



**Australian Government**

# **ASIC Enforcement Review**

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Positions Paper 7  
Strengthening Penalties for Corporate and  
Financial Sector Misconduct

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# EXECUTIVE SUMMARY

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1. The Australian Securities and Investments Commission (ASIC) can pursue a range of regulatory and enforcement sanctions and remedies to respond to misconduct that occurs in the corporate, financial market or financial services sectors. Concerns have emerged in a number of forums that the penalties in the legislation administered by ASIC may not be effective in that they do not reflect community perceptions as to the seriousness of engaging in certain forms of misconduct.
2. In its final report, the Financial System Inquiry (FSI) recommended providing ASIC with “stronger regulatory tools”<sup>1</sup> to allow ASIC to deal with misconduct in the credit and financial services industries. The FSI also concluded that the maximum penalties in financial sector laws were unlikely to deter misconduct by large firms and recommended substantially increasing civil and criminal penalties.<sup>2</sup> The Government accepted the FSI’s recommendations and in its response to the FSI’s final report said that it would review ASIC’s enforcement regime, including penalties. The ASIC Enforcement Review Taskforce was established to conduct a review, guided by terms of reference that include:
  - a. The adequacy of civil and criminal penalties for serious contraventions relating to the financial system (including corporate fraud);
  - b. The need for alternative enforcement mechanisms, including the use of infringement notices in relation to less serious contraventions, and the possibility of utilising peer disciplinary review panels (akin to the existing Markets Disciplinary Panel) in relation to financial services and credit businesses generally; and
  - c. The adequacy of existing penalties for serious contraventions, including disgorgement of profits.
3. The Taskforce has identified three key problems with the current penalties regime:
  - 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 FSI, some penalties are too low to act as a ‘credible deterrent’, and
  - c. some penalties are inconsistent with the penalties for equivalent Commonwealth and State provisions.
4. To assist the review of penalties and development of preliminary positions, the Taskforce has established a set of key principles to take into consideration when addressing the problems identified. In sum the principles are:
  - a. the enforcement regime should be comprehensive and facilitate both responsive regulation and enforcement oriented approaches,

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1 Australian Government, Financial System Inquiry Final Report, November 2014, see recommendation 29.

2 Ibid at page 250.

- b. penalties should represent a credible deterrent,
  - c. penalties should reflect the gravity of conduct, as well as the purpose for which they are imposed, and
  - d. the penalties regime should be clear and consistent.
5. Previous reforms to penalties in ASIC-administered legislation have not been conducted holistically. The penalties for some offences have not been reviewed since 1993. This has led to inconsistency across the penalties framework for corporate offences. For example, in 2010 the maximum terms of imprisonment for insider trading and market manipulation offences were increased from five years to ten years. Pecuniary penalties for these offences were also substantially increased. This created a disparity between the penalties for certain offences even where they relate to misconduct of equivalent seriousness. Further, most State-based fraud offences have much higher penalties than the equivalent Commonwealth offence. To ensure consistency with Commonwealth and State offences of equivalent seriousness, certain criminal penalties should be increased, where appropriate.
6. Similarly, the maximum civil penalties in the *Corporations Act 2001* (Corporations Act) have not increased since enacted in 1993, when the penalty for an individual was set at \$200,000 (and \$1 million for corporations when civil penalties were extended to corporations in 2004). These maximum penalties no longer reflect the seriousness of contraventions and may, in some cases, be substantially lower than the potential profits from misconduct. The maximum civil penalties also differ across ASIC-administered legislations, notwithstanding the misconduct is often comparable. To resolve these issues, the Taskforce is proposing to increase the maximum civil penalties in the Corporations Act, the *Australian Securities and Investments Commission Act 2001* (ASIC Act), the *National Consumer Credit Protection Act 2009* (Credit Act) and the National Credit Code (Credit Code).
7. The FSI concluded that ASIC should “be able to seek disgorgement of profits earned as a result of contravening conduct”.<sup>3</sup> The Taskforce adopts as a preliminary position that disgorgement remedies be available in civil proceedings brought by ASIC under the Corporations, Credit and ASIC Acts. This allows ASIC to seek to recover the profit gained or loss avoided as a result of the contravention to ensure individuals do not profit from their misconduct.
8. The creation of a standardised method for calculating maximum criminal pecuniary penalties (by reference to the maximum imprisonment penalty) ensures greater coherence, and avoids unnecessary complexity, when setting appropriate pecuniary penalties for criminal conduct. A standardised method of calculation would also create greater consistency and transparency across the Corporations Act penalty regime.
9. The method of calculation also sets a higher multiple than the standard multiple in the Criminal Code. This higher multiple reflects the serious consequences and potential profits, arising from corporate misconduct and white-collar crime. It also has the ancillary result of bringing maximum criminal fines for corporations into better alignment with civil penalty maximums for similar conduct – a matter of concern to the Taskforce.

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3 Ibid.

10. Currently, some strict liability offences in the Corporations Act carry imprisonment penalties, contrary to standard Government guidelines on penalty setting. The Taskforce proposes to remove imprisonment for strict liability offences and to give ASIC discretion to deal with such contraventions through the penalty notice regime in section 1313 of the Corporations Act. This emphasises the importance of the proportionality of enforcement action taken by ASIC and gives greater scope for minor contraventions to be dealt with efficiently.
11. The combined effect of some of the Taskforce's positions will make multiple kinds of penalty available for the same conduct, for example the expansion of the penalty notice and infringement notice regimes and the specification of additional civil penalty provisions. New civil penalties will also be created in relation to key obligations on licensees in the Corporations and Credit Acts that are central to the effectiveness of the licence regimes. These measures would provide a greater variety of regulatory responses and empower ASIC to determine an approach that is appropriate given the circumstances and severity of the contravention. Regulatory responses will be tailored to the contravening conduct and, therefore, more proportionate and effective.<sup>4</sup>
12. The positions the Taskforce seeks comment on are as follows.

**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.

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

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

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

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

**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

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

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<sup>4</sup> Australian Law Reform Commission Report No 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, at [11.4]-[11.10] (ALRC Principled Regulation report).

**Position 9:** Maximum civil penalty amounts in ASIC-administered legislation should be increased, as follows:

Act	Provisions	Individual	Corporation
ASIC Act	Consumer protection provisions consistent with the Australian Consumer Law (apart from offences relating to substantiation notices)	2,500 penalty units (currently \$525,000)	Greater of 50,000 penalty units (currently \$10.5m), 3 times the value of benefits obtained or 10% of annual turnover.
Corporations Act, and Credit Act	All other civil penalty provisions	2,500 penalty units (currently \$525,000)	Greater of 12,500 penalty units (currently \$2.625m), 3 times the value of benefits obtained or 10% of annual turnover.

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

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

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

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

**Position 14:** Civil penalty consequences should be extended to insurers that contravene certain obligations under the Insurance Contracts Act 1984

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

**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

13. The Taskforce also seeks comment on the following additional matters:

- a. whether civil penalty consequences should be available as an alternative to criminal prosecution for a range of additional provisions to those proposed by the Taskforce, including provisions identified in Table 7 and specified provisions of the Credit Code;
- b. whether breach of section 180 of the Corporations Act (directors' and officers' duty of care and diligence) should remain a civil penalty provision;
- c. a number of issues relating to the role of peer review panels in the financial services and credit sectors including the decisions to be made by such panels and their establishment, structure and processes.

# 1. BACKGROUND

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1. The Australian Securities and Investments Commission (ASIC) investigates and takes action in response to misconduct that occurs in the corporate, financial market or financial services sectors. The primary legislation under which ASIC undertakes enforcement action, are the:
  - a. *Corporations Act 2001* (Corporations Act);
  - b. *Australian Securities and Investments Commission Act 2001* (ASIC Act); and
  - c. *National Consumer Credit Protection Act 2009* (Credit Act).
2. Under these Acts, ASIC can pursue a range of regulatory and enforcement sanctions and remedies to respond to contraventions, including punitive, protective, preservative, corrective or compensatory actions, or through issuing infringement notices. More detail is set out in Annexure A.
3. Central to an effective enforcement regime is the need to have an appropriate range of penalties available for particular breaches of the law. This will allow the courts scope to impose penalties of greater or lesser severity, or for ASIC to take its own enforcement action, commensurate with the misconduct. Appropriate penalties send a signal to the community that breaches of the law are taken seriously so as to promote confidence in the system, as well as providing a deterrent to would be offenders.
4. Concerns have emerged in a number of forums that the penalties in the legislation administered by ASIC may not be effective in that they do not reflect community perceptions as to the seriousness of engaging in certain forms of misconduct. For example, in 2014 the Senate inquiry into the performance of ASIC (Performance of ASIC report) considered that a compelling case had been made for a review of the penalties set in legislation administered by ASIC, stating:

*It is important that the penalties contained in legislation provide both an effective deterrent to misconduct as well as an adequate punishment, particularly if the misconduct can result in widespread harm. Insufficient penalties undermine the regulator's ability to do its job: inadequately low [sic] penalties do not encourage compliance and they do not make regulated entities take threats of enforcement action seriously. The committee considers that a compelling case has been made for the penalties currently available for contraventions of the legislation ASIC administers to be reviewed to ensure they are set at appropriate levels. In addition, consideration should be given to designing more responsive monetary penalties, such as multiple of gain penalties or penalties combined with disgorgement.<sup>5</sup>*

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5 Senate Economics References Committee, 'Final Report: Performance of the Australian Securities and Investments Commission', 26 June 2014, pp. 367 – 368. [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/ASIC/Final\\_Report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/index).

5. The Financial System Inquiry (FSI) released in November 2014 concluded that the current penalties in ASIC's legislation are unlikely to act as a credible deterrent against misconduct by large firms.<sup>6</sup> It recommended that the maximum civil and criminal penalties for contravening ASIC legislation should be substantially increased and that ASIC should be able to seek disgorgement of profits earned as a result of contravening conduct. The Government accepted the FSI's recommendations and in its response to the FSI's final report said that it would review ASIC's enforcement regime, including penalties (this was the genesis of the ASIC enforcement review taskforce).
6. The final report of the Senate Economics References Committee inquiry into the inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct, or white collar crime made similar recommendations in March 2017. It also suggested that regard should be had to the level of non-criminal penalties in other jurisdictions for comparable offences.<sup>7</sup>
7. It is against this background that the present Taskforce was established to conduct a review, guided by terms of reference that include:

*"The adequacy of civil and criminal penalties for serious contraventions relating to the financial system (including corporate fraud);*

*The need for alternative enforcement mechanisms, including the use of infringement notices in relation to less serious contraventions, and the possibility of utilising peer disciplinary review panels (akin to the existing Markets Disciplinary Panel) in relation to financial services and credit businesses generally; and*

*The adequacy of existing penalties for serious contraventions, including disgorgement of profits."*

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6 Australian Government, Financial System Inquiry Final Report, November 2014, p. 252.

7 The Senate Economics References Committee *'Lifting the fear and suppressing the greed': Penalties for white-collar crime and corporate and financial misconduct in Australia*, March 2017 (White Collar Crime Report) at [6.52] – [6.57].

## 1.1 Key Principles

### The enforcement regime should be comprehensive and facilitate both responsive regulation and enforcement oriented approaches

8. Much of the literature on regulatory sanctions in recent decades focusses on theories around responsive regulation and concepts such as the ‘regulatory pyramid’, developed by Professors Ian Ayres and John Braithwaite. Braithwaite summarised the approach this way:

*“My contention is that compliance is most likely when the regulatory agency displays an explicit enforcement pyramid. ... Most regulatory action occurs at the base of the pyramid where initially attempts are made to coax compliance by persuasion. The next phase of enforcement escalation is a warning letter; if this fails to secure compliance civil monetary penalties are imposed; if this fails, criminal prosecution ensues; if this fails the plant is shut down or a licence to operative is suspended; if this fails, the licence to do business is revoked. The form of the enforcement pyramid is the subject of the theory, not the content of the particular pyramid.”<sup>8</sup>*

9. The Australian Law Reform Commission (ALRC) cited this passage in *Principled Regulation: Federal civil and administrative penalties in Australia* (Report 95, December 2002) (ALRC Principled Regulation report) and described its effect as follows:

*“On this model, the ideal approach of the regulator is described as ‘the benign big gun’; that is, the regulator should have access to severe punishments but should rarely use them in practice. Using John Scholz’s application of game theory to the arena of regulation, Ayres and Braithwaite’s model requires the regulator to behave as though the organisations being regulated wish to cooperate, and ensure that it is economically rational for them to cooperate. Where breaches occur, the initial response should be to persuade and educate them as to the appropriate behaviour. Such an approach promotes self-regulation and the wish to preserve reputation that allows more effective enforcement of the regulatory regime; do not impose undue regulatory burden on business.”<sup>9</sup>*

10. Whether ‘responsive regulation’ is a viable approach to enforcement in the financial sector regulation has been questioned.<sup>10</sup> Nevertheless, the Performance of ASIC report endorsed the ‘enforcement pyramid’ as a foundation for addressing corporate misconduct:

*“The enforcement pyramid model of sanctions of escalating severity is a sound foundation for enabling a regulator to address corporate misconduct. The application of this model to Australia’s corporate laws has generally proven effective.”<sup>11</sup>*

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8 Quoted in F Haines, *Corporate Regulation; Beyond Punish or Persuade* (1997) Clarendon Press, Oxford, 218.

9 Page 112.

10 See, for example, D Kingsford Smith ‘A Harder Nut to Crack? Responsive Regulation in the Financial Services Sector’ (2011) *University of British Columbia Law Review* 717.

11 Page 279.

11. The Performance of ASIC report did, however, express concern about the availability of appropriate penalties and, as outlined above, recommended that penalties be reviewed.
12. The present Taskforce has been established to review the adequacy of penalties and not to conduct a grass roots assessment of the theoretical underpinnings of the regulatory regime for enforcing corporations legislation in Australia. Nevertheless, the Taskforce accepts that it is important that ASIC have a range of options for enforcement to enable it to respond adequately in circumstances of individual cases, including to respond at lower ends of the scale, as by penalty or infringement notices, as well as at the higher end, such as by resort to civil penalty or criminal proceedings.
13. A broad range of powers, underpinned by penalties that have the capacity to deter misconduct, should enhance ASIC's ability to respond appropriately whether that response be weighted, from a theoretical perspective, toward the 'responsive' end of the regulatory spectrum or conversely, toward the 'enforcement' end.

## Penalties should represent a credible deterrent

14. An important principle in any penalty regime is that penalties should have the capacity to deter prospective offenders from the objectionable conduct. This is especially so in respect of civil penalties, the purpose of which is to set a price for offending behaviour sufficient to promote compliance (see below). The ALRC Principled Regulation report implicitly recognised this principle in making its recommendation that:

*"In setting civil penalties, legislators should have regard to whether the level set will achieve the aim of deterrence, which is the principal purpose of civil penalties."<sup>12</sup>*

15. As outlined above, there is mounting support for the proposition that penalties for offences under ASIC related legislation are too low to act as a credible deterrent. This is especially so in relation to civil penalties in the Corporations Act, which would need to be substantially increased simply to keep pace with inflation since their inception in 1993 (see below).
16. The High Court recently emphasised in the Fair Work Decision that the primary purpose of civil penalties is 'primarily if not wholly protective in promoting the public interest in compliance'.<sup>13</sup> The Taskforce considers it important that courts have the flexibility to meet this objective when imposing penalties. There should be power to properly 'price' the offending behaviour for the purposes of deterrence, especially where large gains are made as a result of a contravention or where the offender's capacity to pay is very substantial:

*"The emphasis in deterrence theory is both on pricing the illegal behaviour and having a penalty large enough to deter a well-resourced corporate offender. If large gains can be made then the maximum ought to reflect this. This is the purpose of a high maximum such as the \$10 million penalty for a breach of Part IV of the TPA."<sup>14</sup>*

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12 Recommendation 26-1.

13 *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 326 ALR 476 at 490 [55] referring to French J in *Trade Practices Commission v CSR Ltd* [1990] FCA 521; (1991) ATPR 41-076.

14 Performance of ASIC report, page 798.

17. The question can reasonably be asked as to whether there should be any upper limits on penalties at all. In the United Kingdom there are no maximum limits on amounts that can be imposed in respect of comparable contraventions to those under ASIC-administered legislation. This approach is considered in greater detail below. The Taskforce has, however, stopped short of adopting such a position. Although the Australian courts are well versed in imposing sentences from first principles (see for example *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181, where the Full Court of the Federal Court calculated a penalty largely by reference to profit made, after concluding that “in a practical sense, the overall maximum penalty was so great that there was no maximum penalty”), the Taskforce’s view is that a nominal maximum provides valuable guidance to courts faced with the task of imposing a penalty appropriate to the case before them.
18. The Taskforce believes, however, that nominal penalty maximums (by which is meant maximums expressed in penalty units) should be supplemented, at least in respect of corporations, with amounts limited only by reference to benefit gained or loss avoided as a result of particular contraventions, and by reference to a portion of annual turnover. This would ensure that there is flexibility in the regime sufficient to prevent circumstances arising where a fixed maximum expressed in penalty units would not be large enough to deter the offender due to the size of the benefit, for example.

### **Penalties should reflect gravity of conduct, as well as the purpose for which they are imposed (relationship of criminal and civil penalties)**

19. Penalties available for criminal offences should reflect the fact that this kind of conduct is of a more serious nature than for civil contraventions, however, this principle should be applied subject to the considerations that:
  - a. For individuals, the effect of imprisonment and conviction must be taken into account, as must the fact that liability is, potentially, to imprisonment *and* the maximum fine.
  - b. Criminal fines, unlike civil penalties, may be converted to imprisonment in some cases.
  - c. The legislation allows for both civil *and* criminal penalties to be imposed in respect of the *same* conduct (this is rarely occurs in practice but nevertheless must be taken into account in assessing the comparative liability that results from engaging in particular conduct).
20. These are the kind of factors that likely led the ALRC Principled Regulation report, as well as the Attorney-General’s Department *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (AGD guide), to recognise that financial penalty maximums for civil contraventions may, in some cases, exceed those for criminal offences involving similar conduct, especially in respect of offending by individuals. However, the Taskforce notes that the ALRC expressed considerable doubt about the justification for this principle in respect of offending by corporations, who are not subject to imprisonment and to whom the consequences of conviction more broadly are less severe.<sup>15</sup>

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15 See conclusion at paragraph 26.64 of the report.

21. There are many instances in Commonwealth legislation where civil penalty maximums are greater than criminal penalty maximums in respect of comparable conduct for both individuals and corporations. In addition to the principles outlined above, this may reflect the view, now expressly endorsed by the High Court in the Fair Work case (see above), that the purpose of civil penalties is primarily if not wholly about deterrence (as opposed to criminal penalties which, as well as deterrence, involve considerations of punishment and retribution). The high maximums allowed for civil penalties may, on that view, be directed at ensuring the courts have discretion to impose a penalty that meets “the price of deterrence” in any given circumstance.
22. Nevertheless, the Taskforce shares some of the misgivings expressed by the ALRC regarding the justification for the difference between civil and criminal penalty maximums in respect of corporations. In light of the matters outlined above, the Taskforce does not go so far as to suggest parity in all cases between maximum civil and criminal penalties for corporations. On the other hand, the concern could be addressed somewhat by the Taskforce’s adoption of the view that criminal penalty maximums for corporations should generally represent a higher multiple of the maximum for individuals than is currently the case. The details of this are set out in the text below. The suggestion is that generally the multiple for corporations should be 10 times that for individuals.

### **The penalties regime should be clear and consistent**

23. The penalties framework for corporate, financial services and market misconduct should be transparent and consistent, and avoid, as far as possible, unnecessary complexity. Public confidence is more likely in a system that is clear and easy to understand.
24. Challenges arise when considering the regimes administered by ASIC as they span across different legislation, covering hundreds of offences and types of misconduct some of which overlap. The drafting styles adopted differ among provisions in the legislation due to the fact that they have been implemented and amended at different points in time. This applies even within the Corporations Act. An example can be found in the directors’ duties provisions in sections 181 to 184. Sections 181 to 183 are drafted as simple civil penalty provisions. Section 184 operates to convert sections 181 to 183 to criminal offences where dishonesty or recklessness are present. This approach is not taken uniformly throughout the Act. In relation to insider trading, for example, a contravention of the one provision can give rise to a criminal offence and a civil penalty consequence. The latter approach leaves the choice of penalty to the regulator with the consequence that there is less clarity for the regulated as to the consequences of engaging in different forms of misconduct. The Taskforce would prefer that the consequences for engaging in different forms of misconduct was always clear from reading the legislation itself, however, this would require revision to a range of provisions to address this kind of issue and others to ensure consistent application of the fault elements in the *Criminal Code Act 1995* (Cth) (Criminal Code). Such an exercise is beyond the scope of this review, although the Taskforce considers there would be merit in it.

