financial benefit to the entity in breach.
24. There may well be issues for entities which are prudentially regulated, such as RSE Licensees and ADIs, and entities which otherwise have fiduciary and trustee obligations, such as REs, in complying with a disgorgement regime. This concept and any relevant issues in this regard require further detailed consideration and analysis.
25. The proposal also appears to conflict with the contention that increased penalties will act as a deterrent. It seems to us that the key priority should be compensation to consumers for loss from the offending conduct. We do note that the proposal was recommended by the FSI. However, in our view, if the proposal is to proceed, further detail should be specified – if not, ultimately case law will need to be referred to determine to whom amounts should be paid and on what basis. This is not desirable purely from a consistency and certainty viewpoint.
26. In addition, in our view, maximum penalties should be specified upfront and not become the remit of an enforcement regulator (cf: paragraph 32), although we accept that disgorgement remedies would need to be ordered by a court.

Position 11: The Corporations Act should require courts to give priority to compensation

Questions

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?

27. Yes, we agree with the proposal. However, in our view, it is important that the court retain an overriding discretion in matters such as these. In this way, the court can take into account and appropriately apply the provisions, having regard to all the relevant circumstances.

Position 12: Civil penalty consequences should be extended to a range of conduct prohibited in ASIC-administered legislation

Questions

Should the provisions in Table 6 be civil penalty provisions?

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?

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

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

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

28. We have set out below an extract of some of the provisions in respect of which the Paper asks whether these should be civil penalty provisions (in addition to being offence provisions). Without necessarily supporting the expansion, we consider ASIC currently has sufficient licensing powers to deal appropriately with breaches of disclosure and licensee provisions, including breaches of the FSG and PDS provisions. ASIC has taken action for breaches of FSG and PDS disclosure provisions, without the civil penalty provisions requested.

907A	Holding out (derivative trade repository)
Financial services - disclosure	
941A	Obligation on financial services licensee to give a FSG if financial service provided to person as a retail client
941B	Obligation on authorised representative to give a FSG if financial service provided to person as a retail client
946A	Obligation to give client a SoA
952E	Give a defective disclosure document (FSG, SoA etc) to a retail client
1021E	Give a defective disclosure document (PDS etc) to a retail client
1017BA	Trustees of regulated superannuation funds – obligation to make product dashboard publicly available
Credit Code obligations	
	Conduct that induces a debtor to make a business purpose declaration that is false or

29. We appreciate that additional powers and civil penalty provisions may assist ASIC in obtaining outcomes on a timely basis, and that civil penalties are not subject to the criminal standard of proof (and nor we do suggest they should be). However, the consequences of the imposition of a civil penalty order nevertheless are quite significant.
30. In this context, we note that the Paper sets out a large number of additional powers and penalties which are non-criminal and are quasi-regulatory in substance (such as infringement notices, penalty notices, and additional civil penalties).In our view, there should be appropriate controls and accountability on the use of *infringement notice* and *penalty notice* powers, particularly given the lower standard of proof and reputational consequences for licensees (and that the matters alleged in an *infringement notice* or *penalty notice* are not required to be proved in a court). We acknowledge *civil penalties* are ordered by a court (so this provides for controls/accountability in relation to *civil penalties*). In the case of the proposed additional civil penalties, ASIC currently has significant powers in the form of administrative sanctions (licence conditions and/or banning orders).
31. We also note that the imposition of civil penalties for breaches of licence conditions could be problematic. By way of example, a civil penalty regime attaching to the obligation to act "efficiently, honestly and fairly" creates uncertainty and additional financial risk to licensees for every breach. Moreover, if such a regime is based on a percentage of turnover, this could be a significant and potentially financially disastrous imposition for many licensees where any breach might attract the regime, and particularly so where the actual impact of the breach upon consumers is limited.

32. We do appreciate that there may be stronger arguments for a civil penalty regime for *failure to report* significant breaches. However, we note that this regime itself is undergoing review. This issue will require further consideration and clarification in due course.
33. Finally in this general context, we do question why it is necessary for additional civil penalties to be proposed for a failure to give a PDS. There do not appear to have been recurrent problems in this area (refer to page 56 of the Paper). This seems to be a rather insignificant area to be included within a very robust enforcement regime.
34. In relation to Section 180, we support the views of those members of the Taskforce who have queried whether it is appropriate for Section 180 to remain a civil penalty provision given that it creates a contravention for negligent conduct.
35. We note that the relevant members have expressed the view that mere negligence may not be sufficiently serious to warrant the imposition of a pecuniary penalty. We agree with these observations and suggest that further and detailed consideration be given to the inclusion of Section 180 amongst the listed civil penalty provisions.

