NYMAN GIBSON MIRALIS

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Nyman Gibson Miralis Response

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

Introduction

1. Nyman Gibson Miralis is a leading Australian criminal law firm with substantial experience in assisting companies and individuals who are the subject of white collar and corporate crime investigations.

2. We specialise in matters such as complex fraud, domestic bribery and foreign bribery, insider trading, embezzlement, taxation offences, money laundering and other dishonesty related offences which may be prosecuted by the Australian Securities and Investment Commission (ASIC), Australian Tax Office (ATO), the Independent Commission Against Corruption (ICAC), the Australian Securities and Investment Commission (ASIC), the Commonwealth DPP (CDPP), the Australian Transaction Reports and Analysis Centre (AUSTRAC), the State Police and Australian Federal Police (AFP).

3. We note that the ASIC Enforcement Review Taskforce Position Paper 7 identified three key problems with the existing penalties regime as it currently stands in the *Australian Securities Investment Commission Act 2001* (Cth):

SYDNEY OFFICE ph +61 2 9264 8884 a Level 9, 299 Elizabeth Street, Sydney NSW 2000 dx 11543 Sydney Downtown
PARRAMATTA OFFICE ph +61 2 9633 4966 a Suite 8, Level 2, 154 Marsden Street, Parramatta NSW 2150 dx 8280 Parramatta
abn 89 340 323 906 w ngm.com.au

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a. The variety of penalties available, for some kinds of misconduct, is inadequate to address the range and severity of misconduct;

b. As identified by the Financial system Inquiry Final Report, some penalties were too low to act as a 'credible deterrent'; and

c. Some penalties are inconsistent with the penalties for equivalent Commonwealth and State provisions

4. Although there is a clear need for reform in the area of civil penalties that can be administered by ASIC, there is a need to strike the appropriate balance between increasing civil penalties for certain types of breaches of misconduct and not over-criminalising conduct to the extent that the proposed civil penalties will not reflect the objective seriousness of the crime.

5. These submissions will touch on three key areas examined by the ASIC Enforcement Review, namely:

   a. Disgorgement;

   b. The increased civil penalty provisions for providing misleading information to ASIC under compulsory examination; and

   c. Failure to obtain financial licence

<u>Disgorgement</u>

1. Restitution claims, including disgorgement, are designed to prevent an accused's unjust enrichment by enforcing the accused person to repay any gains made based on their illegal activities. This is usually calculated by measuring the plaintiff or claimant's loss and compensating them for that loss based on the defendant's gain. The defendant will be required to disgorge a monetary payment equal to the profit or gain made that can be traced to that alleged illegal transaction, breach or wrongdoing.

2. The taskforce notes at paragraph [42] that the:

The Taskforce adopts as its preliminary position that disgorgement remedies should be available in civil proceedings brought by ASIC under the Corporations, Credit and ASIC Acts. This would enable ASIC to seek orders requiring payment of an amount representing any profit gained or loss avoided by the person as a result of engaging in a contravention of a civil penalty provision. This position recognises that it may not be appropriate for a defendant to retain a profit or benefit derived from contravening the law, particularly where the financial benefit can be quantified. This may be the case whether or not a person may also be liable to a pecuniary penalty order.

3. The Taskforce provides as an example at paragraph [40(d)] that:

   In the United States, the SEC has secured more than US$1.8 billion in disgorgement orders in each of its four most recent fiscal years—more than the agency has been awarded in statutory penalties each year over the same period.

4. Yet difficulties with the disgorgement principle are well-documented, particularly in the US. Whilst disgorgement is proffered as an equitable remedy that is intended to restore parties to their previous positions it is not always the case that disgorgement simply returns the defendant to their original position had they not broken the law. In many cases, the defendant may be in a significantly financially worse position than they would have been at the commencement of the wrongdoing. Whilst the defendant may be fined for their conduct, an additional action in a court of equity brought by ASIC for disgorgement punitively punishes the defendant twice.

5. There needs to be careful consideration given to the proposed increase in the remedial powers to be granted to ASIC so that disgorgement will only compensate a victim for their loss. With disgorgement orders, a pecuniary penalty cannot operate for the purposes of punishing the offender in the hope of deterring others from committing similar offences.