25. Despite the inconsistency in the legislation, the Taskforce has sought, wherever possible and appropriate, to develop positions that adopt a simple, standardised approach to penalties and apply a consistent rationale. One result of this approach is that the Taskforce has adopted as a preliminary position that criminal fines for Corporations Act offences should be determined by reference to a standard formula calculated on the basis of the number of months of a maximum term of imprisonment times 10 for individuals and multiplied by a further 10 for corporations. The formula approach would represent an increase in maximum criminal fines for most offences and provides for consistency as offences with the same maximum term of imprisonment will have the same applicable fines, which is not currently the case. This would replace a diffuse regime that sets maximum fines on an inconsistent basis across the legislation.
26. The Taskforce also considers that as far as possible similar conduct should give rise to similar consequences. Accordingly, it has adopted the preliminary position that criminal penalties for the most serious criminal offences in the Corporations Act should be increased to the highest terms of imprisonment and fines available under that Act, which are currently applicable to market misconduct and insider trading. Offences of comparable seriousness given the nature of the offending and/or the consequences for the market or financial consumers should give rise to the same penalties. This forms the basis for a number of positions in this paper.
27. The Taskforce noted the increases to financial penalties proposed for the Australian Consumer Law following a review of that law<sup>16</sup> and considers that similar increases should apply to a equivalent contraventions in the consumer protection provisions in the ASIC Act. However, the Taskforce considers that financial penalties in ASIC-administered legislation should be expressed in penalty units and has proposed increases in the ASIC Act that would be equivalent to the monetary maximum amounts proposed in the Australian Consumer Law. In addition, absent the Australian Consumer Law proposals, the Taskforce may not have proposed increases of the same magnitude for corporations in the ASIC Act.
28. As a result, the Taskforce suggests broad alignment with the ACL penalty regime for civil penalty maximums in the ASIC Act and for individuals in the Corporations Act and Credit Act. The Taskforce proposes a different increase to the maximum civil penalty amount for corporations in the Corporations Act and Credit Act while also adopting the 3 times gain and 10% turnover maximums, similar to those in the Australian Consumer Law, which will give courts a discretion to impose substantial civil penalties on corporations in appropriate cases.

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16 Australian Consumer Law Review Final Report, March 2017, <http://consumerlaw.gov.au/review-of-the-australian-consumer-law/final-report/>.



## 2. CRIMINAL PENALTIES

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### 2.1 Maximum penalty settings: imprisonment and fines

1. The Corporations Act, ASIC Act and Credit Act and Code provide for criminal penalty provisions that ASIC has responsibility for investigating and enforcing. These Acts and various parts of them have emerged disparately over time and this is reflected in some inconsistencies in the penalty regimes in each.
2. For example, in 2010, Parliament increased penalties for insider trading, market manipulation offences<sup>17</sup> and dishonest conduct in the provision of financial products and services<sup>18</sup> in the Corporations Act. The maximum term of imprisonment was doubled from five to 10 years and maximum financial penalties were increased as follows:
  - a. for individuals: the greater of 4,500 penalty units, which is currently \$945,000, or three times the value of the benefits obtained;
  - b. for corporations: the greater of 45,000 penalty units, which is currently \$9.45 million, three times the value of the benefits obtained (or loss avoided), or if the Court cannot determine that value, 10% of annual turnover in the preceding 12 months.<sup>19</sup>
3. These now represent the highest maximum penalties applicable for contraventions of the Corporations Act.
4. In contrast, despite their comparable seriousness, the maximum penalties for a number of other offences under the Corporations Act that involve dishonesty in relation to conduct as a director, officer or employee of a corporation, remain at a maximum of five years' imprisonment and/or 2,000 penalty units<sup>20</sup> (currently \$420,000).
5. For any given offence, the maximum penalty '*...reflects a legislative view of the seriousness of the criminal conduct ...*'.<sup>21</sup> The statutory maximum penalty restricts the court's sentencing discretion because it marks the *absolute limit* of any sentence that may be imposed and is reserved for instances of the offence that are so grave that they warrant the imposition of the maximum prescribed penalty for that offence. Where the offence is not so grave a sentencing judge must consider '*where the facts of the particular offence and offender lie on the "spectrum" that extends from the least serious instance to the worst category*'.<sup>22</sup>

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17 Specifically, ss1041A, 1041B(1), 1041C(1), 1041D, 1041E(1), 1041F(1), 1041G(1), 1043A(1) and 1043A(2) of the Corporations Act.

18 Corporations Act sections 1041G and 1041F.

19 Item 310 of Schedule 3 to the Corporations Act. See also the definition of turnover at 761A of the Corporations Act.

20 For example Corporations Act ss184, 601FD, 601FE, 601UAA and 601UAB.

21 *R v Oliver* (1980) 7 A Crim R 174 at 177 per Street CJ.

22 *R v v Kilic* [2016] HCA 48 at [18]–[19]; see also *Ibbs v R* [1987] HCA 46; (1987) 163 CLR 447 at 451-2.

6. The recent Victorian case of *Nicholls v R*,<sup>23</sup> provides an example of a case in which the original sentencing Judge and the Court of Appeal were both constrained by the five-year statutory maximum penalty for a breach of s184. In *Nicholls*, the Victorian Supreme Court of Appeal accepted that the offences were ‘doubtless serious’ and noted that the offending ‘lasted nearly two years’.<sup>24</sup> Nonetheless, the Court of Appeal reduced the original sentence of four years and six months’ imprisonment to three years and six months. The Court concluded with the following remarks in relation to the maximum penalty for s184 offences:

*“We wish to make this additional observation. The assessment of the objective gravity of offending for this offence is necessarily informed and circumscribed in a significant way by the maximum penalty ... It is a matter for the legislature to consider whether sentencing courts should have greater flexibility to impose more substantial sentences for serious breaches of duty involving dishonesty by company directors.”<sup>25</sup>*

7. The original judge in *Nicholls* also noted the constraints of the five-year maximum term of imprisonment, when compared to the ten-year maximum term for dishonesty offences of obtaining property by deception under Victorian legislation.<sup>26</sup>

### 2.1.1 Comparison with overseas jurisdictions

8. The highest maximum prison terms in Australia are generally comparable with those in other jurisdictions, with the exception of the maximum term of imprisonment in the United States, which is 20 years. The Senate Economic References Committee, in its White Collar Crime report, noted some stakeholders advocated for an increase to the maximums terms of imprisonment for white-collar crime. Nonetheless, ‘broadly speaking’ the Committee considered the current maximum terms of imprisonment to be appropriate.<sup>27</sup>
9. There are some types of corporate offences in Australia that differ substantially from comparable offences in other jurisdictions and this makes comparison difficult. For example, in addressing breaches of directors’ and officers’ duties, Australia is unique in having specific statutory duties. In contrast, other jurisdictions rely on common law and equitable principles for penalising breaches of directors’ and officers’ duties.

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23 [2016] VSCA 300 (Redlich and McLeish JJA and Beale AJA).

24 Ibid at [46].

25 Ibid at [49].

26 *DPP (Cth) v Nicholls*, Unreported, County Court of Victoria, Judge Patrick, 6 November 2015

27 White Collar Crime report, p. 62.

**TABLE 1: COMPARISON OF PRISON TERMS (YEARS)**

Country	Insider trading	Market manipulation	Disclosure	False statements	Unlicensed conduct	Dishonest conduct
Australia	10	10	5	10	2	10
Canada (Ontario)	10	10	5	5	5	14
Hong Kong	10	10	—	10	7	10
United Kingdom	7	7	—	7	2	10
United States	20	20	20	20	20	20 <sup>28</sup>

10. Similarly, maximum fines in Australia are generally comparable to most other jurisdictions. However, fines for breaches of the continuous disclosure obligations and unlicensed conduct are much lower in Australia than those in other jurisdictions.

**TABLE 2: COMPARISON OF CRIMINAL FINES FOR INDIVIDUALS (A\$)**

Country	Insider trading	Market manipulation	Disclosure	False statements	Unlicensed conduct	Dishonest conduct
Australia	Greater of \$945,000, or 3 times the benefit gained	Greater of \$945,000, or 3 times the benefit gained	\$42,000	Greater of \$945,000, or 3 times the benefit gained	\$42,000	Greater of \$945,000, or 3 times the benefit gained <sup>29</sup>
Canada (Ontario)	Greater of \$5.08 million, or 3 times the benefit gained	\$5.08 million	\$5.08 million	\$5.08 million	\$5.08 million	—
Hong Kong	\$1.63 million	\$1.63 million	—	\$1.63 million	\$800,000	—
United Kingdom	(unlimited)	(unlimited)	—	(unlimited)	(unlimited)	(unlimited)
United States	\$6.4 million	\$6.4 million	\$6.4 million	\$6.4 million	\$6.4 million	\$6.4 million

11. Particular categories of offences where the Taskforce has identified the potential to increase penalties are defective disclosure/false or misleading statements to consumers; failure to comply with corporate obligation; unlicensed conduct; failure to comply with financial services licensee obligations; client money obligations; credit code obligations; failure to comply with ASIC requirement; and making false or misleading statements to ASIC.
12. The next part of this paper will discuss some of the Taskforce's proposed increases to criminal penalties. However, the discussion will not address each and every increase contemplated. A complete list of increases in imprisonment penalties is provided at Annexure B.

28 Fraud offences that amount to 'securities and commodities fraud' attract a maximum prison term of 25 years under the *Sarbanes-Oxley Act 2002*: see 18 U.S.C. § 1348.

29 This is the maximum fine for dishonest conduct under s1041G of the Corporations Act. While this section is not specifically directed towards fraud, conduct that constitutes fraud also frequently raises issues of dishonest conduct.

## 2.1.2 Defective disclosure/false or misleading statements to consumers

### Obligation to provide information to consumers

13. Chapter 7 of the Corporations Act sets out a number of disclosure requirements for licensees and financial services providers, including requirements to give consumers specific documents and offences relating to the provision of defective disclosure documents. Disclosure documents are generally defective if they contain misleading or deceptive statements or omit material information including information required by the Act to be included in the document.<sup>30</sup> The relevant provisions include the following:
  - a. Sections 1012A, 1012B and 1012C impose obligations to give a Product Disclosure Statement (PDS) in various circumstances. Under section 1021C failure to provide a PDS when required to do so is an offence of strict liability<sup>31</sup> and an ordinary offence;
  - b. Section 1021D creates offences of knowingly giving a defective PDS;
  - c. Sections 941A and 941B impose obligations to give a Financial Services Guide (FSG) to a client and s946A imposes the obligation to give a Statement of Advice (SoA). Under s952C failure to give these documents when required to do so is a strict liability and an ordinary offence carrying maximum penalties of a fine of 50 penalty units for the strict liability offence and 100 penalty units (500 penalty units for a body corporate) and/or two years' imprisonment;
  - d. Sections 952D and 952F create offences of knowingly giving a defective FSG or SoA with maximum penalties of 200 penalty units (1,000 penalty units for a body corporate) and/or five years' imprisonment. Subsection 952L(1) provides for a similar offence, with the same maximum penalty, where someone becomes aware of a defective disclosure and does not remedy the issue as soon as practicable.
14. The offences of failing to provide disclosure documents when required (ss1021C and 952C) have maximum penalties of a fine of 50 penalty units for the strict liability offence (where a fault element such as intention is not required to be established) and 100 penalty units (500 penalty units for a body corporate) and/or two years' imprisonment for the ordinary offence. Knowingly providing defective disclosure (ss1021D, 952D and 952F) carries a maximum penalty of 200 penalty units (1,000 penalty units for a body corporate) and/or five years' imprisonment.
15. These disclosure requirements are fundamental obligations designed to protect consumers. Knowingly providing defective documents to consumers is comparable with the obligations under section 1041E. It seems reasonable therefore, that breaches of sections 952D, 952F, 952L and 1021D should carry the same penalty as s1041E, as outlined in the table below.

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30 See sections 952B(1), which defines 'defective' with respect to Financial Services Guides and statement of advice and section 1021B(1) with respect to Product Disclosure Statements.

31 As discussed further below the strict liability offence does not require the regulator to establish a fault element (such as intent) but the defence of honest and reasonable mistake is available to the accused person.

16. In proposing alignment with the model for the market misconduct and insider trading offences, the Taskforce proposes to make one adjustment in that courts should have discretion to derive a maximum pecuniary penalty based on 10% annual turnover even where the Court can readily determine the value of the benefits obtained (or loss avoided). The Taskforce proposes to apply this approach to all criminal provisions in ASIC-administered legislation where a ‘multiple of benefit and turnover’ maximum penalty is contemplated (for example, existing market misconduct and insider trading offences would be amended in line with this new approach).
17. It is also proposed that the prison terms for offences of failing to give a required disclosure document (sections 1021C and 952C) be increased to five years. Further, under subsection 952L(2) an authorised representative must comply with a licensee direction under subsection 952L(1). Contravention of this obligation currently carries a maximum penalty of 100 penalty units and/or two years’ imprisonment. This maximum penalty should be increased to five years’ imprisonment and 600 penalty units for individuals, to correspond with the proposed increase to subsection 952L(1).

Relevant provision	Current maximum penalty	Proposed maximum penalty
Subsections 952D(1); 952D(2); 952F(2); 952F(3); 952F(4); 952L(1); 1021D(1); 1021D(2)	5 years’ imprisonment and/or 200 penalty units (individuals) 1,000 penalty units (corporations)	General formula does not apply 10 years’ imprisonment and/or 4,500 penalty units or x3 benefits (individuals) 45,000 penalty units or x3 benefits or 10% annual turnover (corporations)
Subsection 952C(3); 952L(2) and 1021C(3)	2 years’ imprisonment and/or 100 penalty units (individuals) 500 penalty units (corporations)	5 years’ imprisonment and/or 600 penalty units (individuals) 6,000 penalty units (corporations)

### Disclosures to investors

18. Chapter 6D provides that a person should only make an offer of securities or distribute an application form for an offer of securities after a disclosure document for the offer has been lodged with ASIC, except in certain circumstances, such as where the offer is only made to sophisticated investors or is part of a small scale offering.
19. The most serious offences under the corporate fundraising disclosure regime are those created by sections 727 and 728. Subsection 727(1) prohibits making an offer of securities that needs disclosure unless a disclosure document has been lodged with ASIC. Subsection 728(3) creates an offence for misleading or deceptive disclosure documents that have a materially adverse impact on investors. Defences under sections 731-733 (such as due diligence, lack of knowledge and reasonable reliance) are available for subsection 728(3).
20. The sale of securities without a prospectus or other disclosure document can have the result that substantial funds are raised illegally from investors to their detriment and for the benefit of those involved in the fundraising. Investors can also be adversely affected by misstatements and omissions in disclosure documents.

21. On the basis of the seriousness of these offences, the Taskforce proposes to increase the maximum criminal penalty as outlined below. The proposed penalty increase is intended to act as a substantial deterrent to those who intentionally seek to avoid their disclosure obligations and those who cause harm to investors through incorrect disclosure documents.

Relevant provision	Current maximum penalty	Proposed maximum penalty
Subsection 727(1); 728(3)	5 years' imprisonment and/or 200 penalty units (individuals) 1,000 penalty units (corporations)	General formula does not apply 10 years' imprisonment and/or 4,500 penalty units or x3 benefits (individuals) 45,000 penalty units or x3 benefits or 10% annual turnover (corporations)

### 2.1.3 Failure to comply with corporate obligation

#### Officers' duties and dishonest conduct

22. As discussed earlier in this paper, a number of offences (including section 184) under the Corporations Act involve dishonesty in relation to conduct as a director, officer or employee of a corporation. Specifically, these are offences under sections 601FD, 601FE, 601UAA and 601UAB, which relate to officers and employees of responsible entities of registered schemes and of licensed trustee companies. Similarly, section 596AB of the Corporations Act, in relation to external administrations, relates to dishonest conduct with the intention to avoid employee entitlements.
23. Given these offences also relate to employees and officers using their position to improperly gain a benefit, or to cause detriment to others, the Taskforce considers it appropriate to increase the criminal penalty for these offences to match the proposed increase to section 184, as outlined below.

Relevant provision	Current maximum penalty	Proposed maximum penalty
Section 596AB	10 years' imprisonment and/or 1,000 penalty units (individuals) 5,000 penalty units (corporations)	General formula does not apply 10 years' imprisonment and/or 4,500 penalty units or x3 benefits (individuals) 45,000 penalty units or x3 benefits or 10% annual turnover (corporations)
Subsections 601FD(4); 601FE(4)	5 years' imprisonment and/or 2,000 penalty units (individuals) 10,000 penalty units (corporations)	As above
Subsections 601UAA(1); 601UAB(1)	5 years' imprisonment and/or 300 penalty units (individuals) 1,500 penalty units (corporations)	As above

## Financial reporting

24. The actions of even a small number of directors and officers can profoundly affect many shareholders and creditors, highlighting the far-reaching effects of misconduct in this category. For example, section 344 of the Corporations Act creates an obligation for directors to keep financial records and prepare financial reports. This obligation is critical for keeping investors informed and for creating confidence in the integrity of financial markets.
25. Failure to comply with the obligation under section 344 attracts a civil penalty but contraventions that are dishonest are treated as a criminal offence<sup>32</sup> attracting a criminal penalty of 2,000 penalty units or 5 years' imprisonment or both. Given the potentially far-reaching effects of a dishonest contravention of this offence, the Taskforce considers it appropriate to increase the criminal penalty for this offence as outlined below.

Relevant provision	Current maximum penalty	Proposed maximum penalty
Subsection 344(2)	5 years' imprisonment and/or 2,000 penalty units (individuals) 10,000 penalty units (corporations)	General formula does not apply 10 years' imprisonment and/or 4,500 penalty units or x3 benefits (individuals) 45,000 penalty units or x3 benefits or 10% annual turnover (corporations)

## Continuous disclosure

26. The Corporations Act imposes strict continuous reporting obligations on disclosing entities. Entities' reporting obligations arise when certain material events occur in relation to the company's operation or financial position. The information that must be disclosed is that which is likely to affect the price or value of the entity's securities (section 674).
27. An entity that fails to comply with subsections 674(2) or 675(2) can be held criminally liable with the current penalties being 200 penalty units and five years' imprisonment or both for individuals. The Taskforce is not proposing to increase the maximum imprisonment penalty for this offence but considers it appropriate to adjust the criminal pecuniary penalty by applying the general formula, as outlined below.

Relevant provision	Current maximum penalty	Proposed maximum penalty
Subsections 674(2); 675(2)	5 years' imprisonment and/or 200 penalty units (individuals) 1,000 penalty units (corporations)	5 years' imprisonment and/or 600 penalty units (individuals) 6,000 penalty units (corporations)

## Disqualified persons

28. Section 206A(1) prevents any person who is disqualified from managing corporations from participating in management responsibilities. Disqualification from managing corporations is an important protection against individuals who have demonstrated themselves unfit to perform a management role.

<sup>32</sup> See subsection 344(2) of the Corporations Act.

29. The current penalty is not sufficient to meet community expectations with misconduct of this kind, which has the capacity to undermine the protective purpose served by disqualification. The proposed increase to the maximum imprisonment penalty is intended to ensure consistency with offences of equivalent seriousness.

Relevant provision	Current maximum penalty	Proposed maximum penalty
Subsection 206A(1)	1 year imprisonment and/or 50 penalty units (individuals) 250 penalty units (corporations)	5 years' imprisonment and/or 600 penalty units (individuals) 6,000 penalty units (corporations)

### 2.1.4 Unlicensed conduct

30. In Australia, financial services and credit providers must be licensed by ASIC. Carrying on a financial services business without a licence is an offence pursuant to section 911A. Section 920C establishes an offence where a person who has been banned from providing financial services engages in conduct in breach of a banning order.
31. A ban from providing financial services is an important protection against individuals who have demonstrated themselves unfit to provide these services. The conduct is comparable to carrying on a financial services business without a licence, with the aggravating factor that the person has already been banned from providing financial services.
32. Similar to the proposal to increase the penalty for section 206A above, the offending conduct can undermine the protective purpose served by banning. The proposed increase to the maximum imprisonment penalty for these offences is intended to ensure consistency with offences of equivalent seriousness.

Relevant provision	Current maximum penalty	Proposed maximum penalty
Subsection 911A(1)	2 years' imprisonment and/or 200 penalty units (individuals) 1,000 penalty units (corporations)	5 years' imprisonment and/or 600 penalty units (individuals) 6,000 penalty units (corporations)
Subsection 920C(2)	6 months' imprisonment and/or 25 penalty units (individuals) 125 penalty units (corporations)	5 years' imprisonment and/or 600 penalty units (individuals) 6,000 penalty units (corporations)

### 2.1.5 Failure to comply with financial services licensee obligations

#### Financial services and markets misconduct (Chapter 7)

33. Breaches of financial services laws can result in significant consumer detriment. As noted by Gilligan and Bird *'[t]he financial and insurance sector is of national strategic importance in Australia'*.<sup>33</sup> Therefore, *'protecting the integrity of Australia's financial and insurance sector is of crucial importance to the well-being of Australia's economy and its population'*.<sup>34</sup>

33 George Gilligan and Helen Bird, *'Financial Services Misconduct and the Corporations Act 2001'*, Working Paper No 2, Centre for Corporate Law & Securities Regulation, The University of Melbourne, 31 July 2015, p. 2.

34 Ibid p.2.

34. Their research found that there was ‘no evidence that the Courts 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’<sup>35</sup> and that ‘imprisonment terms applied by the Courts are cautiously and conservatively applied’.<sup>36</sup> Further, where lengthy prison terms or large pecuniary penalties were imposed this involved multiple contraventions of the law.<sup>37</sup>
35. For example, subsection 991E(1) relates to a licensee’s obligation to disclose when they are acting on their own behalf in dealing in financial products. The maximum penalty for breaching this obligation is 6 months’ imprisonment and/or 25 penalty units (for an individual). Breach of this obligation has the potential to do significant harm to an individual and undermines the integrity of the broader financial services profession. The maximum penalty should be raised to meet with community expectations for such misconduct.

