ASIC Enforcement Review
Financial System Division
The Treasury
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17th November 2017

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

The National Credit Providers Association (NCPA) welcomes the opportunity to make a submission to the ASIC Enforcement Review, Positions Paper 7 – Strengthening Penalties for Corporate and Financial Sector Misconduct.

The NCPA is the peak body representing small and medium enterprises involved in the highly regulated Small Amount Credit Contracts (SACC) sector. These small businesses operate across Australia and provide short term finance for the hundreds of thousands of Australians who are unable or choose not to access finance from main stream lenders such as a bank or credit union, building society and other institutions.

The NCPA acknowledges the principles outlined in **RG 151, ASIC's Approach to Enforcement**.

It is the view of the NCPA that all small amount loan providers operate within the law and their services to consumers and business offerings are based on legal interpretations of relevant laws, and not on the value or consequence of penalty if ASIC has interpreted a different view of those laws. In other words, it is our view that these decisions and interpretations are based on law rather than the principle of 'reward versus risk of penalty'. It is important for ASIC to understand this distinction and principle, as often there is little guidance with new laws until tested by a court or determination where credit providers need continuity of service provision.

As noted on many occasions, and in other submissions and via general contact with ASIC, the NCPA strongly supports and promotes responsible lending practices. As such, it is disappointing for the NCPA and its members to read some commentary and as an example, read comments attributed to ASIC at the recent Parliamentary Joint Committee on Corporations and Financial Services, Oversight of the Australian Securities and Investments Commission and the Takeovers Panel, Friday 27th October 2017 of the following exchange.

***Senator WILLIAMS****: This week, has there been any indication of any incidents regarding self-regulation? Probably not.*

***Mr Saadat:*** *There is an industry association and we do engage with them. They haven't indicated that they're looking at any self-regulation.*

The NCPA continually and regularly promotes and encourages self-regulation with members. The NCPA consistently reinforces the principle and importance of operating a responsible lending business and for lenders to ensure their SACC contracts strictly comply with all relevant laws, in particular the National Consumer Credit Protection Act.

The NCPA continues to meet with ASIC in an effort to build, engage and foster an open and transparent relationship with the regulator, and is available at any time to discuss these and any matters with ASIC.

The NCPA noted in its submission to Treasury, ASIC Enforcement Review – Strengthening ASIC's Licensing Powers in July 2017;

*The NCPA is in-principle supportive of the proposal to provide the Australian Securities Investment Commission (ASIC) with greater regulatory powers in relation to licence cancelation and/or suspension where ASIC forms the view that behaviour of an ACL holder is unprofessional, and promotes a product or products that have been designed to avoid the intention of the law.*

With regard to the Positions Paper 7, the NCPA makes the following observations.

The NCPA acknowledges the ASIC Act and the Corporations Act penalties have not been reviewed since 1993, and the NCPA does support the principle that over time monetary penalties may increase to reflect inflation and the value of money, based on the penalty unit formula, but does not support the principle that as time passes, custodial sentences should also be increased. In this submission, the NCPA notes where it does and does not support proposals to strengthen ASIC powers to take criminal and civil action against misconduct and seek further extended powers to remedy for this misconduct beyond existing and sufficient powers.

As a general point, it is important to ensure increased penalties are commensurate with harm done and are consistent with community standards. Imposing custodial sentences for civil offences that are comparable to sentences imposed for criminal offences would be considered excessive, and is not in the interests of business or the community.

**QUESTIONS**

1. Is it appropriate that maximum terms of imprisonment for offences in ASIC-administered Acts be increased as proposed?
2. Should maximum fine amounts be set by reference to a standard formula? If so, is the proposed formula appropriate?

Q1 The NCPA does not believe it is appropriate to increase the term of imprisonment of 5 years to 10 years for serious contraventions under the Corporations Act. This is excessive and out of step with community standards. It is the view of the NCPA that the existing maximum of 5 years is appropriate. Likewise, the suggestion to increase the maximum penalty of 6 months to 2 years is excessive and not supported. As noted in Positions Paper 7, (34) '*there was no evidence that the Court had ever imposed the maximum imprisonment sentence or awarded the maximum pecuniary penalty for a single contravention of the financial services provisions of the Corporations Act'.* This demonstrates not only that existing laws and penalties are sufficient but further reinforces that increases are not required and have never been required. Yes, however, the exception would be to 911A (1) where it is felt a 5-year penalty is applicable.