6. As the Supreme Court of the United States in *Kokesh v Securities and Exchange Commission* (No. 16-529, Decided June 5 2017) stated at page 8:

   It has become clear that deterrence is not simply an incidental effect of disgorgement. Rather courts have consistently held that "[t]he primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains"... Sanctions

imposed for the purpose of deterring infractions of public laws are inherently punitive because "deterrence [is] not [a] legitimate non-punitive governmental objective[e]"

7. As a government regulator, ASIC acts in the public interest in seeking to remedy the harm done to the public at large rather than standing in the shoes of an injured party. It is clear that the appropriate balance needs to be struck in ensuring that the disgorgement orders granted by ASIC are implemented so as to not punish an offender twice for the same conduct.

8. Similarly, disgorgement orders must not act as a punitive deterrent. It must be ensured that the disgorgement provisions are designed only to compensate an injured party. It is not difficult to envisage a situation where an insider trader may be ordered to disgorge not only the unlawful gains they accrue to the injured party directly, but also the benefit that accrues to third parties whose gains can be attributed to the wrongdoer's conduct.

9. Further, it is unclear whether individuals who illegally provide confidential trading information will be required to disgorge profits gained by individuals who received and traded based on that information, even though that individual never received any profits.

Increased Civil Penalty Provisions – Defective Disclosure to ASIC

10. We note that part of the recommendations put forth by the ASIC Enforcement Taskforce involve increasing the penalties for individuals who provide false or misleading information to ASIC in the course of compulsory examination or investigation.

11. Whilst increasing the penalties for providing false or misleading information to ASIC may ensure consistency with equivalent offences in comparable legislative provisions (e.g. Australian Crime Commission Act 2002 (Cth) s33) there needs to be careful consideration whether an arbitrary increase in civil penalties for people required to provide information under compulsory examination will act as an effective deterrent.

12. The reason for this is twofold. Firstly, there is a public policy consideration that there is a limited public interest in pursuing individuals who may provide false or misleading information under compulsory examination. The primary reason for this is that the integrity

of the system would be undermined should prosecution of these types of matters be widespread. Indeed, the equivalent provisions in the *Crime Commission Act 2012* (NSW) and the *Crime Commission Act 2002* (Cth) are rarely exercised.

13. Secondly, it is questionable whether an increase in civil penalties will act as an effective deterrent. It is noted that the rationale of deterrence through increased civil penalty provisions is that it will prevent those who have committed the crime from reoffending (specific deterrence), whilst highlighting to the community that certain crimes will attract severe penalties that will deter others from committing that particular crime (general deterrence). Yet, there is little theoretical or empirical evidence that suggests that increasing maximum pecuniary penalties will have the desired deterrent effect often intended by the legislature.

Failure to obtain Financial Licence

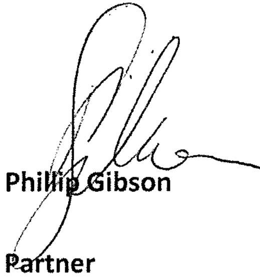
14. It is submitted that clarification is needed in the proposed legislative amendments as to who is required to obtain a financial licence. In Particular, whether Bitcoin traders and Australian Security Exchange Providers are required to obtain a financial licence.

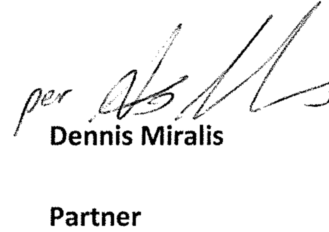
15. Should Parliament decide that crypto-currency users and Australian Currency Exchange providers are required to obtain a financial licence, then It must be a consideration of the legislature as to how ASIC will work with AUSTRAC in terms of monitoring and enforcing compliance amongst crypto-currency users.

Conclusion

16. Currently, ASIC and the Australian Federal Police (AFP) enjoy a successful partnership, indeed the Memorandum of Understanding signed between the two parties in 2013 is testament to this.

17. It is not immediately clear that a compelling case has been presented for all of the increased powers that are being sought by ASIC, and in particular those that have the capacity to affect individual liberties and property rights.





Phillip Gibson

Partner

Nyman Gibson Miralis

17 November 2017

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Dennis Miralis

Partner

Nyman Gibson Miralis

17 November 2017