Relevant provision	Current maximum penalty	Proposed maximum penalty
Subsections 991E(1) and (3)	6 months’ imprisonment and/or 25 penalty units (individuals) 125 penalty units (corporations)	1 year imprisonment and/or 120 penalty units (individuals) 1,200 penalty units (corporations)

#### Non-compliance with ASIC requirement

36. Licensees also have certain obligations to assist ASIC or authorised persons in the performance of the corporate regulator’s functions. Compliance with such obligations is fundamental to the licensing regime and failure to comply should carry a significant penalty – arguably higher than those currently allowed.
37. In particular, a licensee’s obligation to comply with a direction from the regulator to provide a statement containing specified information (s912C) is fundamental to the licensing regime, and contravention should attract a substantial pecuniary penalty to ensure fines are not paid simply as a course of business.

Relevant provision	Current maximum penalty	Proposed maximum penalty
Subsection 912C(3)	6 months’ imprisonment and/or 25 penalty units (individuals) 125 penalty units (corporations)	2 years imprisonment and/or 240 penalty units (individuals) 2,400 penalty units (corporations)

35 Ibid p. 36.

36 Ibid p. 39.

37 Ibid p. 36.

## Obligation to provide information to ASIC

38. Licensees have various obligations to notify ASIC about breaches of their obligations and about participants in the market/facility. The licensee's obligation to report breaches is fundamental to the licensing regime. For example, the obligation to notify ASIC of any breach of conditions on approval under subsection 851D(8) carries a penalty of 100 penalty units for individuals. While the current maximum imprisonment penalty of two years is appropriate, the criminal pecuniary penalty should be increased to reflect the seriousness of such misconduct. Position 2, outlined below, would lift the pecuniary penalty for individuals from 100 penalty units to 240 penalty units.

## Record keeping

39. A financial services licensee is obliged to keep financial records which correctly record and explain the transactions and the financial position of the licensee's financial services business under subsection 988A(1). Failure to comply with these requirements is an offence punishable, for an individual by a fine of 200 penalty units or imprisonment for five years, or both.
40. The obligation to keep proper financial records is fundamental to the financial reporting requirements in Chapter 2M. The current imprisonment penalty is sufficient; however, the pecuniary penalty is too low and may be treated as a cost of business. Position 2, outlined below, would lift the pecuniary penalty for individuals from 200 penalty units to 600 penalty units.

## 2.1.6 Client money obligations

41. There are a number of obligations under Chapter 7 governing how a licensee deals with client monies, including disclosure and how monies received should be managed. For example, the obligation to pay client money into an account as required by section 981B (taken to be held in trust) is an important obligation and its abuse could be motivated by personal gain and/or cause significant detriment to clients.
42. A strict liability offence is appropriate for subsection 993B(1), as this relates to less serious or technical breaches. However, a substantial penalty, as outlined in the table below, is required for the ordinary offence in subsection 993B(3) as this captures intentional and/or dishonest breaches.

Relevant provision	Current maximum penalty	Proposed maximum penalty
Subsection 993B(3)	5 years' imprisonment and/or 200 penalty units (individuals) 1,000 penalty units (corporations)	General formula does not apply 10 years' imprisonment and/or 4,500 penalty units or x3 benefits (individuals) 45,000 penalty units or x3 benefits or 10% annual turnover (corporations)

43. Other provisions impose obligations on product providers, such as obligations under section 1017E. The obligation to pay client money into an account as required by section 981B (taken to be held in trust) is an important obligation and its abuse could be motivated by personal gain and/or cause significant detriment to clients. To that extent the obligation is comparable to the client money provisions and breach of the obligation should carry an appropriately significant penalty. For details on the proposed increases in maximum terms of imprisonment see Annexure B.

### 2.1.7 Defective disclosure to ASIC

44. ASIC investigates a wide variety of serious corporate, markets and financial services related offences. Some of these offences may be notoriously difficult to investigate and prosecute. Investigations can be very complex, as many corporate offences are committed in-house, within corporate/business structures, under a veil of secrecy and complexity and/or hidden within a vast body of legitimate trading or commercial activity (that is, market manipulation, insider trading and false accounting). It is often difficult to obtain information and evidence from relevant parties, particularly where they may themselves be implicated, have close ties to a suspect and/or to a corporate entity or person(s) with commercial interests and reputations to protect.
45. As with many of Australia’s various crime commissions, ASIC often relies on its compulsory examination powers to personally examine individual persons, many of whom are not otherwise co-operative, to obtain prompt, direct, truthful and unfiltered information and evidence. The provision of false or misleading information to ASIC, in the course of a compulsory examination or investigation, can derail or significantly delay the course of justice.
46. A broad search across Australian legislation databases has identified over 50 Commonwealth, State and Territory provisions that prescribe criminal penalties for providing false or misleading information or statements in an ‘examination’ or ‘hearing’ setting. The range of maximum penalties applicable to this type of offending is varied. However, the penalties for providing false or misleading information to entities comparable to ASIC (such as the Australian Criminal Intelligence Commission (ACIC) and Royal Commissions) are significantly higher than similar offences against ASIC. The maximum penalty for ACIC and Royal Commissions is five years’ imprisonment and/or a fine between \$20,000 and 200 penalty units (which currently converts to \$42,000).<sup>38</sup>
47. By contrast, the maximum penalty that currently applies to the provision of false or misleading information to ASIC under subsection 64(1) of the ASIC Act and subsection 291(1) of the Credit Act is two years’ imprisonment and/or a fine of 100 penalty units (which currently converts to \$21,000). Raising the penalty may be necessary to ensure consistency with equivalent offences in other legislation. The Taskforce proposes to increase the penalties for these provisions, as outlined in the table below.

Relevant provision	Current maximum penalty	Proposed maximum penalty
Subsections 64(1) ASIC Act and 291(1) Credit Act	2 years’ imprisonment and/or 100 penalty units (individuals) 500 penalty units (corporations)	5 years’ imprisonment and/or 600 penalty units (individuals) 6,000 penalty units (corporations)

38 Section 6H of the *Royal Commissions Act 1902* and s33 of the *Australian Crime Commission Act 2002*, respectively.

48. False information can significantly delay and undermine the prosecution of offences. For example, in the Victorian case of *R v Chan*,<sup>39</sup> Mr Chan, a securities trader, together with a tight knit group of clients and associates, fabricated a story to conceal their breaches of section 1041A of the Corporations Act (market manipulation offences). Mr Chan attended a compulsory ASIC examination and gave false and misleading information in accordance with the fabricated story in breach of section 64 of the ASIC Act. In addition to eight charges of market manipulation, Mr Chan was charged with providing false or misleading information to ASIC. Mr Chan was sentenced to five months' imprisonment on the section 64 offence, as part of an aggregate sentence of 20 months' imprisonment, to be released after serving four months. An additional five month sentence, while appropriate in the context of a two-year maximum, does not reflect the serious consequential effect of the offence on ASIC's investigations and may not be an adequate deterrence.

## 2.2 Increases to maximum penalties

49. The Taskforce considers that penalties (both terms of imprisonment and maximum fine amounts) should be increased for some of the offences in the categories discussed above.
50. In respect of imprisonment, proposed new maximum terms for offences identified have been set out in Annexure B.
51. In respect of fines, the Taskforce considers that, in addition to increasing maximum amounts, the regime should be simplified and made more consistent by determining maximums by reference to a formula based on the maximum term of imprisonment for the relevant offence. This approach is already adopted as standard in the *Crimes Act 1914*,<sup>40</sup> but only applies where no other intention appears. The practice of prescribing particular amounts for particular offences thus overrides the Crimes Act in many instances.
52. The Crimes Act provides for the maximum fine for individuals to be calculated by (months of imprisonment) X five = maximum penalty units. For corporations, a further multiple of five is applied to the formula for individuals. This is consistent with the AGD guide which contemplates a pecuniary penalty for individuals that is five times the number of months of imprisonment.
53. The AGD guide also notes, however, that much higher multiples may be appropriate for white collar and corporate offences. The Taskforce considers that the standard AGD guide multiple is not sufficient given the high potential profits from corporate misconduct.
54. The Taskforce proposes that pecuniary penalties for individuals should be calculated by taking the number of months of imprisonment and multiplying by ten. The Taskforce proposes that pecuniary penalties for corporations should be ten times the pecuniary penalty for individuals. The proposal necessitates a maximum term of imprisonment penalty in order to calculate the relevant pecuniary penalty.

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39 [2010] VSC 312; (2010) 79 ACSR 183.

40 Section 4B

55. The Taskforce considers that there should be an exception to the application of the formula for the most serious offences in the legislation – generally those offences that carry a maximum term of imprisonment of 10 years, such as corporate fraud (currently 5 years but to increase to 10 on the Taskforce’s position outlined below). Further examples of this class of offence appear in the discussion of different offence categories above.
56. The Taskforce notes that some offences include a pecuniary penalty with no imprisonment option. The Taskforce also notes that for some offences the pecuniary penalty is calculated based on the number of days in respect of which the offence is committed. For example, subsection 904G(5) of the Corporations Act provides for a pecuniary penalty of ‘100 penalty units for each day, or part of a day, in respect of which the offence is committed’ and does not include an imprisonment. Pecuniary penalties cast this way will not be affected by the proposed formula. However, some of these penalties may nonetheless be increased through other positions adopted by the Taskforce, such as the proposal to raise criminal pecuniary penalties to a minimum of 20 penalty units.

**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.

#### **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?

**TABLE 3: EXAMPLES OF CHANGES TO CRIMINAL PENALTIES BASED ON NEW GENERAL FORMULA**

Current maximum penalty	Proposed maximum penalty <sup>41</sup>
3 months' imprisonment and/or 10 penalty units (individuals) 50 penalty units (corporations)	3 months' imprisonment and/or 30 penalty units (individuals) 300 penalty units (corporations)
6 months' imprisonment and/or between 25 and 180 penalty units (individuals) Between 125 and 900 penalty units (corporations)	6 months' imprisonment and/or 60 penalty units (individuals) 600 penalty units (corporations)
1 year imprisonment and/or between 50 and 60 penalty units (individuals) Between 250 and 300 penalty units (corporations)	1 year imprisonment and/or 120 penalty units (individuals) 1,200 penalty units (corporations)
2 years' imprisonment and/or between 100 and 200 penalty units (individuals) Between 500 and 1,000 penalty units (corporations)	2 years' imprisonment and/or 240 penalty units (individuals) 2,400 penalty units (corporations)
5 years' imprisonment and/or between 200-2,000 penalty units (individuals) Between 1000-10,000 penalty units (corporations)	5 years' imprisonment and/or 600 penalty units (individuals) 6,000 penalty units (corporations)
10 years' imprisonment and/or 1,000 penalty units (individuals) 5,000 penalty units (corporations)	General formula does not apply, as discussed above 10 years' imprisonment and/or 4,500 penalty units or x3 benefits (individuals) 45,000 penalty units or x3 benefits or 10% annual turnover (corporations)

## 2.3 Corporate fraud offences

57. Corporate fraud, in ASIC's context, refers to serious misconduct engaged in by directors, other company officers and in some cases employees that gives rise to criminal liability. Perpetrators exploit their position in order to derive a benefit for themselves or someone else.

<sup>41</sup> There will be exceptions to this general rule for setting criminal pecuniary penalties. For example, in other parts of this paper specific pecuniary penalties are contemplated that will align with Australian Consumer Law. The proposed formula for criminal penalties would not apply in such cases.

58. The Corporations Act contains a number of provisions relating to fraudulent conduct. The offence under section 184 has the most general application.<sup>42</sup> Subsection 184(1) imposes criminal liability where a director or officer of a corporation acts recklessly or with intentional dishonesty and fails to fulfil his or her duties to the corporation.<sup>43</sup> It provides:

*“A director or other officer of a corporation commits an offence if they:*

*(a) are reckless; or*

*(b) are intentionally dishonest;*

*and fail to exercise their powers and discharge their duties:*

*(c) in good faith in the best interests of the corporation; or*

*(d) for a proper purpose.”*

59. Subsections 184(2) and (3) apply where a director, officer or employee uses their position or information dishonestly (or recklessly) with the intention to gain an advantage for themselves or someone else or to cause a detriment to the corporation.<sup>44</sup>
60. ASIC is responsible for conducting investigations into suspected contraventions of the Corporations Act. ASIC also has the power to investigate breaches of corporate offences under the crimes legislation of the States and Territories (State-based offences).<sup>45</sup> There are a range of terms and legal effects for misconduct under these State-based offences. For example:
- a. "fraud" (for example, s408C Criminal Code 1899 (Qld), s409 Criminal Code Act 1913 (WA), s192E Crimes Act 1900 (NSW));
  - b. "theft" (for example, s74 Crimes Act 1958 (Vic), s134 Criminal Law Consolidation Act 1935 (SA));
  - c. "deception" (for example, s139 Criminal Law Consolidation Act 1935 (SA)); and
  - d. "obtaining property by deception" (for example, s81 Crimes Act 1958 (Vic)).

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42 Sections 590, 592 and 596 deal with conduct that may properly be described as "fraudulent" and "frauds". However, these offences apply in specific and limited circumstances. The offences under ss590 and 592 are limited to fraudulent activity by directors, officers and/or employees of insolvent companies or under some form of administration. The offence under s596 only relates to fraud that induces provision of credit, fraudulent gifts or transfers of interest, concealment or removal of property to defeat a judgment or order for payment of money. Similarly, s1041G only deals with dishonest conduct only in relation to "a financial product or financial service" and only "in the course of carrying on a financial services business".

43 A breach of similar obligations that is not reckless or intentionally dishonest may give rise to civil penalty action, s181 of the Corporations Act.

44 A breach of similar obligations that is not dishonest may give rise to civil penalty action, ss182 and 183 of the Corporations Act.

45 Section 13 of the ASIC Act.

61. The most common maximum penalty for these State-based offences is up to ten years' imprisonment.<sup>46</sup> However, the penalty for contravening section 184 is only up to five years' imprisonment and/or a fine of up to 2,000 penalty units (currently \$420,000).<sup>47</sup>
62. Corporate fraud generally involves conduct that can encompass a State-based offence (such as obtaining property by deception or theft) as well as conduct that is properly captured by a separate Corporations Act offence. In determining which offences to prosecute, ASIC considers the likely penalty arising out of the prosecution. As a result, ASIC regularly investigates whether misconduct amounts to a contravention of a State-based offence as well as, or instead of, offences under the Corporations Act.
63. Prosecuting a combination of Commonwealth and State-based offences raises difficulties due to legal differences between the jurisdictions (including provable elements and definitions) and, on conviction, differences in statutory penalties and sentencing practices. In some instances the prosecution may not be permitted to run a single trial involving both Commonwealth and State charges despite the commonality of the evidence supporting the offences. Conducting multiple trials has a significant impact on the alleged offender and is costly for the alleged offender, the Court, the Commonwealth Department of Public Prosecutions (CDPP) and ASIC.
64. Prosecuting a State-based offence alone would constrain ASIC's investigative powers. For example, ASIC's power to compel persons to give "all reasonable assistance" in a prosecution can only be used when prosecuting a Commonwealth offence.<sup>48</sup> Similar issues arise in obtaining a search warrant under the Commonwealth Crimes Act. This has been considered separately by the Taskforce in an earlier positions paper.

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

65. To address these issues the Taskforce adopts as a preliminary position an increase to the maximum penalty for a breach of section 184 to 10 years' imprisonment and/or a fine: for individuals the greater of 4,500 penalty units or three times the benefit gained (or loss avoided); and for corporations the greater of 45,000 penalty units, or three times the benefit gained (or loss avoided) or 10% annual turnover.

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46 For example, s192E of the *Crimes Act 1900* (NSW), s139 of the *Criminal Law Consolidation Act 1935* (SA) and s326 of the *Criminal Code* (ACT). However, in Western Australia, the ten year maximum is only applied to fraud contrary to s409 of the *Criminal Code* (WA) in cases in which the person deceived is not less than 60 years old – otherwise the maximum is seven years. South Australia also has an "aggravated offence" provision in relation to victims known by the offender to be over 60 years of age that elevates the maximum penalty for deception to 15 years imprisonment. In Queensland, fraud contrary to section 408C is subject to a standard maximum penalty of five years' imprisonment; however this is elevated to 14 years in specified circumstances – including where the offender is a director or officer of the victim corporation – and to 20 years if the "yield" to the offender or detriment caused is more than \$100,000.

47 From 1 July 2017, the *Crimes Amendment (Penalty Unit) Act 2017* increased the value of the penalty unit for Commonwealth offences from is \$210 (from \$180) with indexation to occur every three years following this date.

48 Section 49 of the ASIC Act.

66. Increasing the penalty under section 184 would align the penalty with comparable State-based offences. Further, it would realign the penalty with the maximum penalties for dishonest conduct in the financial services context (s1041G) and "cheating" in a markets context (for example, section 1041A market manipulation and section 1043A insider trading). These penalties are of comparable seriousness and were increased in 2010, while the penalty for section 184 has remained unchanged since 2001.
67. This proposal would also increase ASIC's ability to prosecute corporate offences under the Commonwealth laws and, therefore, ensure ASIC can consistently access investigative powers in the prosecution of corporate fraud offences.
68. Additionally, ASIC has raised concerns that the wording in subsections 184(2) and (3) raises ambiguity around whether misconduct that *benefits the corporation* would amount to an offence. Minor amendments may be necessary to clarify that a person commits an offence if they use their position dishonestly to gain an advantage even where it is to the benefit of the corporation.

#### QUESTION

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

### 2.3.1 Dishonesty test

69. Currently, there is no consistent definition of dishonesty in Commonwealth law. The Criminal Code contains definitions of dishonest that reflect the Ghosh<sup>49</sup> definition. The Ghosh definition is a two-tiered test that includes both an objective and subjective element. It requires proof that the defendant's conduct was dishonest according to the standards of ordinary people and also that the defendant knew the conduct was dishonest. A similar definition applies in s1041G of the Corporations Act.
70. The High Court has confirmed the *Peters v R*<sup>50</sup> objective definition as the preferred common law standard for 'dishonesty' across Australia. The Peters test applies an objective definition of "dishonest according to the standards of ordinary, decent people". This definition has been held to apply to some provisions of the Corporations Act, for example s588G and s184.
71. In addition to amending the section 184 penalty, the Taskforce considers that the Corporations Act should include a single definition of 'dishonesty' that reflects current common law. This would ensure consistency and certainty when prosecuting offences relating to dishonesty.

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

49 *R v Ghosh* [1982] 2 All ER 689.

50 (1998) 192 CLR 493.

72. Given the *Peters* test has been approved by the High Court as the preferred test for dishonesty, the Taskforce considers that this would be the appropriate test to apply across all dishonesty-related offences in the Corporations Act. While this would not resolve the inconsistency between the Criminal Code and Corporations Act, it would provide consistency within the Corporations Act.

**QUESTION**

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

### 3. STRICT AND ABSOLUTE LIABILITY OFFENCES

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1. A central protection underpinning criminal penalties is the proof of a fault or mental element of the offence. This is because the law recognises that individuals and corporations should generally not be subject to pecuniary penalties and/or imprisonment for unintended or unforeseen consequences of their conduct. However a number of offences under the corporate law may be prosecuted absent a mental element or *mens rea*. These are commonly referred to as strict liability offences.
2. Strict liability offences remove the fault element that would otherwise attach to a physical element of an offence. For such an offence to be made out, the regulator must prove the individual or corporation engaged in the physical elements of the offence. For these offences, the *Proudman v Dayman*<sup>51</sup> defence of honest and reasonable mistake of fact is available to the accused.<sup>52</sup> There are also a small number of absolute liability offences in the Corporations Act, where not only is proof of fault not required, but the *Proudman* defence is also not available.
3. As the ALRC recognised in its report on traditional rights and freedoms, ‘strict liability offences are a common feature of regulatory frameworks underpinning corporate and prudential regulation, and may be appropriate to ensure the integrity of a financial or corporate regulatory regime.’<sup>53</sup> These offences are found in the corporate law context to recognise that requiring proof of fault for certain offences would undermine deterrence and reduce the regulator’s ability to successfully prosecute alleged contraventions of those offences. In 2012, the Senate Standing Committee for the Scrutiny of Bills published a report on the application of strict and absolute liability and concluded that the imposition of strict liability may be justified to ‘ensure the integrity of a regulatory regime (for example, public health, the environment, financial or corporate regulation).’<sup>54</sup>
4. The AGD guide provides that application of strict and absolute liability to all fault elements of an offence should only be considered appropriate where:
  - a. the offence is not punishable by imprisonment and is punishable by a fine of up to 60 penalty units for an individual (300 penalty units for a body corporate);
  - b. the punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences; or
  - c. there are legitimate grounds for penalising persons lacking ‘fault’, for example, because they will be placed on notice to guard against the possibility of any contravention.<sup>55</sup>

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51 (1947) 67 CLR 536.

52 Section 9.2 of the Criminal Code. The defence is not available to absolute liability offences.

53 ALRC Report No. 129 *Traditional rights and freedoms – Encroachments by Commonwealth Law* page 293.

54 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 284.

55 Page 23, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

5. There are approximately 375 strict and absolute liability offences in the Corporations Act. These offences are found in number of areas including: the composition of corporate entities and licensing; the provision of information both to the general public and the regulator; compliance with ASIC and court/tribunal directions; directors' duties and remuneration; corporate governance, including audit requirements; and the holding of monies on behalf of others. The vast majority of strict and absolute liability penalties in the Corporations Act range from 5 to 60 penalty units for individuals (currently \$1,050 to \$12,600) and 25 to 300 penalty units for corporate bodies (currently \$5,250 to \$63,000).
6. In enacting strict liability offences, Parliament recognises that the act of contravening these offences is sufficient to warrant a pecuniary penalty. There is value in having strict liability offences in corporate regulation because it allows ASIC to enforce breaches of lower level offences in a more straightforward way, without the need to prove a fault element. In particular, ASIC regulates areas where people go by choice. Instances of this are company directors, superannuation trustees and financial advisers. It is expected that individuals in these roles should not only refrain from consciously doing wrong, but also take active steps to fulfil certain statutory obligations. A sophisticated regulatory regime like the corporate law requires certain positive obligations to be placed upon participants.

