30 November 2017

Ms Kate Mills
ASIC Enforcement Review
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: ASICenforcementreview@treasury.gov.au

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Dear Ms Mills

Strengthening Penalties for Corporate and Financial Sector Misconduct

The Westpac Group, which includes our Westpac Banking Corporation, St.George, BankSA, Bank of Melbourne, RAMS and BT Financial Group businesses (**Westpac**), welcomes the opportunity to contribute to Treasury's ASIC Enforcement Review Positions Paper 7: *Strengthening Penalties for Corporate and Financial Sector Misconduct*.

We also acknowledge the additional time allowed for us to provide this submission.

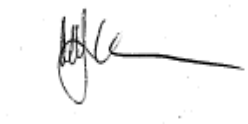
Westpac is generally supportive of each of the Positions set out in Positions Paper 7 (**Paper**). As we have stated in previous submissions to the ASIC Enforcement Review Taskforce, Westpac believes the initiatives contained in the Australian Bankers' Association's *Better Banking Program*, including building a stronger ASIC, are aligned to the Taskforce's proposals. In our view, increasing the penalties for corporate and financial sector misconduct contributes to that initiative.

We note that in Appendix 1 we have provided commentary on specific Positions for Treasury's consideration.

Westpac would welcome the opportunity to discuss our views in more detail with Treasury as each of the proposals in the Paper is further developed.

Please contact me on 0402 898 702 or by email at michaeljohnston@westpac.com.au if you would like any further information.

Yours sincerely



Michael Johnston

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Westpac Group

Appendix 1

Application of penalties to multiple contraventions

The Taskforce should carefully consider the circumstances where multiple contraventions are treated as a single course of conduct. The sector's increasing reliance on technology means that one inadvertent error in an automated system or process could quickly lead to multiple contraventions before the error can be identified and rectified. Such a scenario could be disproportionately punitive if treated as separate multiple contraventions, rather than as a single course of conduct. This is particularly the case given the proposed increases to penalties and the expansion of the civil penalty and infringement notice regimes.

Clear guidance on the impact of these penalties in such circumstances, together with ASIC's proposed approach to multiple contraventions, will be required.

Position 2

Westpac supports the use of a formula to determine the maximum pecuniary penalties for individuals and corporations for all criminal offences in ASIC-administered legislation.

For additional clarity, we consider that the proposed formula for determining maximum pecuniary penalties could be split into two parts, as follows:

> *Maximum term of imprisonment in months multiplied by 10 = penalty units for individuals*
>
> *Maximum term of imprisonment in months multiplied by 100 = penalty units for corporations*

Position 4

The Taskforce proposes that the *Peters* test should apply to all dishonesty offences under the *Corporations Act 2001* (Cth) (**Corporations Act**). Westpac notes that there are currently a variety of dishonesty-related offences in the Corporations Act, some of which are much broader offences than the offence of conspiracy to defraud, which was considered by the High Court in *Peters*. The legislature has imposed a subjective test for some of these offences, and an objective test for others. Careful consideration should be given to the implications of a standard "objective" test for each dishonesty-related offence, which may alter the original intention of the offence.

We also note that, as the Taskforce acknowledges in its Paper, applying a standard test for dishonesty-related offences in the Corporations Act will not create consistency with the Criminal Code.

Positions 10 and 11

Westpac supports the position that the remedy of disgorgement of financial benefits should be available in civil penalty proceedings brought by ASIC. We agree with the Taskforce's view that the Courts should retain the discretion to determine whether any payment of financial benefits under a disgorgement order is an appropriate remedy and how it should be applied (for example payment in satisfaction of compensation orders). However, payment of any financial benefits should not exceed the amount of profit or loss avoided by the defendant.

Westpac also supports the position that the Corporations Act should require Courts to give priority to making a compensation order over any other payments, such as the payment of a pecuniary penalty.

However, the interaction between disgorgement remedies, compensation orders and pecuniary penalties should be carefully considered with stakeholder engagement so that priority is properly given to those who suffer loss or damage, while not imposing more severe penalties on licensees than intended.