Position 13: Key provisions imposing obligations on licensees should be civil penalty provisions

Questions

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

36. For the reasons given in response to the previous position, we do not agree with this Position. Our view is that ASIC currently has appropriate and significant powers in the form of administrative sanctions (licence conditions and/or banning orders) and has regularly exercised these powers.
37. If nevertheless, the proposals were introduced, then it should not be possible for action to be brought in respect of a civil penalty for a breach of a *general licence obligation* as well as a *specific provision*, to the extent to which they relate to the same act, matter or thing.
38. The Paper acknowledges the duplication problem that would arise from making s912A a civil penalty and infringement notice provision (chapter 4, paragraph 86). The solution proposed is that only certain parts of s912A attract that sanction. The Paper

does not, however, appear follow this argument to its logical conclusion.

The elimination of duplication, presumably, would result in the obligation in s912A (1)(c) to comply with the financial services laws being excluded from any new civil penalty and infringement notice regime. There does not appear, however, to be any other provision that overlaps with or duplicates the obligation in s912A (1)(a) to "do all things necessary to ensure that the financial services covered by the license are provided efficiently, honestly and fairly". Accordingly, it would appear that the Paper proposes that this obligation attract its own civil penalties and/or infringement notices. However, in our view, it is not appropriate to impose punishments for contravening an obligation which is so vague and unclear in content. It is not apparent whether there is any objective measure by which a court or regulator determines whether a service is efficient or not. Further, it seems to us that it is not apparent that there may be conduct that is dishonest and unfair but not contrary to another specific rule such as the existing prohibitions on misleading or deceptive conduct and unconscionable conduct.

39. The better approach we respectfully submit is to preserve the status quo, which is that contraventions of s912A are matters that ASIC can properly take into account in deciding whether or not a person is fit and proper to hold an Australian financial services licence but are not the subject of punishment in and of themselves.

(**Chapter 5: Credit Code Provisions**-no comment, apart from noting that section 154, a licensee making a false and misleading representation, may already be covered adequately by the *ASIC Act*).

Position 14: Civil penalty consequences should be extended to insurers that contravene certain obligations under the Insurance Contracts Act 1984, as outlined below.

40. We note the proposal that there should be civil penalty consequences for an insurer that breaches the following provisions of the Insurance Contracts Act 1984, (**ICA**):

    a. the duty of utmost good faith,

    b. the insurer's obligation to provide a Key Facts Sheet.

41. We do not agree with this proposal. The Paper notes that the section 13 ICA, duty of utmost good faith is a financial services law, failure to comply with which is a ground upon which ASIC can take administrative action under the Corporations Act to vary, suspend or cancel an AFS licence or ban a person from providing financial services. We observe that ASIC currently has significant licensing and administrative powers in this area. It is not clear that it is necessary or appropriate to apply civil penalty consequences to this duty, given ASIC's existing licensing/administrative powers, which the Paper acknowledges exists (see page 70).
42. Further, we do not consider it is appropriate for ASIC to have the power to seek civil penalties in relation to disputes which essentially are a matter of contract between two parties and which generally do not have broader significance for other parties. Additionally, and with respect, there does not appear to be any cogent evidence provided in the Paper to support the regulatory need for the creation of civil penalties (in addition to existing administrative/licensing action under the Corporations Act) relating to the duty of utmost good faith.
43. We also note that it is not clear from the Paper how the cited case studies demonstrate a link between the duty of utmost good faith and the need for civil penalties in this area. This is particularly so in respect of CGU v AMP, where the insurer was found not to have breached the duty of utmost good faith. In the MetLife case, while the Court found that the insurer had not discharged its duty, the case was largely based on claims procedure and it is difficult to see how this case (or similar TPD disputes) would warrant the imposition of a civil penalty.
44. In addition, ASIC has had the power since 2013 to intervene in cases involving the ICA or to bring representative action, but to our knowledge has never exercised this power. We believe that the policy of Section 15 ICA remains relevant and appropriate (noting that this provides an insurance contract cannot be the subject of relief under any other legislation).