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

7. The Taskforce recognises that strict liability offences may have adverse effects upon those in certain circumstances. Currently, a number of Corporations Act strict and absolute liability offences also allow for a maximum term of imprisonment either in conjunction or in substitution of the pecuniary penalty. For example, under section 205G, if a director fails to notify the relevant market operator of shareholdings, they may be subject to a pecuniary penalty of 10 penalty units and/or 3 months imprisonment.
8. As a general rule, the Senate Scrutiny of Bills Committee in its Report 6/2002<sup>56</sup> and the AGD guide state that strict and absolute liability offences should not be punishable by imprisonment. This is because individuals should generally not be imprisoned for inadvertent breaches of the law where they lack a fault element. It also has the potential to impose a significant sanction and the loss of liberty on these individuals.
9. The Taskforce's preliminary view is, consistent with Report 6/2002 and the AGD guide, imprisonment should be removed as a possible sanction for the contravention of strict and absolute liability offences under the Corporations Act. The Taskforce considers there is no demonstrable evidence that the possibility of imprisonment for these offences increases deterrence and the enforcement of these offences.

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

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<sup>56</sup> Senate Standing Committee for the Scrutiny of Bills, Sixth report of 2002, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 26 June 2002.

10. Recognising that imprisonment is not an appropriate sanction for strict and absolute liability offences, the Taskforce proposes to introduce a number of ordinary offences based on current strict and absolute liability offences. These new offences recognise that some current strict liability offences should be treated as a criminal offence if a fault element is present, and should be punishable by a fine and/or imprisonment term.
11. Currently some provisions of the Corporations Act create both a strict liability offence and an ordinary offence for the same conduct. An example is section 952C, which applies to an AFS licensee or authorised representative who fails to give a person a financial services guide (FSG) or statement of advice (SoA) in circumstances where they are required to do so. Subsection (1) makes this conduct a strict liability offence, with a current penalty for an individual of 50 penalty units. Subsection (3) makes the same conduct an ordinary offence, with a current penalty for an individual of 100 penalty units or 2 years imprisonment or both.
12. Imposition of a strict liability offence for failure to give a FSG or SoA recognises the importance to the integrity of the financial services disclosure regime of strict adherence to this fundamental obligation. As there is no fault element, an AFS licensee or their representative commits the offence regardless of whether their failure to give a FSG is intentional or inadvertent.
13. The Taskforce is of the view that creation of 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.
14. The proposed classes of offences include obligations on listed company directors and secretaries to notify the market operator of certain information (section 205G), certain prohibitions on acquisitions of voting shares (section 606) and certain financial reporting and auditing obligations (sections 286, 307A and 989CA). The sanctions for these offences will be significantly higher than the current penalties, to reflect that the contravention is a deliberate breach of the corporate law and therefore a higher level of culpability.
15. In all these cases, it is the Taskforce's view that the current strict liability penalty does not adequately reflect the importance of these obligations in maintaining consumer confidence and the integrity of the financial industry. The new ordinary offence addresses serious cases of wilful or reckless non-compliance with the selected obligations. Absent an ordinary offence, individuals and companies found to be in contravention of these provisions may only be subject to a lower level fine. A list of these proposed provisions and penalties is provided at Annexure C.

**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.**

16. The Taskforce proposes that all strict and absolute liability offences under the Corporations Act be subject to a threshold of a maximum 20 penalty units for individuals and 200 penalty units for corporations. For all other strict or absolute liability offences under the Corporations Act, the pecuniary penalty for individuals will remain unchanged and for corporations, the current pecuniary penalty will be doubled. This is consistent with the new formula for calculating criminal pecuniary penalties as outlined under position 2.

17. Currently, there are a number of strict and absolute liability offences with pecuniary penalties below this threshold. The Taskforce is of the view that the maximum pecuniary penalty for these offences are too low and do not represent an adequate level of deterrence to would-be offenders. Pecuniary penalties for these contraventions need to be high enough so that they are not paid by the guilty and innocent alike as a cost of doing business. If penalties are always paid by offenders this may also have the unintended consequence of negatively affecting the moral stigma of the underlying offence. The proposed increase to these offences is also offset by the proposed removal of imprisonment as a possible sanction.
18. The quantum of pecuniary penalties must be balanced against the fact that the offence can be established without a fault element. Penalties need to be set at a level where there is a deterrence factor for the guilty but is not punitive. In addition, if penalties are too low, the cost for ASIC to prosecute possible contraventions will outweigh the penalty itself.
19. A consequential change is also proposed for criminal pecuniary penalties for non-strict liability offences. To reflect the additional seriousness of these offences (above strict liability offences), a threshold of 30 penalty units is proposed for individuals and a threshold of 300 penalty unit for corporations.

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

20. As part of its enforcement toolkit, ASIC currently has the ability to issue penalty notices. However this does not currently extend to all strict liability offences under the Corporations Act. The Taskforce proposes that a penalty notice regime should be available to ASIC for all strict and absolute liability offences under the Corporations Act.
21. Under section 1313 of the Corporations Act, ASIC currently has the ability to serve penalty notices on individuals and corporations for certain lower level breaches (for example, failure to lodge documents within a prescribed time or notification of change to officeholders). A penalty notice must be in a prescribed form and set out details required by the Act including particulars of the relevant offence and the prescribed penalty. If the penalty notice is complied with, including payment of the prescribed penalty, no further action will be taken against the person and the payment is not an admission of liability for any purpose.
22. The Taskforce proposes that ASIC be given the power to issue penalty notices for half the maximum pecuniary penalty (subject to the positions above) of the strict liability offence. The Taskforce considers this an appropriate deviation from the AGD guide, which suggests that infringement/penalty notice type penalties should be set at one-fifth of the maximum pecuniary penalty of the underlying offence. Having removed the imprisonment component of the penalty for strict liability offences, an effective enforcement toolkit should allow ASIC to issue penalty notices to deal with these lower level breaches. This position does not change ASIC's ability to pursue contravention of the underlying offence and higher penalties.
23. This position will require amendments to penalties specified for strict liability offences in Schedule 3 of the Corporations Act and section 1311(5), which specifies a default penalty of 5 penalty units where no penalty is specified. Offences referred to in subsection 1311(5) are strict liability offences by reason of subsection 1311(6).

**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?



## 4. CIVIL PENALTIES

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1. A separate category of remedies that ASIC can pursue is to initiate court proceedings to seek orders for the payment of civil financial penalties where the circumstances fall short of criminal conduct but nevertheless warrant a significant sanction to promote compliance. Civil penalties are currently available for contraventions of:
  - a. sections of the Corporations Act that are specified as civil penalty provisions in section 1317E. These provisions are generally divided into corporation/scheme civil penalty provisions (including directors' duties, related party transactions, share capital transactions, insolvent trading and the operation of managed investment schemes) and financial services civil penalty provisions (including continuous disclosure, market integrity and aspects of the provisions of financial services), and also include contraventions of the market integrity rules, derivative transaction rules, derivative trade repository rules and best interests obligations (which are not specified as financial services civil penalty provisions);<sup>57</sup>
  - b. the unconscionable conduct and consumer protection provisions in Part 2 Division 2 Subdivision G of the ASIC Act, with the exception of the general prohibition on misleading or deceptive conduct in section 12DA;<sup>58</sup>
  - c. provisions in the Credit Act that set out a civil penalty at the foot of the provision, or are specified by another provision of the Act as a civil penalty provision. The Credit Act civil penalty regime is contained in Part 4.1;<sup>59</sup>
  - d. key requirements in connection with credit contracts or continuing credit contracts, as set out in a number of specified provisions of the Credit Code.<sup>60</sup>

### 4.1 Purpose of civil penalties

2. Civil penalties were introduced into the *Corporations Act 1989* (Cth) (now repealed) in 1993, in response to recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs in its report *Company directors' duties: Report on the social and fiduciary duties and obligations of company directors*.<sup>61</sup> That report proposed (among other things) that: a range of penalties should be available to the regulator to best address the individual circumstances of the case; criminal liability should apply only where conduct is genuinely criminal; civil penalties should be provided for breaches by directors where no criminality is involved; and where appropriate, individuals suffering loss should have rights to claim damages.<sup>62</sup>

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57 Section 1317DA.

58 Sections 12GB and 12GBA.

59 See the definition of 'civil penalty provision' in s5.

60 Section 111.

61 Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors*, report, Australian Senate, November 1989.

62 For a discussion of the origins of civil penalties in Australian legislation see the Australian Law Reform Commission Report No 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, at [2.53] to [2.62].

3. The introduction of civil penalties in the Corporations, ASIC<sup>63</sup> and Credit<sup>64</sup> Acts focused on the deterrent effect of imposing a civil penalty as well as the flexibility and proportionality of civil penalties as opposed to criminal sanctions.<sup>65</sup> As discussed earlier in this paper, the High Court recently emphasised in the Fair Work Decision that the purpose of civil penalties is 'primarily if not wholly protective in promoting the public interest in compliance'<sup>66</sup> distinct from the purposes of retribution and rehabilitation associated with criminal penalties.

## 4.2 Features of civil penalties

### Imposing a financial penalty

4. Under the Corporations and Credit Acts, if a Court is satisfied that a person has contravened a civil penalty provision, the Court must make a declaration of contravention. A declaration of contravention is conclusive evidence of the matters specified in the declaration.<sup>67</sup> Under the ASIC Act, where ASIC applies for a pecuniary penalty order any finding of fact made against a person found to have contravened or been involved in a contravention of a civil penalty provision is prima facie evidence of that fact in any other proceeding for damages or compensatory orders.<sup>68</sup>
5. Once a declaration of contravention is made under the Corporations Act or Credit Act and the court is satisfied that a person has contravened an ASIC Act civil penalty provision it may order a person to pay a pecuniary penalty as it determines to be appropriate up to the maximum amount specified in the legislation.<sup>69</sup> Maximum civil penalty amounts are set out in Table 4 below.
6. The ASIC Act and the Credit Code set out specific factors that the court must have regard to when considering the imposition of a penalty, including:
  - a. the nature and extent of the person's conduct;
  - b. loss or damage suffered as a result of the conduct;
  - c. the circumstances in which the conduct took place;
  - d. whether the person has previously been found to have engaged in any similar conduct.<sup>70</sup>

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63 Civil pecuniary penalties for contraventions of the consumer protection provisions of the ASIC Act were introduced in 2010 by the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010*.

64 Civil penalties were incorporated into the enforcement regime in the Credit Act from its commencement.

65 See Explanatory Memorandum to the National Consumer Credit Protection Bill 2009 at [4.17], [4.21] and [4.26] – [4.28]; Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill 2009 at [4.3] – [4.4].

66 *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 326 ALR 476 at 490 [55] referring to French J in *Trade Practices Commission v CSR Ltd* [1990] FCA 521; (1991) ATPR 41-076.

67 Corporations Act subsections 1317E(2) and 1317F; Credit Act ss166 and 169.

68 ASIC Act s12GG.

69 Corporations Act s1317G; ASIC Act s12GBA; Credit Act s167; Credit Code s112. Under the ASIC Act and Credit Act a person contravenes a civil penalty provision if they attempted to contravene the provision or were involved in the contravention (ASIC Act ss12GBA(1); Credit Act s169 and s5 for definition of 'involved in a contravention').

70 ASIC Act s12GBA(2); Credit Code ss112 and 113.

7. In addition, Courts have identified a range of principles that guide the exercise of discretion as to whether to impose a pecuniary penalty and the amount of penalty.<sup>71</sup>

## Disqualification orders

8. Under the Corporations Act and ASIC Act a Court can make an order disqualifying a person from managing corporations for a period that the Court considers appropriate if the Court is satisfied that the disqualification is justified.<sup>72</sup>
9. If a disqualification order is sought against an individual this will be taken into account when assessing the appropriate pecuniary penalty. The application for a disqualification order will be considered first,<sup>73</sup> and its outcome will impact on the outcome of the pecuniary penalty application, particularly if a disqualification order will have significant consequences for the defendant.<sup>74</sup>

## Other orders

10. The Court may make a range of other orders in response to a contravention of a civil penalty provision, including:
  - a. compensatory orders made on the application of ASIC or a person who suffers damage resulting from the contravention.<sup>75</sup> Under the ASIC and Credit Acts, courts must give preference to making an order for compensation if a person has insufficient financial resources to pay a pecuniary penalty (or fine) and compensation;<sup>76</sup>
  - b. under the ASIC Act and Credit Act punitive orders requiring adverse publicity – an order requiring the person to disclose information or publish an advertisement as specified in the order;<sup>77</sup> and
  - c. under the ASIC Act non-punitive orders, which include community service orders, probation orders (for example, requiring a person to establish a compliance, education and training program or revise internal operations) or orders requiring the disclosure of information or the publishing of an advertisement.<sup>78</sup>

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71 See *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80 at [126] and more recently *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd* (in liquidation) (No 3) [2017] FCA 1018 [29] – [30].

72 Corporations Act s206C; ASIC Act s12GLD.

73 See *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80 at [56] for an outline of the factors relevant to whether to make a disqualification order and the period of disqualification.

74 See *Australian Securities and Investments Commission v Australia Property Custodian Holdings Ltd (recs and mgrs apptd)* (in liq) [2014] FCA 1308; (2014) 103 ACSR 1 at [79] and [102] per Murphy J.

75 Corporations Act section 1317GA (refund orders for contravention of s962P, charging client an ongoing fee after termination of a fee arrangement), 1317H(1), 1317HA(1), 1317HB(1) and 1317J; ASIC Act sections 12GF, 12GM, 12GN and 12GNB; Credit Act sections 178 and 179; Credit Code ss118 and 124.

76 ASIC Act s12GCA; Credit Act s181.

77 ASIC Act s12GLB; Credit Act s182.

78 ASIC Act s12GLA.

11. The Court may relieve a person from liability for contravention of a civil penalty provision if it appears to the Court that the person has acted honestly and having regard to all the circumstances of the case (including those connected with the person's appointment as an officer or employment as an employee of a corporation), the person ought fairly be excused for the contravention.<sup>79</sup>

## Procedural requirements

12. Where substantially the same conduct as constitutes a contravention of a civil penalty provision also constitutes an offence:
  - a. a Court must not make a declaration of contravention or pecuniary penalty order against the person for a contravention if the person has been convicted of the offence;
  - b. proceedings for a declaration of contravention or pecuniary penalty order are stayed if criminal proceedings for the offence are or have already been started;
  - c. criminal proceedings for the offence may be started regardless of whether a declaration of contravention, pecuniary penalty order, refund order, compensation order or disqualification order has been made; and
  - d. evidence of information given or production of documents by an individual in proceedings for a pecuniary penalty is not admissible in criminal proceedings against the individual.<sup>80</sup>
13. When hearing proceedings relating to the alleged contravention of a civil penalty provision the court must apply the rules of evidence and procedure relating to civil matters. However, the courts have considered that although the principle purpose of civil penalties is 'protective', imposition of a pecuniary penalty has a punitive character. As a result the procedural requirements for conducting civil penalty proceedings may be adjusted in the interests of justice.<sup>81</sup>
14. While the usual standard of proof in civil proceedings is 'on the balance of probabilities', the *Briginshaw*<sup>82</sup> test requires the court in civil cases involving serious allegations or significant adverse consequences for the defendant to reach a higher level of satisfaction commensurate with the seriousness of the allegations. This means that in civil penalty proceedings the distinction between the 'balance of probabilities' and the criminal standard of proof of 'beyond reasonable doubt' is reduced.

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79 Section 1317S; ASIC Act s12GI(5); Credit Act s183.

80 Corporations Act sections 1317M, 1317N, 1317P and 1317Q (except in a criminal proceeding in respect of the falsity of the evidence given); ASIC Act s12GBB; Credit Act s174.

81 Australian Law Reform Commission Report No 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, at [2.77] – [2.86] and [3.103].

82 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

15. In addition, the common law privilege against exposure to penalties<sup>83</sup> (akin to the privilege against self-incrimination) will operate to ensure that an individual defendant is not required to disclose information that may assist in establishing their liability to a penalty. Defendants entitled to claim the privilege may not be required to comply with the usual rules of court relating to the content of their defence, discovery and interrogatories and disclosure of their evidence prior to the trial. In addition, statements made in an examination under Part 3 of the ASIC Act or Part 5.9 of the Corporations Act cannot be admitted in evidence where claims of privilege are made during the examination.
16. By their nature, civil penalty proceedings brought by the regulator are usually commercially and legally complex and resource intensive.<sup>84</sup> Research on directors' duties cases conducted by the Centre for Corporate Law & Securities Regulation of The University of Melbourne concluded that:

*Contrary to a commonly held view that civil enforcement is more efficient than criminal enforcement, the duration of both the civil and criminal enforcement processes was lengthy. From the first detected contravention to the final judgment, the average duration of civil matters was about 6.9 years, while the average duration of criminal matters was about 7.9 years.*<sup>85</sup>

### 4.3 Civil penalty amounts

#### Inconsistency and low maximum civil penalties in the Corporations Act

17. Maximum civil penalties in the Corporations Act have not been raised since they were introduced in predecessor legislation in 1993, when the maximum penalty for an individual was set at \$200,000. Merely to keep pace with inflation, that amount should be around \$360,000 in 2017.<sup>86</sup> In 2004, following a CLERP 9 recommendation, the maximum penalty for corporations was increased from \$200 000 to 5 times that amount - \$1 million (about \$1.35 million in 2017 dollars).<sup>87</sup> Apart from the failure to keep pace with inflation, current penalties could in any case be considered too low, given the seriousness of the civil penalty financial services and markets matters.
18. In 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.<sup>88</sup>

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83 See *Rich v Australian Securities and Investments Commission* [2004] HCA 42; 220 CLR 129 at [23]–[37].

84 See for example *Access to Justice Arrangements*, Productivity Commission Inquiry Report, Vol 1, Chapter 11 'Court Processes'.

85 Jasper Hedges, Helen Bird, George Gilligan, Andrew Godwin and Ian Ramsay, 'An Empirical Analysis of Public Enforcement of Directors' Duties in Australia: Preliminary Findings', Working Paper No. 3, Centre for Corporate Law & Securities Regulation, The University of Melbourne, 31 December 2015, p. 2.

86 Treasury approximations based on CPI.

87 *ibid.*

88 See the discussion in Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95, 2003, at [26.81] – [26.99].

19. Maximum civil penalties set in legislation for comparable conduct differ across the ASIC Act, the Credit Act and the Competition and Consumer Act 2010 (Competition and Consumer Act) and are higher than those set in the Corporations Act.
20. In addition, the Australian Consumer Law Review Final Report<sup>89</sup> recommended (proposal 18) that the maximum financial penalties available under the Australian Consumer Law (the provisions of which are mirrored in Division 2 of Part 2 of the ASIC Act) be increased and aligned with the penalty regime under the competition provisions of the Competition and Consumer Act, which are:
- a. for companies, the greater of: the maximum penalty of \$10 million; or 3 times the value of the benefit (or loss avoided) the company received from the act or omission, or if the benefit cannot be determined, 10 per cent of annual turnover in the preceding 12 months; and
  - b. for individuals, \$500,000.
21. The final report further stated that the ‘maximum penalties in the ASIC Act provisions should be similarly increased to ensure they operate as an effective deterrent and deliver outcomes consistent with the ACL’.<sup>90</sup>

**TABLE 4: COMPARISON OF MAXIMUM CIVIL PENALTIES**

Act	Maximum penalty for an individual	Maximum penalty for a body corporate (\$AUD)
Corporations Act	\$200,000	\$1 million
Credit Act	2,000 penalty units (currently \$420,000)	10 000 penalty units (currently \$2.1 million)
Credit Code	\$500,000	\$500,000
ASIC Act	2,000 penalty units (currently \$420,000)	10,000 penalty units (currently \$2.1 million)
<b>Penalties in comparable Acts</b>		
Australian Consumer Law (current)	\$220,000	\$1.1 million
Australian Consumer Law (planned amendments)	\$500,000	Greater of \$10 million, 3 times the value of benefits obtained or 10% of annual turnover
Competition and Consumer Act <sup>91</sup>	\$500,000	Greater of \$10 million, 3 times the value of benefits obtained or 10% of annual turnover

89 Australian Consumer Law Review Final Report, March 2017, <http://consumerlaw.gov.au/review-of-the-australian-consumer-law/final-report/>.

90 Ibid pp88-89.

91 The highest civil penalties apply to the cartel conduct provisions of the Competition and Consumer Act. There are a number of additional civil penalty provisions with differing maximum penalties.