Positions 12 and 13

Westpac supports in principle that the civil penalty regime should be extended within ASIC-administered legislation. However, there are a large number of provisions proposed for inclusion in this extended regime, and the rationale for doing so should be carefully considered in each instance.

The Taskforce proposes to introduce civil penalties as an alternative to criminal prosecution for some existing provisions. The result of this proposal may be that the same conduct would now be subject to either criminal or civil penalties, at ASIC's discretion. In these circumstances, we have concerns about the way in which these proposed reforms will lower the standard of proof for contraventions which are currently criminal offences.

In addition, the Taskforce proposes to introduce civil penalties to ordinary provisions, which will increase the seriousness of these provisions. Westpac is cautious of this proposal, particularly for those ordinary provisions for which a civil penalty may not necessarily be an appropriate remedy.

If the Taskforce's proposal does proceed for any of provisions listed in the Paper, it will be important to ensure that there is sufficient clarity on how provisions should be interpreted by licensees and how they will be applied by ASIC and the courts. This will be particularly important for the key provisions that impose obligations on licensees, such as 912A of the Corporations Act. For any civil penalty provision, licensees should be able to identify where a "safe harbour" is available, so that they can design policies, procedures and frameworks to achieve compliance.

To illustrate the point that any extended civil penalty regime should be considered on a provision by provision basis, there are good reasons why introducing a civil penalty provision in respect of a contravention of 912D of the Corporations Act would be a matter of concern. There are various complexities (whether under the current or proposed breach reporting regime) in determining whether a matter is required to be reported. In particular, an assessment is required to be made as to whether a breach, or likely breach, of certain obligations under 912A and 912B has occurred at all (in this respect we also note, for example, the language of s912A(1)(a)) and whether that breach is "significant". To the extent that it was proposed that a contravention of 912D of the Corporations Act should attract a civil penalty, that should be confined to deliberate failures to report.

We also reiterate the comments made in our response to ASIC Enforcement Review Consultation and Position Paper 1 concerning a civil penalty regime for failing to report significant breaches when required. These included that:

1. meaningful consultation and careful drafting will be important for any proposed reforms lowering the standard of proof of a contravention;
2. clear and unambiguous guidance around ASIC's proposed application will need to be prepared, with stakeholder consultation;
3. any civil penalty regime and guidance should make it easy for licensees to know where the "safe harbour" lies; and
4. appropriate negotiated outcome and penalty reduction mechanisms should be carefully considered within any civil penalty framework, and a licensee's action to ensure it operates in a "safe harbour" should be recognised.

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

Section 180 currently captures a broad spectrum of conduct ranging from mere negligence (involving simple human error that when judged with the benefit of hindsight may not have occurred) to gross negligence. Westpac suggests distinguishing between mere negligence, which we consider should not be covered by sanctions, and the more serious gross negligence and recklessness.

Position 15

Westpac does not consider it necessary to expand the circumstances in which ASIC can issue infringement notices in relation to civil penalty offences. In our view, infringement notices are only appropriate where the offence is a minor offence with strict or absolute liability, and where there should not be any dispute as to whether a contravention has occurred.

Further, there are limitations to the utility of infringement notices as they do not provide a rationale for why they have been imposed, and therefore offer limited guidance to the community and Industry.

Finally, the breach of a civil penalty provision is considered to be a serious matter, as signified by the penalties attached to these provisions and proposed increases to those penalties. Westpac is of the view that expansion of the infringement notice regime in relation to civil penalty provisions could weaken this important signalling, and risks compromising procedural fairness for licensees accused of serious matters.

However, if ASIC's power to issue infringement notices is ultimately extended, Westpac supports the introduction of a mechanism that would allow a licensee to present its case to a peer review panel, prior to an infringement notice being issued. This peer review panel should comprise both industry and non-industry participants, and be subject to clear procedures and standards.

We also reiterate the following comments made by the ABA in response to the ASIC Enforcement Review Consultation and Position Paper 1 concerning infringement notices for failing to report significant breaches when required:

1. infringement notice regimes are appropriate where there is a clear and easily established basis for a contravention; and
2. introduction of an infringement notice regime for failing to report significant breaches is at odds with the cooperative approach between ASIC and industry.