Position 15: Infringement notices be extended to an appropriate range of civil penalty offences

45. The Paper acknowledges the ALRC's serious reservations about the appropriateness of infringement notices. It does not, however, attempt to reconcile the proposed expansion of infringement notice regime with those reservations.
46. In our view, the infringement notice regime should not be expanded unless there is a compelling need to do so. The Paper

does not identify any such need. It appears to proceed on the basis that flexibility in enforcement is an end in itself. This seems to us to be wrong in principle.

47. It is axiomatic that the cost of successfully defending the subject matter of an infringement notice commonly is greater than the cost of paying the notice. As a result, regulated persons pay the penalty even if the better view is that they have done no wrong. This flaw in the regime would be exacerbated by its expansion to contraventions which have a high subjective or evaluative content, such as Ss344(1) and 601FC(5) of the Corporations Act. Reasonable minds can and will differ about what constitutes taking reasonable steps or the exercise of reasonable care. Individuals responsible for taking the steps or exercising that care ought not to be subject to the exercise of discretion or the formation of opinion by the executive branch of government.
48. The proposal to extend the infringement notice regime to contraventions of s674(2A) is of particular concern. Section 674(2A) is concerned with a contravention by a person 'involved' in a contravention. 'Involvement' is defined in s79. It is well established that proof of involvement requires proof of knowledge or intent. Applying infringement notices to such a provision is directly inconsistent with the views of the ALRC referred to in paragraph 3 of chapter 7 of the paper.

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

Question

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

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?

49. We note this position. For the reasons outlined previously, we do not believe it is appropriate for Section 33C ICA to be subject to the civil penalty regime. ASIC has sufficient powers currently

from an administrative and licensing perspective to address any failures by an insurer to provide a Key Facts Sheet.

50. At this stage, and in the time available to respond to the Paper, we have not had an opportunity to consider the implications of each and every one of the provisions included in this list. We do make a general observation however that it is important that industry not be subjected to potentially unreasonable and harsh penalties.
51. It is important that there be uniformity in the penalty regimes of all Commonwealth-administered legislation to the extent this is feasible. We do see some merit in the default proportion model adopted under the *Credit Act*.

Chapter 8: Peer Disciplinary Review Panels

Questions

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)?

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?

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

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?

52. We previously have made a submission on the proposed Financial Services Panel (see our submission of 23 May 2017 in relation to CP 281). We confirm the observations we made in that submission. Although as our earlier submission indicates, we do see some merit in a Financial Services Panel having a power to ban individuals from specific financial services sectors, we do have reservations as to this proposal.

53. This proposal is quite different. There are peer review panels in the ASX markets space (ASX Markets Disciplinary Panel). The Takeovers Panel also is in the nature of a similar peer review panel. However each of these have specific characteristics which may justify a peer review panel, for example, a large body of "market practice" (as to what is appropriate) in the case of the ASX Markets Disciplinary Panel, or a need for quick decisions (in the case of the Takeovers Panel).
54. We are concerned that delegation of ASIC's enforcement powers in the case of licensees generally may not be appropriate. We consider further detailed consultation would be needed if this was to progress. Certainly, if such a proposal were to proceed, we would be strongly supporting and advocating for a Panel which included appropriate industry and legal representatives and which did not consist solely of ASIC representatives. Such a panel also would need to be subject to rules of procedural fairness and generally be amenable to judicial review. However, our preference is that if Government were to proceed with this proposal that there be further and detailed consideration and consultation on the topic.

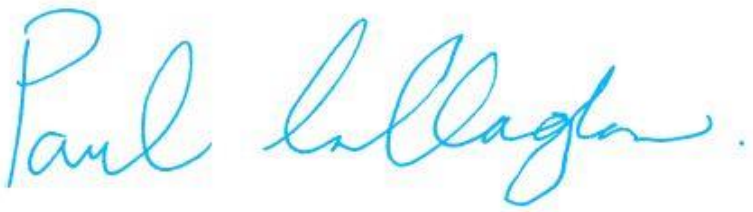
9. ADDITIONAL ISSUE

9.1 ASIC Act – false or misleading statements

55. We note the analysis and reasoning of the Taskforce in this regard. The suggested change seems to us to be logical and reasonable.

Should you have any questions, please contact us on 02-9299 3022.

Yours Faithfully



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