## Non-criminal penalties in overseas jurisdictions

22. In March 2014 ASIC released Report 387 ‘Penalties for corporate wrongdoing’ (ASIC Penalties Report). The ASIC Penalties Report compared penalties available under the legislation administered by ASIC for corporate wrongdoing with penalties available in international jurisdictions with comparable legal systems, including Canada (Ontario), Hong Kong, the United Kingdom and the United States. The comparison focused on the following types of misconduct:
- a. market misconduct—insider trading, market manipulation, continuous disclosure and false statements to the market; and
  - b. financial services misconduct—inappropriate advice, unlicensed conduct, fraud and false or misleading representations.
23. In relation to non-criminal monetary penalties the ASIC Penalties report concluded that in other jurisdictions a broader range of penalties are available, including:
- “(i) greater flexibility to impose higher non-criminal penalties and scope to use non-criminal penalties against a wider range of wrongdoing (see Table 5). For example, in some jurisdictions, the quantum of non-criminal penalties may be a multiple such as three times the financial benefit obtained for some contraventions (for example, Hong Kong and the United States). In addition, in the United Kingdom, large administrative penalties can be imposed by the regulator; and*
  - (ii) the ability to require disgorgement—that is, the removal of financial benefit (for example, profits gained). In the overseas jurisdictions we have surveyed, the power to require disgorgement is either provided in legislation (as in Canada (Ontario), Hong Kong and the United States) or is incorporated as a step in the process of penalty setting by the regulator (as in the United Kingdom)”<sup>92</sup>*
24. Table 5 below, is a modified version of a table in the ASIC Penalties Report that highlights the differences in civil and administrative penalties for individuals in relation to a number of types of misconduct. Table 5 shows that generally maximum non-criminal penalties in Australia are lower than civil penalties for equivalent misconduct in other jurisdictions such as the United Kingdom, where there are no limits on either civil or administrative penalties available for most kinds of serious misconduct.

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92 ASIC Penalties Report at [9].

**TABLE 5: COMPARISON OF CIVIL AND ADMINISTRATIVE PENALTIES FOR INDIVIDUALS (A\$)<sup>93</sup>**

Country	Insider trading	Market manipulation	Disclosure	False statements	Unlicensed conduct	Inappropriate advice
Australia	Civil: \$200,000	Civil: \$200,000	Civil: \$200,000	-	-	Civil: \$200,000
Canada (Ontario)	Admin: \$1.05m	Admin: \$1.05m	Admin: \$1.05m	Admin: \$1.05m	Admin: \$1.05m	Admin: \$1.05m
Hong Kong	Admin: profit gained or loss avoided	-	Civil: \$1.12m	-	-	Admin: greater of \$1.4m, or 3 times the benefit gained
United Kingdom	Civil and admin: unlimited	Civil and admin: unlimited	Admin: unlimited	Civil and admin: unlimited	-	Admin: unlimited
United States	Civil: 3 times the benefit gained <sup>94</sup>	Civil: greater of \$111,000, or the benefit gained	Civil: greater of \$111,000, or the benefit gained	Civil: greater of \$111,000, or the benefit gained	Civil: greater of \$111,000, or the benefit gained	Admin: \$83,850

25. An example involving JP Morgan provides an indication of the impact of the differing approaches. JP Morgan was fined heavily for losses of over \$6 billion (in addition to compensation) on the so-called ‘London whale trades’ affair:
- £138 million by the UK FCA;
  - US\$200 million by the US Securities and Exchange Commission (SEC);
  - US\$200 million by the US Federal Reserve;
  - US\$309 million by the US CFPB; and
  - US\$300 million by the US Office of the Comptroller of the Currency.
26. In addition to differences in the applicable maximum penalties some jurisdictions specify the manner in which penalties are to be calculated. The US SEC’s system of civil penalties is a tiered system, with the first tier available for less serious offences, rising to a third tier for more serious offences.
27. Alternatively, the UK FCA takes a five-step approach to setting fines. The total amount payable by a person subject to enforcement action may be made up of two elements: disgorgement of the benefit received as a result of the breach, and a financial penalty reflecting the seriousness of the breach.

93 This table does not address the availability of disgorgement. Some contraventions that do not attract a civil or administrative penalty may nonetheless be subject to disgorgement orders. For example, in Hong Kong, market manipulation does not attract a civil or administrative penalty; however, disgorgement is available.

94 For control persons, the maximum non-criminal penalty is the greater of \$AUD1.1 million or three times the benefit obtained.

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

28. The Taskforce adopts as its preliminary position that maximum civil penalties in ASIC-administered Acts should be increased to ensure that ASIC can seek and courts are empowered to impose penalties that :
- a. reflect community perceptions of the seriousness of engaging in corporate, financial market and financial services misconduct and expectations as to the associated consequences; and
  - b. are broadly consistent with the regimes of overseas counterparts and other domestic regulators.
29. This should be done by:
- a. expressing monetary amounts as penalty units, which are regularly reviewed and updated, rather than fixed sums;
  - b. aligning the maximum civil penalties for contravention of the consumer protection provisions in the ASIC Act ( Division 2 of Part 2) with the increases to financial penalties proposed for the Australian Consumer Law, following the review of that law as discussed above, with equivalent penalties set by reference to penalty units as follows:
    - i. for individuals – 2,500 penalty units (currently \$525,000);
    - ii. for corporations – the greater of 50,000 penalty units (currently \$10.5 million) or 3 times the value of benefits obtained or losses avoided or 10% of annual turnover in the 12 months preceding the contravening conduct;
  - c. increasing the maximum civil penalties in the Corporations Act and Credit Act as follows:
    - i. for individuals 2,500 penalty units (currently \$525,000);
    - ii. for corporations - the greater of 12,500 penalty units (currently \$2.625 million) or 3 times the value of benefits obtained or losses avoided or 10% of annual turnover in the 12 months preceding the contravening conduct.
30. In both proposals the civil penalty for corporations would involve some departure from the model in the Competition and Consumer Act and proposed for the Australian Consumer Law. In addition to expressing monetary amounts in penalty units, it is proposed that the court's ability to determine the penalty on the basis of 10% of annual turnover in the 12 months preceding the contravening conduct will be an alternative to either the penalty unit amount or determination on the basis of 3 times the benefit gained or loss avoided. In other regimes calculation of a penalty on the basis of annual turnover is only available where the value of benefits cannot be determined.

31. ASIC considers that the maximum civil penalty for an individual should be increased to \$1 million (or the equivalent in penalty units) or 3 times the value of the benefits obtained or losses avoided. The Taskforce has not adopted this as its preliminary position but seeks submissions on whether such a penalty would be appropriate.
32. When considering an appropriate way to address concerns about the current value of civil penalty maximums and inconsistency across various Acts the Taskforce had regard to the United Kingdom regime where the legislation does not set maximum limits for administrative penalties that can be imposed by regulators, including the FCA. The FCA may impose penalties '*... of such amount as it considers appropriate*'.<sup>95</sup> While no limits are set the FCA is required to publish guidance as to its practice in setting penalties that takes into account a number of factors set out in the legislation.<sup>96</sup> Such an approach has attraction as it does not require periodic updating by Parliament and provides absolute flexibility, allowing penalties to be tailored to fit the circumstances of the contravention.
33. In adopting the above proposals, the Taskforce considered that setting a monetary maximum provides clear guidance to courts, industry and the community. At the same time the Taskforce's proposals provide the courts with flexibility to impose an appropriate penalty on corporations that takes into account the nature of the offending and the circumstances of the wrong doer by having the option to determine the penalty for corporations on the basis of a multiple of gains or losses avoided as a result of engaging in the contravening conduct or 10% of annual turnover in the preceding 12 months.

## 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?

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95 Financial Services and Markets Act 2000 s66 (approved persons), s91 (listing rules), s123 (market abuse), s206 authorised persons. In market abuse matters the FCA can apply to the court to impose a penalty where it also seeks an injunction or restitution order. The court may make an order requiring a person to pay to the FCA a penalty of such amount as it considers appropriate (Financial Services and Markets Act 2000 s129).

96 Financial Services and Markets Act 2000 ss69, 210, 93, 124.

## 4.4 Disgorgement in civil penalty proceedings

34. There is no clear mechanism for ASIC to seek ‘disgorgement’ of financial benefits in civil penalty proceedings. ‘Disgorgement’ is a vehicle for preventing unjust enrichment and involves the removal of financial benefit (such as profits illegally obtained or losses avoided) that arises from wrongdoing. Disgorgement orders reduce the likelihood that wrongdoers can treat penalties as a cost of doing business.
35. In a criminal context, the Australian Federal Police (AFP) and CDPP are empowered to bring civil proceedings under the *Proceeds of Crime Act 2002* (Cth) to recover the proceeds or benefits arising from alleged criminal offences, even in the absence of a criminal conviction.<sup>97</sup> However, they would be unlikely to bring such proceedings in the absence of a criminal investigation and the prospect of a criminal conviction. Orders made under the *Proceeds of Crime Act* require forfeited money to be paid into a ‘confiscated assets account’ and cannot be restrained for the benefit of the victims.
36. There is no process similar to that provided for in the *Proceeds of Crime Act* for civil penalty proceedings issued under the *Corporations Act*, *ASIC Act* or *Credit Act*. These Acts currently provide for the making of compensation orders in civil penalty proceedings<sup>98</sup> and the court to make any order that it sees fit under s1101B of the *Corporations Act*. However, these avenues do not provide a basis for disgorging financial benefits from wrongdoers.
37. The aim of a compensation order is different from disgorgement. A compensation order involves identifying the party who has suffered loss or damage, quantifying the loss or damage caused by the defendant and returning this to the injured party. The focus is on the impact on the injured party not the financial benefit derived by the wrongdoer. In cases brought by ASIC, particularly in market misconduct matters, the parties suffering loss may not be easily identified while the financial benefit resulting from the misconduct can be quantified.
38. Under s1101B of the *Corporations Act*, if there is a breach of a provision in Chapter 7 of the *Corporations Act*, the court may make any order it considers fit, provided that the order does ‘not unfairly prejudice any person’. While section 1101B provides a non-exhaustive list of orders that a court may make, it neither includes nor expressly prohibits an order for payment of profits. As a result a court could, theoretically, make such an order; however, there is no precedent for such an order being made.<sup>99</sup>

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97 The *Proceeds of Crime Act*’s civil regime is directed to confiscating unlawfully acquired property independently from the prosecution process. The civil stream provides for the forfeiture of property on the basis of a court being satisfied to the civil standard that the person has committed a serious offence.

98 See ss1317H, 1317HA, 1317HB, 1101B and 1325 of the *Corporations Act*, s50 of the *ASIC Act* and s275 of the *Credit Act*. Section 1325 of the *Corporations Act* and s50 of the *ASIC Act* require written consent.

99 Under s1101B, ASIC has sought the appointment of a receiver and restraining orders including restraining orders to carry on a financial business for a certain number of years: *Australian Securities and Investments Commission v Monarch FX Group Pty Ltd, in the matter of Monarch FX Group Pty Ltd* [2014] FCA 1387; (2014) 103 ACSR 453. The effect of such orders has been to disqualify a person from dealing in financial products for a certain number of years; In the matter of *Idyllic Solutions Pty Ltd - Australian Securities and Investments Commission v Hobbs* [2013] NSWSC 106; (2013) 93 ACSR 421.

## Disgorgement in non-criminal proceedings overseas

39. Disgorgement remedies are available in a number of international jurisdictions for a range of misconduct. Disgorged money may be paid to the relevant government to be absorbed back into consolidated revenue (as in Canada (Ontario) and Hong Kong in certain instances), or directed to compensation funds for victims or investor education or advocacy programs (as in Canada (Ontario), the United Kingdom and the United States). While the precise mechanism of disgorgement varies between jurisdictions, the fundamental feature of disgorgement in all jurisdictions is that the profits gained or losses avoided are removed from the wrongdoer.
40. Having access to disgorgement increases the flexibility regulators have to address wrongdoing efficiently and effectively. Examples include the following:
- a. In Canada (Ontario), if a person has not complied with the securities law, the Ontario Securities Commission (OSC) may require that person to disgorge to the OSC any amounts obtained as a result of the non-compliance.
  - b. In Hong Kong, the Market Misconduct Tribunal can order disgorgement up to an amount not exceeding the amount of any profit gained or loss avoided by the person as a result of market misconduct.
  - c. In the United Kingdom, the FCA follows a five-step framework for determining the appropriate level of financial penalty—the first of these is disgorgement to remove any financial benefit derived directly from a breach. It is only then that the FCA proceeds to look at the seriousness of the breach, aggravating and mitigating circumstances, an appropriate deterrent effect, and a settlement discount (if applicable).
  - d. 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.
41. Canada (Ontario), Hong Kong and the United States have disgorgement remedies built into their legislation. The seriousness of the breach is determined according to five tiers, ranging from 0% up to 20% as a proportion of the firm's revenue.

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

42. 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.

43. As in the case of disqualification orders, it may be expected that the court would take into account any disgorgement remedy sought or granted when exercising its discretion whether to make a pecuniary penalty order and in determining the amount of any penalty ordered to be paid.
44. The Taskforce considers that the legislation should include a general disgorgement remedy that may be ordered on the application of ASIC. The court should retain the discretion to determine whether any payment is appropriate and how it should be applied given the circumstances. Where there are parallel proceedings for compensation it may be appropriate to make the funds available to satisfy compensation orders. Otherwise it may be appropriate for the funds to be paid to consolidated revenue.

#### 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?

## 4.5 Priority for compensation

45. As stated above, under the ASIC and Credit Acts courts must give preference to making an order for compensation if a person has insufficient financial resources to pay a pecuniary penalty (or fine) and compensation.<sup>100</sup> There is no equivalent provision in the Corporations Act.

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

46. The Taskforce adopts as its preliminary position that the Corporations Act should expressly require courts to give preference to making a compensation order where a defendant does not have sufficient financial resources to pay both a pecuniary penalty order and a compensation order. This will ensure that priority is always given to compensating victims who suffer loss or damage as a result of misconduct, which is consistent with provisions in the ASIC Act and the Credit Act<sup>101</sup> and appropriate given the increases to maximum civil penalties proposed above.

#### 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?

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100 ASIC Act s12GCA; Credit Act s181.

101 See s12GCA of the ASIC Act and s181 of the Credit Act.

## 4.6 Expanding the civil penalty regimes

47. As noted above, the Corporations Act, ASIC Act, Credit Act and Code set out specific civil penalty provisions. The civil penalty provisions sit alongside criminal penalties and may provide an additional or alternative remedy. The civil penalty remedy addresses conduct that is sufficiently serious to warrant the imposition of a pecuniary penalty and/or a disqualification order but is not truly criminal, in that it does not merit the ‘moral and social censure and stigma that attaches to conduct regarded as criminal’.<sup>102</sup> As stated in the ALRC Principled Regulation report:

*“Civil penalties provide a means for the state to enforce breaches of laws without going as far as declaring all lawbreakers ‘criminals.’”<sup>103</sup>*

48. In some cases a series of provisions imposing similar obligations may give rise to a civil penalty for specified contraventions and a criminal offence for contraventions that are more serious because additional elements can be established. For example, sections 181 to 183 of the Corporations Act impose obligations on directors, officers and employees of corporations. A breach of similar obligations that is reckless or intentionally dishonest is converted to a criminal offence by s184 of the Corporations Act. Alternatively, in other cases (for example, insider trading) a contravention of the one provision can give rise to a criminal offence and a civil penalty consequence.<sup>104</sup>
49. 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.
50. Where there are parallel criminal and civil penalties for the same conduct, criminal offences require proof of the physical and fault elements in accordance with the Commonwealth Criminal Code, whereas liability for a civil penalty may only require proof of the physical elements of a contravention. There are exceptions to this model, including some market misconduct provisions, which contain a mental element.<sup>105</sup>

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<sup>102</sup> ALRC Principled Regulation report at [3.110]. See also the discussion at [2.10]-[2.11].

<sup>103</sup> Ibid at [3.46].

<sup>104</sup> Many contraventions could also give rise to administrative action, including banning and/or licensing action.

<sup>105</sup> ALRC Principled Regulation report at [4.61], [11.27] to [11.31] and [11.55], examples of the exceptions being sections 1041E, 1041F and 10413A. The Full Court of the Federal Court has recently confirmed that the Commonwealth Criminal Code is not generally engaged in proceedings seeking civil penalties and other civil proceedings for contraventions of the Corporations Act: *Australian Securities and Investments Commission v Whitebox Trading Pty Ltd* [2017] FCAFC 100, at [72] – [73].

51. The ALRC considered that ‘there was value in maintaining provisions in legislation which allow for a choice of criminal or civil proceedings for the same conduct. Such flexibility is an important feature of regulation and allows a regulator the ability to tailor appropriate penalties to breaches’ and recognised that this can benefit the regulator and the regulated. At the same time the ALRC considered that the legislation should be drafted in a manner that clearly states the elements of each offence especially where different mental elements govern the criminal offence and civil penalty contravention.<sup>106</sup>
52. The Taskforce also considers 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.
53. Taking the above into account, the Taskforce considers that the civil penalty regime in the Corporations Act could be expanded for any one or a combination of the following reasons:
- a. to enable action to be taken to deter further contraventions and promote compliance with the regulatory regime where the conduct is serious but may not be truly criminal or warrant the moral repugnance or social censure associated with criminal conduct;
  - b. to provide an alternative remedy that may be a more appropriate or proportionate response to the misconduct; and
  - c. to ensure consistency with analogous obligations in other legislation.

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

54. The Taskforce adopts as its preliminary position that, civil penalty consequences should be extended to the following provisions:

**TABLE 6: ADDITIONAL CIVIL PENALTY PROVISIONS**

Section	Description
<b>Corporations – failure to provide and defective disclosure and takeover documents</b>	
670A	Misstatements in, or omissions from, takeover and compulsory acquisition and buy-out documents
727	Offering securities without a current disclosure document
728	Misstatement in, or omission from, disclosure document
<b>Financial services - disclosure</b>	
1012A	Obligation to give a PDS —personal advice recommending particular financial product
1012B	Obligation to give a PDS - situations related to issue of financial products
1012C	Obligation to give a PDS - offers related to sale of financial products

<sup>106</sup> ALRC Principled Regulation report at [11.5] and [11.65] – [11.67].

**TABLE 6: ADDITIONAL CIVIL PENALTY PROVISIONS (CONTINUED)**

Section	Description
<b>Financial services and markets – unlicensed conduct</b>	
911A	Need for a financial services licence
791A	Need for a licence (financial market)
820A	Need for a licence (CS facility)
905A	Need for a licence (derivative trade repository)
<b>Financial services – failure to comply with client money obligations</b>	
981B	Obligation to pay client money into an account as required
981C	Requirements relating to dealing with client money account
<b>Financial services and markets – failure to notify ASIC of breaches of obligations</b>	
912D	Failure to notify ASIC of breach of obligations
792B	Failure to notify ASIC of breach of obligations
821B	Failure to notify ASIC of breach of obligations

## Corporations – failure to provide and defective disclosure and takeover documents

55. The takeover and fundraising provisions are cornerstone provisions which support the fairness and transparency of key corporate actions in the Australian market. Compliance with these provisions ensures that investors are confident and properly informed when making investment decisions.
56. Chapter 6D of the Corporations Act governs fundraising by corporations. That Chapter generally provides that offers of securities must be accompanied by a prospectus or other disclosure document, unless a specified exception applies. The fundraising regime is premised on the idea that investors and their advisers should be provided with all the information they would reasonably require to make an informed assessment of the merits of the offer.<sup>107</sup>
57. Chapter 6 of the Corporations Act governs takeovers of listed companies, unlisted companies with more than 50 members and listed managed investment schemes. The takeovers regime is premised on the idea that shareholders in the target company should be given all the information that is material to a shareholder's decision as to whether to accept the offer.<sup>108</sup>
58. Penalties for offering securities without a disclosure document and making misleading statements in or omissions from a disclosure document are set out in Part 6D.3 Division 1.<sup>109</sup> Penalties for misleading statements in or omissions from takeover documents are set out in Chapter 6B.<sup>110</sup> Currently only criminal penalties are available.<sup>111</sup>

<sup>107</sup> Corporations Act s710.

<sup>108</sup> Corporations Act subsections 636(1) and 638(1).

<sup>109</sup> Corporations Act ss727 and 728.

<sup>110</sup> Corporations Act s670A.

<sup>111</sup> Earlier in this paper it is proposed that the criminal penalties for breaches of ss727, 728 and 670A be increased.

59. The Takeovers Panel has some jurisdiction in relation to takeover documents, to the extent that under s657A it may declare circumstances in relation to the affairs of a company to be unacceptable and under s657D make consequential orders. However, the Panel may make a declaration of unacceptable circumstances whether or not there has been a contravention of the Corporations Act and conversely a contravention may not be enough in itself for the Panel to make a declaration.<sup>112</sup>
60. If the Takeovers Panel makes a declaration of unacceptable circumstances, the consequential orders that may be made by the Takeovers Panel include remedial orders, to protect the rights or interests of affected persons or to ensure that a bid proceeds as if unacceptable circumstances had not occurred.<sup>113</sup> The Takeovers Panel cannot make punitive orders and accordingly, deterrence is not a purpose of the orders made by the Takeovers Panel.<sup>114</sup>
61. Introducing civil penalties as an alternative to criminal prosecution would enable ASIC to address a broader range of misconduct and in some cases provide a more appropriate response to the circumstances of the contravening conduct.
62. In some cases a failure to provide required disclosure may not be criminal, in that the person did not intend to breach the obligation, although their conduct was reckless and/or grossly negligent and lead to substantial funds being raised from consumers and lost. While the conduct is serious it is not truly criminal. Providing ASIC with the ability to bring civil penalty proceedings would enable ASIC to take appropriate action to deter further misconduct by the wrong doers involved and secure greater compliance with the regulatory regime by others. At the same time ASIC could seek compensatory orders and protective orders, where appropriate, which enables a range of outcomes to be sought in the one proceeding.
63. In the below case study, the misconduct fell short of criminal contraventions. ASIC was limited to bringing civil proceedings seeking a declaration from the court that there had been breaches of s727 of the Corporations Act by the defendants. Allowing ASIC to seek civil penalties in response to these types of breaches would enable ASIC to take more effective action to deter misconduct that can have serious consequences for investors.

