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ASIC Enforcement Review
Financial System Division
The Treasury
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ASIC Enforcement Review – Position Paper 7
Strengthening Penalties for Corporate and Financial Sector Misconduct

The Australian Financial Markets Association (AFMA) welcomes the opportunity to comment on the *ASIC Enforcement Review – Strengthening Penalties for Corporate and Financial Sector Misconduct* ("the Review").

AFMA members are committed to ensuring that markets function fairly and efficiently and properly serve the needs of investors and the wider economy and community. This outcome requires a range of inputs including prudent risk taking, investment and innovation by industry participants within the framework of a regulatory regime that is designed to serve this purpose and is supported by a credible penalty regime.

In this regard, we consider the review of penalties for corporate and financial services misconduct to be a significant development and would be pleased to contribute to the process of ensuring the penalties are calibrated in a manner that supports both the effective functioning of financial markets and promotes strong public confidence in them.

It is important that the right balance is achieved to foster decisions that will enhance the productivity of the financial system and the broader economy, and also to position Australia as a competitive centre for the conduct of financial business. The balance needs to be achieved in terms of:

- the level and breadth of regulatory intervention into business affairs;
- the severity of penalties to achieve deterrence while avoiding an inefficient allocation of resources; and
- consistency of penalties and treatment of offenders to ensure that community confidence is maintained in the integrity of the justice system.

If the correct balance is achieved, this will sustain innovation and risk taking that will help to achieve the Government's signature productivity policy. In contrast, a penalty regime

that is either too loose or too severe will conflict with this agenda. The Murray Financial System Inquiry specifically recognised the importance of striking this balance in making its recommendation of higher penalties:

> "While the Inquiry recommends substantially higher penalties, it does not believe that Australia should introduce the extremely high penalties for financial firms recently seen in some overseas jurisdictions."[1]

We note that the existence and scale of penalties are one element of a deterrence regime but there are others. In particular, the likelihood of being caught breaking the law is also a notable influence on conduct by relevant entities. ASIC has in recent years taken significant initiatives to strengthen its capability to detect misconduct on financial markets in an efficient and timely way, including its globally leading Markets Analysis and Intelligence surveillance system and a new suspicious activity reporting rule. The Taskforce will want to assess the adequacy of the penalties regime within the framework of the broader set of deterrence tools.

We expect that the current consultation process will achieve its purpose by drawing together the type and quality of input that is essential to understand likely impact of penalties of the type proposed and provide expected greater clarity on where the balance needs to be set to achieve outcomes that are consistent with the Government's economic policy objectives. Moreover, given the serious implications of the Taskforce proposals for individuals, corporations, and the business environment, any recommended intervention must be properly assessed and justified and the feedback received will help in this regard.

We believe that further analysis and dialogue with the industry will be necessary to fully address the implications of the current proposals. This is a complex exercise in part because the penalty regime extends beyond the financial and custodial penalties contemplated and includes potential harm to the reputation of firms and individuals affected.

In this submission, we suggest ways to take the review process forward in a constructive and efficient manner. A process that is cognisant of the broad social and legal context and uses a systematic approach to assess the information received is more likely to arrive at a balanced set of recommendations. Ultimately the outcome that is best for Australia is a partnership approach to regulation that, where possible avoids excessively adversarial, legalistic or overly punitive outcomes.

One of Australia's strengths as a jurisdiction is its law-based system of regulation, and it is important that this advantage is maintained through clear obligations and outcomes – where obligations are not clear we support clarifying regulatory requirements prior to introducing penalties.

[1] *Financial System Inquiry Final Report*, November 2014 p. 252

Against the backdrop provided above, our submission provides detailed responses to the Review Paper's questions and the positions that it presents. Summary points of particular significance within the framework of the submission include:

- The benefits of a broad and deep policy analysis in helping to achieve balanced penalties that are a net benefit to the community;
- Notable practical difficulties with the turnover proposal particularly in light of the Financial System Inquiry recommendations; and
- A consideration of the risks associated with disgorgement remedies in relation to civil matters.

Finally, in relation to the broader policy setting for the proposed changes, we believe that the Taskforce should release for industry consultation a holistic package of near-final recommendations from the 8 Position Papers as these measures will work, and so should be considered, in tandem with one another. It would also be beneficial to ASIC to assess the implications of the final package of Enforcement Review measures on its operations and this could be incorporated into the holistic package.

We would be pleased to answer any questions or do further work in this regard if desired.

Yours sincerely

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AFMA

AFMA Submission to:
ASIC Enforcement Review

Positions Paper 7 Strengthening Penalties for Corporate and Financial Sector Misconduct

December 2017

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Potential impacts to the business environment

AFMA member firms understand the importance of ensuring the community has confidence in financial markets and have a clear business interest in securing this outcome. This has led to important work over the last few years to increase the focus on conduct and standards that meet community expectations.

While a sound penalties regime contributes to a successful business environment, this will occur only if the correct balance is achieved between the benefits of deterrence and the associated costs, taking account of both direct costs and behavioural effects. In this context, it is important to understand the potential impact of the proposals on companies and individuals that are conducting their businesses in good faith, who are the great majority of industry participants.