Q2. Yes, maximum term of imprisonment in months multiplied by 10 = penalty units for individuals, multiplied by a further 10 for corporations is considered a workable proposal.

**QUESTION**

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

Q3. The NCPA does not support this proposal and considers the existing penalty continues to be appropriate.

**QUESTION**

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

Q4. The NCPA notes that the Peters test is purely an objective test as to whether conduct is criminally dishonest if the fact finder (ASIC) concludes that ordinary, decent people would consider the conduct to be dishonest. We do however suggest the Ghosh definition would be more appropriate, to allow the defendant a more equitable position in the need to prove dishonesty as it applies both a subjective and objective element.

**QUESTIONS**

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

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?

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?

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

Q5. Yes, it is agreed that imprisonment be removed from all strict and absolute liability offences as proposed.

Q6. Yes, this view is supported.

Q7. The list of new "ordinary" offences listed in Annexure C is appropriate and extensive.

Q8. ASIC should be afforded the opportunity to issue Penalty Notices in these circumstances.

**QUESTIONS**

9. 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?

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

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?

Q9. Yes.

Q9 a. Reference to penalty units is appropriate as it will harmonise civil penalties in keeping with Australian Consumer Law.

Q9 b. Yes.

Q9 c. No, the maximum proposed at 2500 penalty units for an individual is very large and needs no further increase.

Q10. A maximum monetary amount of 3 times the benefit or losses avoided is sufficient as in the proposition in conjunction with 9c.

Q11. This proposal is agreed.

**QUESTIONS**

12. Should ASIC be able to seek disgorgement remedies in civil penalty proceedings under the Corporations Act, ASIC Act and/or Credit Act?
13. If so, should the making of the payment and where it is to be paid be left to the court's discretion?

Q12. This proposal is supported.
Q13. This instruction should be at the discretion/direction of the Court.

**QUESTIONS**

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?

Q14. This proposal is supported.

**QUESTIONS**

15. Should the provisions in Table 6 be civil penalty provisions?
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?
17. Should any of the provisions in Table 7 be civil penalty provisions?
18. Should any other provisions of ASIC-administered Acts be civil penalty provisions?
19. Should section 180 of the Corporations Act be a civil penalty provision?

Q15. This proposal is supported on the basis of provisions listed.
Q16. Yes, the proposition as to where the Criminal Code covers the contravention that the contravention be viewed as a criminal offence. Where the Criminal Code covers the offence, the criminal code applies.

Q17. The NCPA does not support this inclusion.

**QUESTIONS**

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

Q20. To avoid potential over reach and duplication, no change is supported to current practices.

**QUESTION**

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

Q21. A change to current provisions in the Code is not required. Significant penalties already apply for providers of SACC loans 23A(1), and 32A(2), over and above other forms of credit and other measures as part of consumer protection laws.
Sections 154 and 179U regarding misrepresentations do not need amendments to the penalty regime as the existing onus of proof is on the Service Provider.

**QUESTION**

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

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?

The NCPA is concerned with any proposal to increase the opportunity for any issuance of Infringement Notices on the basis that ASIC can use such an instrument as a threat where there is no onus of proof or evidence of a breach or fault required on their behalf.

Q22. The NCPA have no view on the current or proposed civil penalty provisions in the Corporations Act or the Insurance Act. However, while many of the current civil penalty provisions in the Credit Act don't specifically relate to the small amount loans sector, we are of the view that the civil penalty regime is significant in nature and provides for sufficient enforcement powers by the Regulator and does not require amendment or the addition of further or increased civil penalties.

Q23. No. The proposed 12 penalty units for an individual and 60 units for a corporation is not an appropriate level and if Infringement Notices were to be adopted, it is felt that the current Credit Act model of a default proportion of the maximum penalty is more appropriate.

**QUESTIONS**

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)?
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?
26. Should the Panel be comprised of industry and non-industry participants (for example, lawyers or academics) only or should members of ASIC be included?
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?

Q24 to Q27 are not supported.

The Credit landscape is already very complex with many levels of law, regulation and oversight. The NCPA does not support a further layer of complexity through a Peer Review Group to oversee the compliance of the entire sector. We note the suggestion of substitute panellists with experience in specific products, however this would only represent a very small number of panellists sitting at any given time with an ability to influence outcomes when other stakeholders may not have an appreciation or understanding of specific products or processes.

The NCPA appreciates the opportunity to provide this submission to the ASIC Enforcement Review.

Yours sincerely

Rob Bryant
Chairman