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112 Part 6.10 of the Corporations Act sets out the primary powers of the Panel to review decisions and make declarations and orders. Part 10 of the ASIC Act contains most of the machinery provisions for the Panel, including its establishment and conduct of its proceedings.

113 Corporations Act s657D(2).

114 Takeovers Panel Guidance Note 4: Remedies General states at paragraph 5 'The Panel does not seek to punish when deciding on a remedy'.

## CASE STUDY: ASTRA RESOURCES<sup>115</sup>

ASIC brought civil proceedings against a UK public company Astra Resources Plc (**Astra Resources**) and associated Australian company Astra Consolidated Nominees Pty Ltd (**Astra Nominees**) for alleged breaches of s727. ASIC sought declarations against those companies and orders under s206E of the Corporations Act that three former directors be disqualified from managing a corporation.

The Federal Court made declarations that:

- Astra Nominees contravened s727(1) by offering shares to 281 investors, who paid a total of more than \$6.5 million for their shares between September 2011 and August 2012;
- Astra Resources contravened s727(1) by distributing share application forms to those investors, through its agents or in a number of cases directly itself.

The Court also made orders disqualifying the former directors. Liquidators were appointed to Astra Resources during the course of ASIC's proceeding against the company.

64. Similarly where disclosure documents provided to investors are defective because they contain misleading statements or omit material information enabling ASIC to seek civil penalties would enable ASIC to take action where conduct is reckless or grossly negligent but not necessarily criminal in nature. There may be a public interest in ASIC taking action to promote the importance of compliance with the obligations with respect to the content of disclosure documents and seek a range of additional orders that may better address the misconduct than a criminal sanction.

## Financial services disclosure

65. A person is required to give another person a product disclosure statement (PDS) in a range of circumstances including when providing personal advice recommending a financial product, issuing a financial product and selling a financial products.<sup>116</sup> Failure to comply can be a strict liability offence<sup>117</sup> or an ordinary offence.<sup>118</sup> Again, there is no civil penalty for failure to comply.

115 *Australian Securities and Investments Commission v Astra Resources Plc* (2015) 107 ASCR 232; *Australian Securities and Investments Commission v Astra Resources Ltd (No 2)* (2016) 113 ASCR 162.

116 Corporations Act ss1012A, 1012B and 1012C.

117 Corporations Act s1021C(1), carrying a maximum penalty for an individual of 50 penalty units,

118 Corporations Act s1021C(3), carrying a maximum penalty for an individual of 100 penalty units or imprisonment for 2 years or both.

66. Adding a civil penalty remedy in the alternative to prosecution of the ordinary offence where there is failure to comply with financial product disclosure obligations would add to the range of penalties available allowing ASIC to adopt the remedy that will best address the individual circumstances of the case. Similar to the corporate fundraising context breaches may occur in circumstances where no criminality is involved, although the conduct may be reckless or grossly negligent and have serious consequences for financial consumers. In other cases a civil penalty may provide a more proportionate response to the contravening conduct where there is a need to promote the public interest in compliance with the obligations rather than retribution and rehabilitation associated with criminal sanctions. In these cases, there may also be efficiencies for the regulator and regulated in seeking a range of remedies in the one proceeding, including injunctions and disqualification orders for protective purposes and compensation orders where consumers have suffered losses.

## Financial services and markets – unlicensed conduct

### Need for a Australian financial services licence

67. Section 911A of the Corporations Act provides that a person who carries on a financial services business in Australia must hold an Australian financial services (AFS) licence covering the provision of the services, subject to a number of specified exemptions.<sup>119</sup> Failure to comply is a criminal offence.<sup>120</sup>
68. Section 29(1) of the Credit Act similarly provides that a person must not engage in a credit activity unless the person holds a licence authorising the person to engage in that activity. Failure to comply with this provision is an offence (carrying a maximum penalty as aligned with subsection 911A(1) of the Corporations Act). However, in contrast to the Corporations Act section 29(1) of the Credit Act is also a civil penalty provision, with a maximum penalty for an individual of 2,000 penalty units (currently \$420,000) and 10,000 penalty units (currently \$2.1 million) for a corporation.
69. The penalties for unlicensed conduct in the AFS context should be consistent with the penalties that apply to unlicensed conduct in the Credit Act given that: the conduct is similar in nature; the process for applying for an AFS and credit licence are similar; and the assessment criteria will be aligned.
70. Providing a civil penalty remedy for a breach of subsection 911A(1) will enable ASIC to take action in circumstances where through negligence or inadvertence a person carries on a financial services business without a licence covering the provision of those services. Under the Credit Act ASIC can already take similar action where a person engages in credit activity without a licence. In those circumstances, as well as the conduct lacking the requisite criminality for a criminal prosecution a criminal sanction may be a disproportionate response to the misconduct. An adequate deterrent may nevertheless be appropriate to protect consumers from the risks associated with the provision of unlicensed financial services by the person that engaged in the conduct and others in the industry.

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119 Corporations Act s911A.

120 Currently, carrying a maximum penalty for an individual of 200 penalty units and/or imprisonment for 2 years and for a corporation 1,000 penalty units.

## Need for a financial market infrastructure licence

71. The Corporations Act has established licensing regimes for three types of market infrastructure licences: financial market, clearing and settlement facility (CS facility), and derivative trade repository licences.<sup>121</sup> The Government has also proposed legislative reform to introduce a licensing regime for administrators of certain financial benchmarks. Failures to comply with the market infrastructure licensing requirements are criminal offences.
72. Similar to issues discussed above with respect to the AFS licence requirement providing a civil penalty remedy for a breach of these licencing provisions would enable ASIC to address a broader range of misconduct and provide more flexibility in enforcement options to best address the individual circumstances of the conduct. This would include where an entity through negligence or inadvertence conducts business that constitutes operating a financial market, CS facility or derivative trade repository in this jurisdiction without a licence, exemption or (in the case of trade repositories) a prescription that covers the operation of those facilities. In those circumstances the conduct may not involve the requisite criminality for a criminal prosecution and a criminal sanction may be a disproportionate response to the misconduct. It may be difficult to establish the elements of a criminal offence and a criminal sanction may in any event be disproportionate to the misconduct. A civil penalty may provide a more appropriate response to the contravening conduct where there is a need to promote the public interest in compliance with the obligations, given the potential risks to financial system stability, rather than retribution and rehabilitation associated with criminal sanctions.

## Financial services - failure to comply with client money obligations

73. Section 981B of the Corporations Act requires that an AFS licensee pay client money into an account that satisfies certain requirements. This money is taken to be held in trust by the licensee for the benefit of the client.<sup>122</sup> Failure to comply with this obligation can be a strict liability offence under subsection 993B(1), carrying a maximum penalty for an individual of 50 penalty units, or an ordinary offence under subsection 993B(3), carrying a maximum penalty for an individual of 200 penalty units or imprisonment for 5 years or both. However, there is no civil penalty for failure to comply.
74. Similarly, regulations made under section 981C make provision as to how client money held in such an account may be dealt with.<sup>123</sup> Failure to comply with a requirement in the regulations can be a strict liability offence under subsection 993C(1), carrying a maximum penalty for an individual of 50 penalty units, or an ordinary offence under subsection 993C(3), carrying a maximum penalty for an individual of 100 penalty units or imprisonment for 2 years or both. Again, there is no civil penalty for failure to comply.

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121 Corporations Act section 791A (Australian market licence); section 820A (Australian CS facility licence); section 905A (Australian derivative trade repository licence).

122 Section 981H.

123 See regulations 7.8.02 and 7.8.05.

75. The client money obligations in sections 981B and 981C are significant consumer protection provisions. Availability of a civil penalty for serious transgressions which are not necessarily criminal would enhance ASIC's ability to ensure these obligations are adhered to. Similar to unlicensed conduct breaches may occur in circumstances where no criminality is involved, although the conduct may be reckless or grossly negligent and have serious consequences for financial consumers. In other cases a civil penalty may provide a more proportionate response to the contravening conduct where there is a need to promote the public interest in compliance with the obligations rather than retribution and rehabilitation associated with criminal sanctions. In these cases, there may also be efficiencies for the regulator and regulated in seeking a range of remedies in the one proceeding, including injunctions and disqualification orders for protective purposes and compensation orders where consumers have suffered losses.

## Financial services and markets – Failure to notify ASIC of breach of obligations

76. Section 912D, which requires AFS licensees to notify ASIC of breaches of their obligations, is the subject of a separate paper issued for consultation by the Enforcement Review Taskforce. The preliminary positions developed by the Taskforce in that paper include that a civil penalty attach to a failure to comply with this requirement, in addition to a criminal offence.<sup>124</sup>
77. Separate breach reporting requirements apply to financial market licensees, CS facility licensees and derivative trade repository licensees.<sup>125</sup> Failure to comply with these requirements is an offence, carrying a maximum penalty for individuals of 100 penalty units or imprisonment for two years or both.
78. Enforcement of these requirements would be enhanced by the availability of civil penalties, in the same way as section 912D. A civil penalty remedy will give ASIC greater flexibility to pursue a remedy that best addresses the circumstances of the offending and promote compliance with the obligations through the deterrent effect of the imposition of a civil pecuniary penalty. Similar to section 912D the introduction of a civil penalty may result in ASIC taking enforcement action in relation to breach reporting obligations more often, particularly because it could seek a civil penalty for any breach of the breach reporting obligations when it takes civil penalty proceedings relating to the subject matter of the breach itself in appropriate circumstances.

## Additional civil penalty provisions may be appropriate

79. The 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.

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124 ASIC Enforcement Review Taskforce Position and Consultation Paper 1, *Self-reporting of contraventions by financial services and credit licensees*, 11 April 2017, position 5.

125 Corporations Act subsections 792B(1), 821B(1) and 904C(1) respectively.

**TABLE 7: POSSIBLE ADDITIONAL CIVIL PENALTY PROVISIONS**

<b>Section</b>	<b>Description</b>
<b>Corporations – acquisition and disclosure of interests</b>	
205G	Listed company--director to notify market operator of shareholdings etc.
606	Prohibition on certain acquisitions of relevant interests in voting shares
671B	Information about substantial holdings must be given to company, responsible entity and relevant market operator
<b>Financial services and markets – unlicensed conduct</b>	
911B	Providing financial services on behalf of a person who carries on a financial services business
911C	Holding out
791B	Holding out (financial market)
820B	Holding out (CS facility)
907A	Holding out (derivative trade repository)
<b>Financial services - disclosure</b>	
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
<b>Credit Code obligations</b>	
13(6)	Conduct that induces a debtor to make a business purpose declaration that is false or misleading
155	Person must not harass a person in attempting to get them to apply for credit
156(1)	Credit provider must not visit residence for purpose of inducing person to apply for credit
172(6)	Engaging in conduct that induces a debtor to make a declaration that goods hired under lease are for a business purpose
174(3)	Lessor not to enter consumer lease that does not contain certain disclosures
179V	Lessor or supplier must not harass a person in attempting to get that person to apply for or enter a consumer lease.
<b>Compliance with ASIC requirements</b>	
912C(3)	Failure to comply with ASIC direction to provide a statement or audit report
ASICA 63(1)	Failing to comply with requirements made under Part 3 – Investigations and information gathering
NCCP 290	Failing to comply with requirements made under Chapter 6 – Compliance and enforcement

80. ASIC also considers that contraventions relating to the following should give rise to a civil penalty remedy in the alternative to a criminal prosecution:
- a. corporate obligations with respect to financial statements, conducting audits and provision of false or misleading information relating to the affairs of a corporation;
  - b. entering into agreements or transactions to avoid employee entitlements;
  - c. prohibition against offering securities in a body that does not exist;
  - d. unlicensed conduct in respect of managed investment schemes, conduct in breach of banning orders and authorisations and sub-authorisations of authorised representatives of AFS licensees;
  - e. specific financial markets licensee obligations in Part 7.2 to Part 7.5A of the Corporations Act;
  - f. specific AFS licensee obligations in Part 7.6 to Part 7.12 of the Corporations Act;
  - g. financial services disclosure relating to document provided to and by authorised representatives of AFS licensees;
  - h. additional financial services client money obligations;
  - i. additional financial services disclosure obligations;
  - j. failure to comply with ASIC requirements.
81. The Taskforce proposes to consult on whether any provisions in addition to those mentioned in Tables 6 and 7 should be civil penalty provisions and will make recommendations after considering submissions received.

### **Should a breach of s180 give rise to a civil penalty?**

82. In addition, some members of the Taskforce have queried whether it is appropriate for section 180 of the Corporations Act (directors' and officers' duty of care and diligence) to remain a civil penalty provision given that it creates a contravention for negligent conduct. Those members have expressed the view that mere negligence may not be sufficiently serious to warrant the imposition of a pecuniary penalty. At the same time it is recognised that section 180 captures a broad range of conduct that may extend from mere negligence to gross negligence bordering on recklessness. The Taskforce proposes to consult on whether it is appropriate for section 180 to remain a civil penalty provision and will make recommendations after considering submissions received.

## 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?

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

83. The Taskforce adopts as its preliminary position that provisions imposing general obligations on licensees should be civil penalty provisions.<sup>126</sup> These provisions impose a range of important obligations and are central to the effectiveness of the licence regimes. Contravention is not currently an offence, nor does it attract a civil penalty. The consequences are administrative, in that failure to comply with an obligation is one of the grounds upon which ASIC, in the case of financial services and credit licences, and the Minister, in the case of a market or CS facility licence, may suspend or cancel a licence. Where misconduct or compliance failures have occurred but are not ongoing, it may be difficult to take this action. Suspension or cancellation of a licence is a harsh penalty that can also impact on a range of third parties.
84. However, a licensee's failure to comply with their obligations can cause significant detriment to clients, market participants, users and more broadly the Australian financial system.

#### **CASE STUDY: MARKET OPERATOR SYSTEM AND TECHNOLOGY FAILURE**

A market operator can experience operational disruptions, brought on by things like hardware or other technological failures. Significant failures can trigger events that have considerable impact on market users such as brokers as well as potential impacts on investors, listed entities and operators of other markets.

Consequences of such significant failures can include delays to the opening and/or early closing of the affected market, reduced trading volume during the affected period due to market closure or uncertainty among market users and in some cases cancelled trades. The failures can be due to deficiencies in a range of areas, such as insufficient business continuity and disaster recovery arrangements. The consequences may be exacerbated if stakeholder dependencies are not fully understood and adequately factored into incident management and recovery arrangements.

<sup>126</sup> Corporations Act s 792A – market licensees; Corporations Act s821A – CS facility licensees; Corporations Act s904A – licensed derivative and trade repositories; Corporations Act s912A – AFS licensees; Credit Act s47 – credit licensees.

85. A potential licence cancellation would not address this type of issue in a way that would support the ongoing orderly and effective functioning of the market. Having the ability to seek civil penalties would give ASIC more scope to take appropriate regulatory action. Imposition of civil penalties could 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.<sup>127</sup>

#### CASE STUDY: XYZ PTY LTD

XYZ is a licensed consumer lease provider. Its customers make fixed periodic lease payments to XYZ over a set contract length (12, 24, 36 or 48 months). ASIC found that customers of XYZ made payments in excess of the scheduled periodic payments provided for in the lease contract. XYZ also continued to collect payments from customers where the contract had ended. A large proportion of XYZ's customers paid through the Department of Human Services Centrepay system.

ASIC considered that XYZ had failed to engage in credit activities efficiently, honestly and fairly [s47(1)(a)] and that the company did not have adequate systems in place to ensure compliance with the general conduct obligations [s47(1)(k)]. However, the only remedy available for breach of these obligations is administrative, or the negotiation of refunds to consumers for the excess payments made.

86. However, it may not be appropriate to make every obligation a civil penalty provision as the consequences of attaching a civil penalty to some obligations may be undesirable. For example, attaching a civil penalty to the obligation of AFS licensees to comply with financial services laws may cause duplication between the general obligation and specific provisions to which a civil penalty also attaches.<sup>128</sup> Further, in this example, a contravention of any financial services law by a licensee would potentially attract civil penalty liability, not just those laws to which it has been determined a civil penalty should attach.
87. Accordingly, only certain obligations should be made civil penalty provisions. This would require that each obligation that is a civil penalty provision be separately identified and would enable consideration to be given to the appropriateness of attaching a civil penalty to each obligation, including where, as in the above example, this would have potentially undesirable consequences.

#### QUESTIONS

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

127 One example of a market operator system and operational failure is set out in ASIC's Report 509 Review of the ASX equity market outage on 19 September 2016 (REP 509): <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-509-review-of-the-asx-equity-market-outage-on-19-september-2016/>.

128 For example s 601FC(5) which is a financial services law and a civil penalty provision.



## 5. CREDIT CODE PROVISIONS

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1. The Credit Code provides for the imposition of civil penalties for contravention of 'key requirements'. Section 111 lists the provisions of the Credit Code that are key requirements and s113 provides that the court may order a credit provider who contravenes a key requirement to pay a penalty. Either a party to a credit contract or ASIC may apply for an order, but if the application is made by ASIC s116 provides that the maximum penalty that may be imposed is \$500,000.
2. The civil penalty regime in the Credit Code could be expanded to a number of provisions discussed further below to ensure that equivalent misconduct is treated consistently and/or appropriate remedies are available as an alternative to suspending or cancelling a credit licence, which may not always be a proportionate response to the misconduct and can have consequences for third parties and clients. The Taskforce proposes to consult on the appropriateness of making these provisions civil penalty provisions and will make recommendations after considering submissions received.

### 5.1 Prohibited monetary obligations for small amount credit contracts

3. Section 23(1) of the Credit Code is a key requirement. That section applies generally to credit contracts other than small amount credit contracts and provides that the contract must not impose a monetary obligation on the debtor that is prohibited by the Code.
4. Section 23A(1) of the Credit Code contains a similar prohibition in relation to small amount credit contracts but is not a key requirement. There does not seem to be any reason why subsection 23(1) is a key requirement whereas subsection 23A(1) is not.
5. Section 24 creates a strict liability offence for a credit provider who enters into a contract which contravenes either subsection 23(1) or subsection 23A(1), carrying a maximum penalty of 100 penalty units. Being a strict liability offence provision, ASIC can issue an infringement notice to a credit provider who contravenes either subsection 23(1) or subsection 23A(1). However, in the event of failure to pay an infringement notice, for breaches of section 23A ASIC does not have the ability to pursue civil penalty proceedings, in the alternative to criminal prosecution. Its only option is prosecution for a strict liability offence under subsection 24(1A).
6. An example of a prohibited monetary obligation for small amount credit contracts is contained in subsection 31A(1) of the Credit Code, which provides that such a contract must not impose fees and charges except permitted establishment and monthly fees, default fees and government charges. A contract imposing a fee or charge prohibited by this provision contravenes subsection 23A(1) and the credit provider entering the contract commits a strict liability offence under section 24, but is not subject to a civil penalty.
7. Interest 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.

## CASE STUDY: FAIR GO FINANCE PTY LTD<sup>129</sup>

ASIC issued infringement notices to Fair Go Finance Pty Ltd (**Fair Go Finance**) for overcharging interest and establishment fees on payday loans. ASIC identified that Fair Go Finance charged establishment fees of more than twice the 20% maximum allowed and in a number of instances the total amount repaid by consumers over the term of the loan exceeded the maximum amount allowed under the Credit Act.

Fair Go Finance agreed to refund approximately 550 consumers around \$34,500 for the interest collected from them in excess of the maximum amount allowed under the Credit Act.

ASIC was able to issue infringement notices in this case, because the contravention of s23A(1) by Fair Go Finance was a strict liability offence under s24. However, ASIC could not pursue civil penalty proceedings.

## 5.2 Prohibitions relating to credit contracts

8. Sections 32A(1) and (2) of the Credit Code provide:
  - a. A credit provider must not enter into a credit contract if the annual cost rate of the contract exceeds 48%
  - b. A person must not provide credit assistance to a consumer by suggesting that the consumer apply, or assisting the consumer to apply, for a particular credit contract with a particular credit provider if the person knows, or is reckless as to whether, the annual cost rate of the contract exceeds 48%.
9. These are offence provisions carrying a maximum penalty of 50 penalty units. Subsection 32A(1) is a key requirement under s111 of the Credit Code, but 32A(2) is not. Accordingly, the court has power to make penalty orders for a breach of subsection 32A(1), but not 32A(2).
10. In the case of subsection 32A(2), as an alternative to criminal prosecution, the only enforcement remedy available to ASIC is administrative action to suspend or cancel a licence, or ban individuals involved in a breach. ASIC may accept an enforceable undertaking if this is offered by the contravening licensee. However, if civil penalty action were available, this could provide a more effective deterrent outcome in appropriate cases.

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<sup>129</sup> 16-027MR Payday lender penalised for overcharging consumers <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-027mr-payday-lender-penalised-for-overcharging-consumers/>.

## 5.3 Limit on amount that may be recovered if there is default under a small amount credit contract

11. Section 39B(1) of the Credit Code provides:

*If there is a default in payment under a small amount credit contract, the maximum amount that may be recovered (whether by repayments under the contract or otherwise) by the credit provider in relation to the contract must not exceed an amount that is twice the adjusted credit amount in relation to the contract.*

12. The remedy for a breach of subsection 39B(1) is that amounts paid in excess of this limit are recoverable by the consumer. A sanction that only results in return of funds wrongfully charged is largely ineffective in terms of providing a meaningful deterrent.
13. Further, unlike a breach of the cap on costs under s31A, which allows consumers to recover all fees and charges they have paid the credit provider, a breach of the double default cap under s39B only enables consumers to recover any amount paid above the default cap.
14. Attaching 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.