The business environment is affected by the penalties regime in a number of ways:

- If penalties are disproportionate, they risk businesses making inefficient allocations of resources to ensure absolutely minimal risk of even minor non-compliant outcomes;
- The inclusion of licence provisions in the civil penalties regime risks introducing greater uncertainty as to what obligations firms have in the market given their broad scoping; and
- The frequency and size of penalties and particularly their deployment for minor matters can impact the reputation of Australia as a place to conduct financial services business.

These points will each be discussed in turn below.

Inefficient allocation of resources

General deterrence is one of the aims of the justice system as a whole[2] and penalties have a part to play in achieving this outcome. However, penalties should not be set so high that they drive a disproportionate allocation of private resources into the complete avoidance of risk; even of the most minor non-conformance with regulation. Nor should penalties be set at a level that might impair them as a credible deterrent. In either case, the effect of an imperfect deterrence signal would lead to a misallocation of economic resources within the framework of government policy, as reflected in the regulations it issues.

An excessive penalty regime may incentivise some firms to completely eliminate risk that naturally arises in the conduct of their business rather than prudently managing that risk. The Financial Stability Board's concerns about correspondent banking provide a case study illustration of this.[3] Alternatively, a firm may incur increased costs to curtail risk in

[2] For a discussion on the role of penalties in relation to general deterrence in relation see https://www.sentencingcouncil.vic.gov.au/publications/maximum-penalties-principles-and-purposes-preliminary-issues-paper, p. 5.

[3] www.fsb.org/2015/06/fsb-chair-co-authors-article-on-correspondent-banking-and-financial-inclusion/

its business to an absolute minimum by placing new internal restrictions on product/service delivery and/or using more external resources (e.g. external experts to conduct risk reviews). This would likely lead to higher costs being placed on affected activities (e.g. issuing a PDS). Another outcome could be less innovation to improve products for clients and consequently less downstream productivity enhancements for the economy.

In contrast, a good balance in the penalty regime would avoid this situation and promote fair outcomes that would further stimulate the efficient allocation of resources.

It is important to appreciate that the risk of reputational damage is another important driver for regulatory compliance by reputable firms. The deterrence effect can apply in a broader way than the formal penalties.

The financial and reputational costs to entities accused of misconduct highlight the importance of providing balance in the penalty regime that supports a fair outcome for all involved. The penalty regime should provide flexibility for the regulator to advocate its position in a resolute manner to protect its reputation as an effective enforcer of the law, while at the same time providing a licensee with a reasonable prospect of protecting its position in the event of disagreement. The absence of this balance would increase the risk of misallocation of economic resources.

As noted, a more stringent penalty regime would naturally mean that entities whose activities are covered by the law face more serious and financial and custodial consequences in the event that they breach the law or are accused of doing so by the regulator. Another implication is that the regulator may be in a stronger position to press an entity to voluntarily accept its findings, irrespective of the firm's own view of its actions. Smaller entities may face more of a challenge in this regard because they may have more limited resources to protect their interests, particularly given the cost of litigation. How the structure of the penalty regime should be designed in order to to strike an equitable balance in these relationships is one of the tasks that the Taskforce will need to consider.

Increased uncertainty

As we will discuss in our answers to the specific questions in the consultation, requirements around excessively broad provisions, notably those around licences, will increase uncertainty as to what is required to operate lawfully within the jurisdiction.

For example, the proposal to make the requirements from the vaguely worded section 912A(1)(a) for licensees to "do all things necessary to ensure that the financial services covered by the license are provided efficiently, honestly and fairly" subject to civil penalties will increase uncertainty as to what is required to operate within regulatory bounds.

Businesses do not find uncertain regulatory environments attractive, particularly where the uncertainty is associated with large penalties. This is a matter that the Taskforce will have to consider in the next phase of its work, which initially involves assessing the feedback received.

Reputation as a place to conduct financial services business

Australia's system of financial regulation is rightly held in high regard by international institutions and is a competitive strength. While a materially inadequate penalties regime would have led to questions about the effectiveness of our regulatory regime, it is an appropriate time to review the current arrangements to ensure they remain in step with stakeholder expectations. That said, this needs to be a carefully managed process with well-articulated objectives against which to assess proposals, as one of the risks associated with a change to the penalties regime is an adverse impact on Australia's attractiveness as a place to conduct financial business (given the impacts outlined above).

Markets of comparable size and particularly those in the region such as Singapore and Hong Kong with which Australia directly competes, have regulators that are generally recognised as being supportive of business development in their financial centres. Changes to the penalties regime should be calibrated in a manner that builds on our strengths and do not unnecessarily make Australia less attractive as a home for financial services businesses. This is another of the factors that the Taskforce will need to consider in making its recommendations to the Government.

Review process

AFMA supports a strong role for public involvement in government policy making as, in our experience, the most effective outcomes embody the full range of experience and expertise relevant to the issues at hand. In this context, we appreciate the opportunity afforded us to be able to provide this submission and contribute to the review process.