## 5.4 Credit code – false or misleading representations relating to credit contracts

### False or misleading representations

15. Section 154(1) of the Credit Code provides:

*“A person must not make a false or misleading representation in relation to a matter that is material to entry into a credit contract or a related transaction or in attempting to induce another person to enter into a credit contract or related transaction.”*

16. Similarly, subsection 179U(1) provides:

*“A person must not make a false or misleading representation:*

- (a) in relation to a matter that is material to entry into a consumer lease or a related transaction; or*
- (b) in attempting to induce another person to enter into a consumer lease or a related transaction.”*

17. Failure to comply with either of these sections is an offence carrying a maximum penalty of 50 penalty units. However, it is a defence to a prosecution if the person charged proves that they reasonably believed that the representation was not false or misleading.<sup>130</sup> Both provisions are comparable to the false or misleading representations prohibitions in s12DB of the ASIC Act, contravention of which may be an offence or attract a civil penalty. It would be consistent with the civil penalty regime in the ASIC Act and allow ASIC greater flexibility in its response to this kind of misconduct if ss154 and 179U of the Credit Code were civil penalty provisions. It may be appropriate to provide a defence to liability for a civil penalty (separate to the current defence to prosecution for an offence), for example taking reasonable steps to ensure the relevant representation was not false or misleading.

#### QUESTION

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

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<sup>130</sup> Sections 154(2) and 179U(2).

## 6. INSURANCE CONTRACTS ACT 1984 (ICA)

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### 6.1 The duty of utmost good faith

1. ASIC is responsible for the general administration of the ICA, which regulates the content and operation of insurance contracts.<sup>131</sup> Section 13(1) of the ICA creates an implied contractual term that requires both the insurer and the policy holder to act towards each other, in respect of any matter arising under or in relation to the contract, with the utmost good faith. If reliance on a contractual provision by either the insurer or the policy holder would involve a failure to act with utmost good faith, the party cannot rely on that provision. Section 13(1) provides:

*A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.*

2. This section 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.<sup>132</sup>
3. However, the Corporations Regulations specifically exclude 'handling insurance claims' from the definition of a financial service in the Corporations Act.<sup>133</sup> This means that those parts of the Corporations Act regulating the provision of financial services do not apply to insurance claims handling, which would generally also preclude the exercise of ASIC's administrative powers.
4. As a result of amendments made to the ICA in 2013, s14A of that Act now enables ASIC to exercise its administrative powers in relation to a failure to comply with the duty of utmost good faith in the handling or settlement of claims, as if failure to comply with the duty were a failure to comply with a financial services law.<sup>134</sup> However, this section does not provide ASIC general standing to take legal action in relation to such a failure.

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131 ICA s11A.

132 Corporations Act sections 761A (definition of *financial services law*), 764A(1)(d), (e) and (f), 915C(1) and 920A(1).

133 Section 766A(2)(b) and reg 7.1.33.

134 ICA s14A, which applies to contracts of insurance entered into or renewed (not automatically) after 28 June 2013. See also the Explanatory Memorandum to the *Insurance Contracts Amendment Bill 2013* (ICA EM), at [1.8] – [1.11] and [1.13] – [1.14].

5. The amendments made to the ICA in 2013 also clarified that a failure to comply with the duty of utmost good faith is a breach of the ICA, such that ASIC now has power to take representative action under s55A of the ICA in relation to such a breach.<sup>135</sup> That is, ASIC has power, if it is in the public interest, to either:
  - a. bring an action against the insurer on behalf of an insured person or third-party beneficiary in relation to a breach; or
  - b. take over and continue, on behalf of the insured person or third-party beneficiary, an action brought against the insurer by that person or third-party beneficiary in relation to a breach.
6. However, as noted by ASIC in Report 498: Life insurance claims: An industry review (Rep 498) released in October 2016, there are limitations to both the exercise of administrative powers and representative action as regulatory tools:
  - a. ASIC would typically only use its administrative powers against an insurer or its representatives when there is serious and systemic misconduct that justifies suspension or cancellation of the insurer's AFS licence, or banning individuals from continuing to provide financial services; and
  - b. commencing court action for individual transactions may not be an effective regulatory tool to deal with systemic issues and in many circumstances an external dispute resolution scheme may be best placed to pursue these transactions so that ASIC can focus on underlying systemic conduct.<sup>136</sup>
7. The ICA EM states that isolated breaches of the duty of utmost good faith would not be expected to result in ASIC pursuing a banning order.<sup>137</sup>
8. Section 15 of the ICA limits ASIC's ability to take alternative action as it provides that a contract of insurance is not capable of being made the subject of relief under any other Act for judicial review of a contract on the ground that it is harsh, oppressive, unconscionable, unjust, unfair or inequitable. As a result, ASIC cannot take action in relation to a contract of insurance under, for example, s12CB of the ASIC Act for unconscionable conduct in connection with a financial service.

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135 ICA s13(2). See also the ICA EM, at [1.7] and [1.12].

136 Rep 498, at [59] and [146].

137 ICA EM, at [1.14]

9. The case studies below illustrate the potential scope of section 13 of the ICA.

**CASE STUDY: CGU INSURANCE LTD V AMP FINANCIAL PLANNING PTY LTD (2007)  
235 CLR 1**

AMP, an authorised securities dealer, was insured by CGU under a professional indemnity policy. Two of AMP's authorised advisers were involved in a failed investment, which resulted in a complete loss for a number of clients. Consequently, AMP and its advisers faced numerous claims. AMP reported its claims to CGU who accepted AMP's proposed settlement protocol but reserved its rights and withheld any indemnity determination, reminding AMP to act as a 'prudent uninsured' would in the circumstances.

AMP sought from CGU the amounts paid to settle the underlying claims. CGU eventually denied indemnity and contended that AMP was required, and had failed, to establish legal liability and the reasonableness of the settlement.

The High Court held that utmost good faith may require insurers to act in line with 'commercial standards of decency and fairness' with 'due regard to the legitimate interests of an insured, as well as to its own interests'. However, the Court held that a breach of the duty by the insurer does not allow the Court to find the insurer liable to indemnify the insured.

The Court further concluded that AMP would not have been able to seek relief even if it was found that CGU had breached its duty of utmost good faith, as there was 'not such a degree of reciprocal good faith'.

**CASE STUDY: ZIOGOS V FSS TRUSTEE CORPORATION AS TRUSTEE OF THE  
FIRST STATE SUPERANNUATION SCHEME [2015] NSWSC 1385**

Ms Ziogos was a former NSW Police Officer who developed Post-Traumatic Stress Disorder, anxiety and depression over the course of her employment. She became Totally and Permanently Disabled and was unable to continue working.

Ms Ziogos lodged a claim under two TPD insurance policies taken out by her superannuation company First State Superannuation with the insurer MetLife.

Ms Ziogos' treating doctor confirmed that she was Totally and Permanently Disabled. MetLife organised for Ms Ziogos to be examined by two other doctors who gave less favourable reports. One doctor reported that 'with treatment' Ms Ziogos would be able to work again. Ultimately MetLife declined Ms Ziogos' claim and she commenced proceedings in the Supreme Court.

Justice Ball held that 'the requirement of utmost good faith requires the insurer to explain how it reached the decision it did so that the insured person can be satisfied that the decision itself was reached in the utmost good faith'.

Justice Ball found that MetLife was not required by the duty of utmost good faith to undertake its own investigations. His Honour also found that MetLife had not acted unreasonably by engaging in covert surveillance of Ms Ziogos, nor by failing to investigate her claim in a timely manner or requesting submissions in relation to material without identifying the material it considered to be adverse.

However, Justice Ball did find that MetLife had breached its duty on the basis that it had made its decision in the erroneous belief that Ms Ziogos was capable of working part-time, that it was unreasonable for MetLife to conclude, based on the facts, that Ms Ziogos had the capacity to return to work at some time in the future, and that it was unreasonable for MetLife to place any weight on video surveillance (which showed Ms Ziogos undertaking activities that bore no relationship to those she would be required to undertake in employment).

The Court then considered whether Ms Ziogos was totally and permanently disabled within the meaning of the insurance policy. Justice Ball found in Ms Ziogos' favour and she was awarded the full amount of her claim of \$935,865.

10. Conduct which has been found by the Financial Ombudsman Service to be inconsistent with the duty of utmost good faith includes:
  - a. insurer relying on a provision restricting claims where the insured was never notified of the provision (insurer failed to provide a copy of the PDS to the insured), and where the sales agent persisted with the sale despite the consumer asking to see the policy document first;
  - b. insurer suspending benefits because it considered that investigations might reveal the insured was not entitled to payments, which could be reasonable if the insurer's assessment was delayed solely due to a lack of cooperation by the insured, but not if due to the insurer making numerous unwarranted separate requests for information;
  - c. insurer imposing a condition for continuing to pay benefits when the insured travelled overseas, that required the insured to seek treatment from doctors registered in a list of countries that did not include the country travelled to.
11. If section 13 were a civil penalty provision, this would enhance ASIC's use of the provision as an enforcement tool, in circumstances where administrative or representative action may not be appropriate, but action is needed to deter conduct by an insurer which is not consistent with its duty of utmost good faith. Civil penalties would be available as an enforcement outcome for contraventions of the duty, not only in relation to insurance claims handling, but also potentially in relation to pre-contractual and post-contractual conduct by insurers.

## 6.2 Section 33C – Insurer's obligation to provide Key Facts Sheet

12. Section 33C(1) provides that an insurer must provide a Key Facts Sheet for a prescribed contract in the prescribed manner. Failing to comply with this provision is an offence carrying a maximum penalty of 150 penalty units. This requirement is similar to the requirement to provide a Key Facts Sheet under sections 133AD and 133BC of the Credit Act, both of which are civil penalty provisions in addition to being offence provisions.

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

13. It is proposed that there should be civil penalty consequences for an insurer that breaches the following provisions of the ICA:
  - a. the duty of utmost good faith,
  - b. the insurer's obligation to provide a Key Facts Sheet.

## 7. INFRINGEMENT NOTICES

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1. Infringement notices have been used for decades in Australia in relation to high volume, low-level, often quasi-criminal matters such as traffic offences. Their use has increased markedly in recent years at both the State and Federal level.<sup>138</sup>
2. Infringement notices are an allegation of a contravention of the law, payment of which causes the regulator to not pursue the alleged contravention any further. Payment of the notice also is not taken as an admission of guilt by the alleged offender. However, if the infringement notice is not complied with, ASIC remains entitled to bring other proceedings, civil or criminal, against the offending party.
3. In federal regulation, an infringement notice may be used as an alternative to criminal or civil penalty proceedings. The ALRC Principled Regulation report recommended that infringement notices should apply in the case of criminal penalty schemes, only to 'minor offences of strict or absolute liability'<sup>139</sup> and in the case of civil penalty schemes, only to 'minor contraventions in which no proof of a fault element or state of mind is required'.<sup>140</sup>
4. Infringement notices in the financial services industry were first canvassed in a CLERP 9 discussion paper, released in September 2002, which raised a number of proposed changes to Australia's corporate law framework to improve corporate disclosure and audit regulation in response to a number of high profile corporate collapses.<sup>141</sup>
5. One of the proposals in that discussion paper sought to give ASIC the power to issue infringement notices for minor violations of the continuous disclosure obligations. The proposal was agreed to and the majority of CLERP 9 proposals were enacted in the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*, including the introduction of ASIC's power to issue infringement notices with a penalty of up to \$100,000. The Infringement notice provisions supplement ASIC'S powers to enforce the criminal and civil penalty provisions.
6. The amounts provided for under the various infringement notice regimes over which ASIC presides are all considerably lower than the maximum penalty allowed for in the legislation for contravention of the obligations themselves, in order to act as an incentive for the party to pay the infringement notice amount rather than litigate the matter. ASIC uses infringement notices as a regulatory tool in relation to less serious contraventions that it considers can be more efficiently and effectively dealt with by an administrative penalty.

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138 Rees A, 'Infringement notices and federal regulation: wolves in sheep's clothing?' (2014) 42 Australian Business Law Review 276.

139 ALRC Principled Regulation report, n 2, Rec 12-1.

140 Ibid., n 2, Rec 12-2.

141 CLERP 9, Corporate Disclosure: Strengthening the Financial Reporting Framework (Commonwealth of Australia, 2002).

7. Infringement notices are currently available in relation to the following areas of the corporate law:
  - a. certain unconscionable conduct and consumer protection provisions of the ASIC Act;
  - b. strict liability offences and certain civil penalty provisions under the Credit Act;
  - c. continuous disclosure obligations under the Corporations Act; and
  - d. breaches of the Market Integrity Rules, Derivative Transaction Rules and Derivative Trade Repository Rules.
8. Currently, infringement notices can be issued by either an ASIC delegate or in the case of breaches of market integrity rules, the markets disciplinary panel. The panel is made up of industry peers and one ASIC representative. It may be appropriate for a similar peer review panel to issue infringement notices for contraventions of financial services and credit obligations. The AGD guide states that an infringement notice may only be issued by an officer authorised to exercise that power and those officers should belong to a specified class of persons. The Taskforce will consider the issue of a peer review panel issuing infringement notices later in this paper.
9. In *INFO 151 ASIC's Approach to Enforcement*, ASIC outlines the factors that it may consider in deciding which remedy in its regulatory toolkit it should pursue,<sup>142</sup> including
  - a. nature and seriousness of the suspected misconduct;
  - b. conduct of the person or entity after the alleged contravention;
  - c. the strength of ASIC's case;
  - d. the expected level of public benefit.
10. Issues that may favour an infringement notice as being the most appropriate regulatory approach might include lack of adverse compliance history, lack of evidence of significant consumer loss, how the entity responded to the breach after it became aware of it and whether the breach was inadvertent.
11. Broadly, infringement notices have the following benefits:
  - a. they increase the likelihood that contraventions will be penalised<sup>143</sup> because ASIC is able to take action in relation to a larger number of contraventions than it otherwise would be able to by way of legal proceedings, thereby encouraging voluntary compliance;<sup>144</sup>

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142 INFO 151 at page 8.

143 Explanatory Memorandum, CLERP 9 at [4.255], Explanatory Memorandum, *National Consumer Credit Protection Act 2009* at [9.50].

144 M Welsh, 'Enforcing contraventions of the continuous disclosure provisions: Civil or administrative penalties', *Company and Securities Law Journal*, Vol. 25, 2007, at p.315.

- b. they enable ASIC to more efficiently and effectively take action in relation to less serious contraventions;<sup>145</sup>
- c. they reduce the cost and time for ASIC in pursuing less serious contraventions,<sup>146</sup> because they can be characterised as a form of settlement, there is no need to compile evidence for a criminal or civil brief;
- d. they reduce the burden on the judicial system by decreasing the number of prosecutions;<sup>147</sup>
- e. they enable entities to avoid costly and lengthy court proceedings where appropriate;<sup>148</sup>
- f. they provide ASIC with more flexibility in terms of the enforcement tools it may use to deal with contravening conduct,<sup>149</sup> enabling ASIC to target its response to contraventions to the tenor of the conduct and to the circumstances of different entities;<sup>150</sup>
- g. while financial penalties for infringement notices are substantially lower than penalties resulting from civil and criminal proceedings taken by ASIC, the reputational effect of infringement notices can act as an additional deterrent and can encourage compliance;<sup>151</sup>
- h. they enable ASIC to signal to the market more easily its views on contraventions of the law than through court action,<sup>152</sup> as infringement notices have an educative effect, informing the market of specific situations where ASIC expects a change in conduct; and
- i. they are less harsh and discriminatory and therefore appropriate for dealing with less serious breaches.<sup>153</sup>

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145 Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010* at [8.5].

146 Explanatory Memorandum, CLERP 9 at [4.255], Second Reading Speech – Upper House, *Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010*.

147 M Nehme, M Hyland and M Adams, 'Enforcement of continuous disclosure: The use of infringement notice and alternative sanctions', *Australian Journal of Corporate Law*, Vol. 21, 2007 at p.118 and R G Morison and I Ramsay, 'Enforcement of ASIC's market integrity rules: An empirical study', *Australian Journal of Corporate Law*, Vol 30, 2015, at p.32.

148 Second Reading Speech – Upper House, *Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010*, Explanatory Memorandum, *National Consumer Credit Protection Act 2009* at [9.49] and [9.51] and R G Morison and I Ramsay, at p.32.

149 Second Reading speech. CLERP 9, Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010* at [8.4].

150 Explanatory Memorandum, *National Consumer Credit Protection Act 2009* at [4.35] to [4.38].

151 R G Morison and I Ramsay, at p.32.

152 Explanatory Memorandum, CLERP 9 at [5.458].

153 M Welsh, at p.325.

12. However, the Taskforce notes that the use of infringement notices in the corporate law has been criticised by stakeholders, including the ALRC and the Law Council of Australia (LCA). The ALRC Principled Regulation report criticised the then CLERP 9 proposal for an infringement notice regime for contraventions of continuous disclosure provisions as it involved subjective judgments as to the materiality of information and are, therefore, contraventions involving a 'state of mind' element.<sup>154</sup> The ALRC also raised concerns with the size of the penalties that could be levied under infringement notices. The LCA has previously stated:

*"Infringement notices in the area of white-collar crime have been a contentious issue. We as a body have always opposed the use of infringement notices. We believe it is lazy regulation. It does not involve a finding of culpability. It does not provide guidance to the community as to what conduct should be proscribed or not. We note that the ALRC does not support infringement notices in areas such as this, and we would continue our opposition to infringement notices and our opposition to a broadening of the application of infringement notices in the corporations' context."*<sup>155</sup>

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

13. While noting some of the opposing views on infringement notices, the Taskforce's preliminary position is that infringement notices should be extended to an appropriate range of civil penalty offences under the Corporations Act, the Credit Act and Credit Code. While infringement notices are part of ASIC's enforcement toolkit in relation to breaches of market integrity rules, continuous disclosure and ASIC Act offences they are not currently available for a range of civil penalty offences under the Corporations Act and some offences under the Credit legislation. The introduction of an infringement notice regime for these provisions provides ASIC with an additional regulatory response to these lower level breaches.
14. Infringement notices have been an effective enforcement tool for ASIC. ASIC has provided evidence to the Taskforce that the payment rate of infringement notices in recent years has been very high. Where notices are not paid, ASIC retains the flexibility to commence civil or criminal penalty proceedings against the entities involved as appropriate.
15. The Taskforce recognises that not all existing civil penalty provisions will be suitable for an infringement notice regime. Some provisions under the Corporations Act are unsuitable because of their nature and the importance of the obligations contained therein (for example, sections 180-183 of the Corporations Act) to be dealt with by infringement notices.
16. Under the Credit Act, there are over 100 civil penalty provisions and almost half of those provisions are currently subject to the applicable infringement notice regime. However a number of lower level breaches in both Acts could be appropriately and proportionately dealt with by way of an infringement notice regime.

<sup>154</sup> ALRC Principled Regulation report.

<sup>155</sup> Page 71 Senate Standing Committee on Economics 'Lifting the fear and suppressing the greed – penalties for white-collar crime and corporate and financial misconduct in Australia' March 2017.

17. In position paper 1 '*Self-reporting of Contraventions by Financial Services and Credit Licensees*' the Taskforce consulted on the possible introduction of an infringement notice regime for a failure to self-report breaches under section 912D. A majority of stakeholders supported this position and noted its flexibility to deal with minor and inadvertent non-compliance efficiently.
18. ASIC has provided the Taskforce with a preliminary list of current and proposed civil penalty provisions, which it views as being suitable for infringement notices. This is provided at Annexure D and the Taskforce seeks stakeholder views on this list and whether these provisions and any other Corporations or Credit Act provisions would be suitable for an expanded infringement notice regime. The list includes a number of current and proposed civil penalty provisions under the Corporations Act, Credit Act and Code and the ICA. Consistent with the AGD guide, the list contains provisions which ASIC considers to be relatively minor offences and where a penalty will be more effective for deterrence, if it is imposed immediately.

**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.**

19. The AGD guide provides that infringement notices may be employed for relatively minor offences where a high volume of contraventions is expected, a penalty must be imposed immediately to be effective, and/or it is easy to make an assessment of guilt or innocence.<sup>156</sup> It further notes that infringement notice schemes should not require proof of fault and as such, are more suitable for strict or absolute liability offences.<sup>157</sup> Further the guidelines state that the 'amount payable under an infringement notice scheme should not exceed 12 penalty units for a natural person or 60 penalty units for a body corporate'.
20. The penalties available under most existing infringement notice provisions under ASIC-administered legislation are 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. One exception is the continuous disclosure regime, where infringement notice penalties are graduated, being \$33,000, \$66,000 or \$100,000, depending on whether the entity is a Tier 1, 2 or 3 entity in terms of market capitalisation and whether it is the entity's first contravention.
21. Under the Credit Act and Regulations, infringement notice penalties imposed for civil penalty provisions must not exceed one-fortieth of the maximum penalty that a court could impose, and must not exceed one-fifth of the maximum penalty that a court could impose for strict liability criminal offences. As the maximum civil penalty under the Credit Act is generally 2,000 penalty units, the individual infringement notice amount is 50 penalty units and for corporations, 250 penalty units. For consistency, this ratio will apply to any new infringement notice provisions under the Credit Act (considered as part of position 15).

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<sup>156</sup> AGD Guide, at [6.2.1].

<sup>157</sup> AGD Guide, at [6.2.1].

22. The Taskforce’s preliminary position is that infringement notice amounts should generally be set at the prescribed maximums in the AGD guide: 12 penalty units for individuals and 60 penalty units for corporations. Any existing infringement notice provisions, including those amounts that are above the AGD guide (that is, continuous disclosure, Credit legislation) will remain unchanged. However the Taskforce is seeking stakeholder views on whether a ratio-type regime, similar to the Credit Act would be more appropriate, noting this will result in higher infringement notice amounts.

**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?

## 8. PEER DISCIPLINARY REVIEW PANELS

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1. Peer review is a form of co-regulation where government agencies collaborate with industry. A properly constituted peer review panel should have authority to make administrative decisions that would ordinarily be made by a government body (such as ASIC). Peer review panels strengthen the impact of administrative decisions by drawing from industry expertise and experience.
2. The Markets Disciplinary Panel, for example, takes disciplinary action in relation to suspected breaches of the market integrity rules. It is established by ASIC on an ad hoc basis and can make decisions about whether an infringement notice should be issued or whether to accept enforceable undertakings. Other panels are enshrined in legislation. For example, the Takeovers Panel, which is the primary forum for dispute resolution regarding takeovers, is established under section 171 of the ASIC Act with powers under Part 6.10 of the Corporations Act.
3. The Markets Disciplinary Panel is subject to regulatory guidance issued by ASIC,<sup>158</sup> which specifies the policies that will be applied by the panel and the general approach adopted when administering available remedies.
4. Peer review panels seek to improve regulatory outcomes by:
  - a. Incorporating industry practice into administrative decisions;
  - b. Providing industry expertise in an area of change and increasing complexity;
  - c. Allowing industry peers to regulate inappropriate behaviour and advance industry standards;
  - d. Promoting professionalism and self-discipline within the industry; and
  - e. Building greater confidence in the regulatory system.

### 8.1 Proposed Financial Services and Credit Panel

5. ASIC's administrative powers in relation to Australian financial services licences and Australian credit licences include the power to suspend and cancel licences and a power to make a banning order. ASIC is currently proposing to establish a panel called the Financial Services and Credit Panel to make administrative banning decisions in relation to financial services and credit activities (the Panel).<sup>159</sup>

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158 ASIC's RG 216: Markets Disciplinary Panel, issued on 29 July 2010. Available at: <http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-216-markets-disciplinary-panel/>.

159 See ASIC's Consultation paper 281: *Financial Services Panel*, April 2017. Available at: <http://download.asic.gov.au/media/4214126/cp281-published-11-april-2017.pdf>.

6. ASIC plans to enable the Panel to take administrative action against AFS and credit licensees and other individuals. This would not preclude ASIC from continuing to exercise its administrative powers. Instead, the Panel will sit alongside ASIC's current administrative action processes.
7. ASIC considers it appropriate for the Panel to decide administratively whether to ban individuals from providing financial services or credit. As discussed above, the Panel could also potentially exercise other administrative powers such as the power to issue infringement notices or the power to accept enforceable undertakings. Infringement notices and enforceable undertakings are distinct from a banning power. They are agreed or negotiated outcomes and are not administrative decisions that are subject to appeal.
8. ASIC also proposes that the Panel comprise of "financial services and credit industry participants and/or non-industry participants with relevant expertise" and "at least one ASIC staff member". The Taskforce notes the broad range of businesses in the financial services and credit industries creates sensitivities in adequately capturing a panel of industry peers in individual cases. The Taskforce considers panel members should be drawn from a pool of experienced persons on a case-by-case basis, as is suited to the particular circumstances of that case.
9. ASIC has produced a regulatory guide on the Markets Disciplinary Panel practices and procedures. This regulatory guide sets out the conduct of proceedings for alleged breaches of ASIC market integrity rules. Similar regulatory guidance may be appropriate for the Panel and could address matters such as the objectives of the Panel and the procedures for the Panel making a decision. Such guidance may also establish procedures around the publication of decisions and any appeal rights for decisions made by the Panel.

#### 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?

## 9. ADDITIONAL ISSUE

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### 9.1 ASIC Act – false or misleading statements

1. Section 12DB of the ASIC Act prohibits certain kinds of false or misleading representations made in connection with the promotion or supply of financial services. This is both an offence and civil penalty provision, each carrying the same maximum penalty of 2,000 penalty units for an individual and 10,000 penalty units for a body corporate.
2. The ASIC Act also contains a general prohibition against misleading or deceptive conduct (s12DA) with exclusions for statements made in disclosure documents. This section is neither an offence nor a civil penalty provision.<sup>160</sup> Section 1041H of the Corporations Act is in similar terms.
3. A contravention of sections 1041H or 12DA can be a basis for the Court to impose civil liability or order injunctive relief. Each section is a financial services law, contravention of which is a ground upon which ASIC may suspend or cancel a financial services licence or ban a person from providing financial services.
4. ASIC is unable to take civil penalty or prosecution action for conduct that is false or misleading, but does not comprise a false or misleading representation specifically within the scope of section 12DB of the ASIC Act. Examples of representations that arguably are not false or misleading representations of a kind specifically described in section 12DB include:
  - a. false or misleading statements about a company's proposals to list on the ASX;<sup>161</sup>
  - b. false statements about the number of a company's shares on issue;
  - c. false or misleading statements about an entity's assets or liabilities;<sup>162</sup>
  - d. false or misleading statements about contracts entered into by an entity;
  - e. false or misleading statements about the constitution of a company's board;
  - f. false or misleading statements about a company's financial performance or prospects;

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<sup>160</sup> Both provisions are modelled on the former s52 of the *Trade Practices Act 1974*.

<sup>161</sup> Misrepresentations of the kind referred to in this and the following subparagraphs [137.1] - [137.5] were found to be misleading or deceptive in contravention of s 1041H in *Australian Securities and Investments Commission v SunEnergy Asia Pacific Pty Ltd* [2011] FCA 275 (*SunEnergy*).

<sup>162</sup> In *SunEnergy*, the defendant company made a misrepresentation that it had secured certain property for the construction of a solar farm.

- g. false statements that funds deposited by clients would be held in trust accounts and not inter-mingled with other funds;<sup>163</sup> and
- h. false statements about the commencement of legal proceedings for recovery of money owing under a credit facility.<sup>164</sup>

#### CASE STUDY: RESPONSIBLE ENTITY OF MANAGED INVESTMENT SCHEME

ASIC investigated the conduct of a responsible entity of a managed investment scheme, which had been wound up as the result of the failure of certain investments, owing a substantial amount of money to investors.

Among the potential contraventions investigated by ASIC were contraventions of s1041H of the Corporations Act, alternatively sections 12DA or 12DB of the ASIC Act. ASIC formed the view that reports issued by the responsible entity to investors were misleading or deceptive in contravention of s1041H, because they misrepresented the actual asset allocations of the fund at the time of the reports, in a way that failed to disclose the exposure of the fund to investment risk.

Notwithstanding this view, on the advice of counsel, ASIC did not pursue civil penalty action for contraventions of s12DB of the ASIC Act, because the provisions of that section seemed inapt to describe the particular conduct being investigated. Instead, ASIC sought civil penalties for unrelated breaches of the responsible entity's duties arising out of management of the fund. However, ASIC was unable to seek civil penalties for contraventions of s1041H as that section is not a civil penalty provision.

- 5. This could be addressed by amending s12DB of the ASIC Act to capture additional representations that are not currently captured by that section. Such an amendment would still confine the proscribed conduct to particular kinds of false or misleading representations made in relation to financial products or services.

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163 This was one of the representations declared to be misleading or deceptive in contravention of s1041H in *Australian Securities and Investments Commission v Vault Markets Pty Ltd* [2014] NSWSC 1641.

164 This was the conduct found to be misleading or deceptive in contravention of s12DA in *Australian Securities and Investments Commission v Accounts Control Management Services Ltd* [2012] FCA 1164. In that case ASIC obtained declarations and injunctions to restrain the defendant debt collection agency from engaging in the conduct.

## ANNEXURE A: TYPES OF ACTION AVAILABLE TO ASIC

Type of action	Description
Punitive	<p>ASIC can pursue action in the courts to punish a person or entity in response to the misconduct. Actions include:</p> <ul style="list-style-type: none"> <li>criminal penalties (for example, terms of imprisonment; fines; community service orders) — matters giving rise to criminal penalties are prosecuted by the Commonwealth Director of Public Prosecutions (CDPP), with the exception of a number of minor regulatory offences, which are prosecuted by ASIC; and</li> <li>civil monetary penalties.</li> </ul> <p>All monetary penalties in these types of actions are payable to the Commonwealth.</p>
Protective	<p>ASIC can take administrative action decided by an ASIC delegate designed to protect consumers and financial investors. Actions include:</p> <ul style="list-style-type: none"> <li>disqualification from managing a corporation;</li> <li>a ban on providing financial services or engaging in credit activities;</li> <li>cancellation, suspension or variation of conditions of a licence; and</li> <li>public warning notices.</li> </ul> <p>ASIC can also apply to the court for a disqualification order.</p>
Preservative	<p>ASIC can take court action to protect assets or compel someone to comply with the law (for example, through an injunction or freezing order).</p>
Corrective	<p>ASIC can seek a court order for corrective disclosure.</p>
Compensatory	<p>ASIC can begin a representative action in the courts to recover damages or property for those who have suffered loss (for example, ASIC Act, s50; Corporations Act, s1317J).</p>
Negotiated or agreed outcome	<p>ASIC can use negotiated alternatives to remedies where these can achieve an effective regulatory outcome. These include:</p> <ul style="list-style-type: none"> <li>enforceable undertakings (EUs); and</li> <li>payment of infringement notices.<sup>165</sup></li> </ul>

Source: [Information Sheet 151](#) ASIC's approach to enforcement (INFO 151).

<sup>165</sup> The payment of an infringement notice is an agreed outcome in the sense that the recipient may choose whether to pay the penalty specified.

## ANNEXURE B: PROPOSED INCREASES TO IMPRISONMENT PENALTIES

Relevant criminal offence	Current criminal penalty	Proposed criminal penalty
<b>Corporations Act 2001</b>		
<b>Part 2D.1 – Duties and powers</b>		
184(1)	5 years	10 years
184(2)	5 years	10 years
184(3)	5 years	10 years
<b>Part 2D.6 – Disqualification from managing corporations</b>		
206A(1)	1 year	5 years
<b>Chapter 2M – Financial reports and audit</b>		
344(2)	5 years	10 years
<b>Part 5C.2 – Responsible entity of registered scheme</b>		
601FD(4)	5 years	10 years
601FE(4)	5 years	10 years
<b>Part 5D.4 – Duties of officers and employees of licensed trustee companies</b>		
601UAA(1)	5 years	10 years
601UAB(1)	5 years	10 years
<b>Chapter 6B – Rights and liabilities in relation to Chapter 6 and 6A matters</b>		
670A(3)	1 year	5 years
<b>Chapter 6D – Fundraising</b>		
708AA(10)	6 months	2 years
708A(9)	6 months	2 years
727(1)	5 years	10 years
728(3)	5 years	10 years
<b>Chapter 7 – Financial services and markets</b>		
<b>Part 7.2 – Licensing of financial markets</b>		
792D(1)	6 months	2 years
<b>Part 7.3 – Licensing of clearing and settlement facilities</b>		
821C(1)	6 months	2 years
821C(3)	6 months	2 years
821D	6 months	2 years
821E(2)	50pu	2 years
<b>Part 7.5 – Compensation regimes for financial markets</b>		
892K	2 years	5 years
<b>Part 7.5A – Regulation of derivative transactions and derivative trade repositories</b>		
905A	500pu	2 years
907A	500pu	2 years

Relevant criminal offence	Current criminal penalty	Proposed criminal penalty
<b>Part 7.6 – Licensing of providers of financial services</b>		
911A(1)	2 years	5 years
911B(1)	2 years	5 years
911C	1 year	2 years
912C(3)	6 months	2 years
912D(1B)	1 year	2 years
912E(1)	6 months	2 years
<b>Part 7.6 – Licensing of providers of financial services</b>		
920C	6 months	5 years
<b>Part 7.7 – Financial services disclosure (financial services guide, general advice warning, statement of advice etc)</b>		
952C(3)	2 years	5 years
952D(1)	5 years	10 years
952D(2)	5 years	10 years
952F(2)	5 years	10 years
952F(3)	5 years	10 years
952F(4)	5 years	10 years
952L(1)	5 years	10 years
952L(2)	2 years	5 years
<b>Part 7.8 – Other provisions relating to conduct</b>		
982D	6 months	2 years
991B(2)	6 months	1 year
991E(1)	6 months	1 year
991E(3)	6 months	1 year
993B(3)	5 years	10 years
993C(3)	2 years	5 years
<b>Part 7.9 – Financial product disclosure – issue, sale and purchase</b>		
<b>Part 7.9 Division 2 – Product disclosure statements</b>		
1012DAA(10)	6 months	2 years
1012DA(9)	6 months	2 years
<b>Part 7.9 Division 3 – Other obligations of the issuer</b>		
1017E(3)	2 years	5 years
1017E(4)	2 years	5 years
1017G(1)	2 years	5 years
<b>Part 7.9 Division 7 - Enforcement</b>		
1021C(3)	2 years	5 years
1021D(1)	5 years	10 years
1021D(2)	5 years	10 years
1021J(2)	2 years	5 years
1021J(3)	2 years	5 years

Relevant criminal offence	Current criminal penalty	Proposed criminal penalty
<b>Part 7.12 – Miscellaneous</b>		
1101E	1 year	2 years
1101F(1A)	1 year	2 years
1101F(1)	1 year	2 years
<b>Part 9.3 - Books</b>		
1307(1)	2 years	5 years
1307(2)	2 years	5 years
<b>Part 9.4 - Offences</b>		
1308(4)	5/25pu	2 years
1308(8)	5/25pu	5 years
1309(2)	1 year	2 years
1310	5 penalty units	2 years
<b>Australian Securities and Investments Commission Act 2001</b>		
<b>Part 3 – Investigations and information gathering</b>		
ASICA 64(1)	2 years	5 years
ASICA 64(2)	3 months	2 years
ASICA 65(2)	6 months	1 year
ASICA 66(1)	1 year	2 years
<b>National Consumer Credit Protection Act 2009</b>		
<b>Chapter 2 – Licensing of persons who engage in credit activities</b>		
<b>Part 2.4 Banning or disqualification of persons from engaging in credit activities</b>		
NCCP 82(2)	2 years	5 years
<b>Chapter 3 Responsible Lending - Part 3.6A Miscellaneous Rules</b>		
NCCP 160D(2)	2 years	5 years
<b>Chapter 6 Compliance and Enforcement</b>		
NCCP 291(1)	2 years	5 years

**Proposed maximum penalty<sup>166</sup>  
(individual/corporations)**

3 months' imprisonment

30 penalty units / 300 penalty units

6 months' imprisonment

60 penalty units / 600 penalty units

1 year imprisonment

120 penalty units / 1,200 penalty units

2 years' imprisonment

240 penalty units / 2,400 penalty units

5 years' imprisonment

600 penalty units / 6,000 penalty units

General formula does not apply, as discussed above

10 years' imprisonment

4,500 penalty units or x3 benefits / 45,000 penalty units or x3 benefits or 10% annual turnover

<sup>166</sup> There will be exceptions to this general rule for setting criminal pecuniary penalties. Please see discussion at Part 2.2 Increases to maximum penalties of this paper.

## ANNEXURE C: PROPOSED NEW ORDINARY OFFENCES BASED ON EXISTING STRICT LIABILITY OFFENCES

Section	Current criminal penalty	Proposed ordinary offence
<b>Part 2D.5 – Public information about directors and secretaries</b>		
205G(1) (strict liability)	10pu and/or 3 months 50pu	240pu and/or 2 years 2400pu
205G(3) (strict liability)	10pu and/or 3 months 50pu	240pu and/or 2 years 2400pu
205G(4) (strict liability)	10pu and/or 3 months 50pu	240pu and/or 2 years 2400pu
<b>Part 6.1 – Prohibited acquisitions of relevant interests in voting shares</b>		
606(1) (absolute liability)	25pu and/or 6 months 125pu	600pu and/or 5 years 6000pu
606(2) (absolute liability)	25pu and/or 6 months 125pu	600pu and/or 5 years 6000pu
606(4) (absolute liability)	25pu and/or 6 months 125pu	600pu and/or 5 years 6000pu
<b>Chapter 6C – Information about ownership of listed companies and managed investment schemes</b>		
671B(1) (strict liability)	25pu and/or 6 months 125pu	240pu and/or 2 years 2400pu
<b>Chapter 2M – Financial reports and audit</b>		
286 (strict liability)	25pu and/or 6 months 125pu	240pu and/or 2 years 2400pu
307A (strict liability)	50pu 250pu	240pu and/or 2 years 2400pu
<b>Part 7.8 – Other provisions relating to conduct</b>		
989CA(strict liability)	50pu 250pu	240pu and/or 2 years 2400pu

# ANNEXURE D: ASIC'S PROPOSED NEW INFRINGEMENT NOTICE PROVISIONS

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## Current civil penalty provisions (Corporations Act)

188(1) and (2)

209(2)

344(1)

601FC(5)

674(2A)

675(2A)

961K(1) and (2)

961L

961Q(1)

962P

962S(1)

963E(1) and (2)

963F

963G(1)

963J

963K

964A(1)

964D(1) and (2)

964E(1)

985E(1)

985H(1)

985J(1)

985J(2)

985J(4)

985K(1)

985L

985M(1)

985M(2)

Subclause 29(6) of Schedule 4

## Proposed civil penalty provisions (Corporations Act)

205G

606

670A

671B

728

791B

**Proposed civil penalty provisions (Corporations Act) - Continued**

792A

792B

820B

821A

821B

904A

907A

911C

912A

912D

941A

941B

946A

952E

1012A

1012B

1012C

1017BA

**Current civil penalty provisions (National Consumer Credit Protection Act)**

31(1)

70(1)

124A(1)

124B(1)

133AC(2)

133AD(2)

133AE(2)

133BC(1)

133BD(1)

133BG(1)

133BH(3)

133BJ(1)

133CA(1)

133CB(1)

133CC(1)

133DB(1)

133DC(2)

133DD(2)

133DE(1) and (2)

160B(1)

160C(1)

160E(2) and (3)

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**Current and proposed civil penalty provisions (National Consumer Credit Code)**

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17(3), (4), (5), (6), (8), (9), (11), (15), (15A)

23(1)

23A(1)

32A

39B

32AA(2)

34(6)

35(1)

72(4)

154

177B(4)

179U

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**Insurance Contracts Act**

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33C

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## ANNEXURE E: ASIC ENFORCEMENT REVIEW TERMS OF REFERENCE

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The Taskforce will review the enforcement regime of the Australian Securities and Investments Commission (ASIC), to assess the suitability of the existing regulatory tools available to it to perform its functions adequately.

The review will include an examination of legislation dealing with corporations, financial services, credit and insurance as to:

- The adequacy of civil and criminal penalties for serious contraventions relating to the financial system (including corporate fraud);
- The need for alternative enforcement mechanisms, including the use of infringement notices in relation to less serious contraventions, and the possibility of utilising peer disciplinary review panels (akin to the existing Markets Disciplinary Panel) in relation to financial services and credit businesses generally;
- The adequacy of existing penalties for serious contraventions, including disgorgement of profits;
- The adequacy of enforcement related financial services and credit licensing powers;
- The adequacy of ASIC's power to ban offenders from occupying company offices following the commission of, or involvement in, serious contraventions where appropriate;
- The adequacy of ASIC's information gathering powers and whether there is a need to amend legislation to enable ASIC to utilise the fruits of telephone interception warrants or to grant the equivalent of Federal Crimes Act search warrant powers under ASIC's enabling legislation for market misconduct or other serious offences;
- The adequacy of ASIC's powers in respect of licensing of financial services and credit providers, including the threshold for granting or refusing to grant a licence, the circumstances in which ASIC may vary, suspend, or cancel licenses; and its coercive powers (including whether there is a need for ASIC to have a power to direct licensees to take, or refrain from taking, particular action);
- The adequacy of the frameworks for notifying ASIC of breaches of law, including the triggers for the obligation to notify; the time in which notification is required to be made; and whether the obligation to notify breaches should be expanded to a general obligation (currently confined under the Corporations Act to auditors, liquidators, and licensees, and noting that obligations to report offences exist under other Federal or State statutes); and
- Any other matters, which arise during the course of the Taskforce's review of the above, which appear necessary to address any deficiencies in ASIC's regulatory toolset.

Upon completion of the Review, the Taskforce will identify any gaps in ASIC's powers and make recommendations to the Government which it considers necessary to strengthen any of ASIC's regulatory tools and as to the policy options available that:

- address gaps or deficiencies identified in a way that allows more effective enforcement of the regulatory regime;
- foster consumer confidence in the financial system and enhance ASIC's ability to prevent harm effectively;
- do not impose undue regulatory burden on business, and promote engagement and cooperation between ASIC and its regulated population;
- promote a competitive and stable financial system that contributes to Australia's productivity growth; and
- relate to other matters that fall within this Terms of Reference.

Further information on the ASIC Enforcement Review taskforce is available at our website: <http://www.treasury.gov.au/ConsultationsandReviews/Reviews/2016/ASIC-Enforcement-Review>.