As noted above and further explained in the answers to the consultation questions, the Taskforce has a complex and challenging task in providing its considered advice to the Government on changes to the penalties regime. We believe that further analysis and dialogue with the industry and other stakeholders will be necessary to fully address the implications of each of the current proposals.

ASIC and Treasury have considerable experience in conducting effective consultations this should provide a framework within which the further dialogue with stakeholders can take place. We are unaware of the composition of the Enforcement Review's stakeholder Reference Group. However, we believe that future dialogue should include direct meetings with relevant industry representative bodies and AFMA would be pleased to participate in this process. An analysis should be prepared and made available outlining the responses received and the reasoning as to why final positions were reached. The objective of the process should be to enable the Taskforce to provide the reasoning and justification for its final recommendations to the Government.

Where proposals are related, such as with the 8 Position Papers under the Taskforce's Review, the near-final recommended proposals of the Taskforce following stakeholder feedback should be released for a final industry consultation so that they can be considered as they will operate in practice – as one entire package.

Each position should be well supported by sound arguments and full justifications, subject to industry and stakeholder consultation.

Consideration of the implications of the impact on ASIC operations

The Enforcement Review will likely involve significant increases to ASIC's powers and the penalties associated with them. A relevant consideration in this regard is the capacity of ASIC's current operational arrangements to ensure that the policy objectives underpinning the reforms are met in the manner intended. An assessment of this capacity should ideally be conducted in the context of the full package of changes that emerge from the Enforcement Review and not on the basis of a subset of those changes.

Responses to Review Paper Questions

Criminal penalties

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

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

Generally, there would be real benefit in understanding the Taskforce's reasoning in relation to all of the proposed changes including those listed in the Annexures. Where there are supporting arguments provided for proposed changes, we find them abbreviated or that they do not take into account the full range of considerations.

Further, some of the proposals appear to be in conflict with the Government's published guidance on penalties, in particular a number of points from the Attorney General's Department *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, and one of the recommendations of the Financial System Inquiry.

We will answer the specific questions in reverse order. The answer to the question on fines will focus on the formula proposals and should be read with and in the context of the answer on imprisonment terms.

Fines

While consistency is generally to be preferred, consistency for its own sake should not be. Where there is variance between different penalties, careful analysis needs to be undertaken to balance the appropriate penalty level given the specifics of the offence to deliver a proportionate and just outcome.

We note the comments of the Financial System Inquiry:

> "While the Inquiry recommends substantially higher penalties, it does not believe that Australia should introduce the extremely high penalties for financial firms recently seen in some overseas jurisdictions."[4]

Given this starting point, any suggested increase in penalties should require thorough evidence-based justification and particularly those that could result in 'extremely high penalties'. AFMA's view is that the Position Paper should have included more information in this respect, which would also have assisted entities preparing a response to its proposals.

Standard formula

A standard formula could be a reasonable approach if the outcomes were consistent. As it stands the formula creates some increases that are disproportionate. The factor of 10 for businesses appears to create particular issues and may be worth specific review. It is

[4] *Financial System Inquiry Final Report*, November 2014 p. 252.

not clear how this figure has been calculated as being appropriate, particularly in light of the median size of the more than 6100 entities that hold Australian Financial Services Licenses (AFSL).

The formula proposed by the Taskforce works on the basis of the amended imprisonment penalties proposed by the Taskforce. There is therefore a requirement that these amended imprisonment sentences are correct for the penalties to have a chance of being appropriate. However, there is not yet sufficient justification to show that this is the case. This is particularly so when the Taskforce has proposed increases of up to 10 times the existing imprisonment terms.

These large multiple increases in penalties would be a significant change in the seriousness of offence that Parliament's previous penalty arrangements have implied.

Further evidence of the effect of the proposals can be found in the large increases proposed for some offences. For subsections 952D(1), 952D(2), 952F(2), 952F(3), 952F(4), 952L(1), 1021D(1), and 1021D(2) for corporations the proposed increase to the fine is by 45 times. Similarly, increases for these same offences for individuals are of up to 22.5 times. It is challenging to understand, and the Position Paper does not explain, what the magnitude of these increases is based on. Further discussion of the individual criminal penalties follows.

We find concerns with the additional uncertainty and arbitrariness of the provision of a 10% annual turnover penalty provision. Proposals to base punishments on the size of the corporation do not accord with the principle that justice should generally be blind to the offender. It is not at all clear why a large bank should face penalties potentially in the billions of dollars[5,6] when a small institution could face a much smaller penalty for the same offence. These differences suggest serious issues with the 10% of turnover formula proposal as it relates to financial services that require further consideration.

We also note that turnover itself is a poor guide to the profitability of the entity. Businesses that are efficient and operate on large turnover and low margins would be radically disadvantaged by the proposal. Further the questions raised by targeting turnover are similar to those that will be discussed in relation to disgorgement. For example which legal entity is being targeted - the smallest profit centre or the ultimate parent locally or internationally or something in between – the banking entity or trading entity for example?

[5] E.g. see for turnover https://www.commbank.com.au/about-us/shareholders/financial-information/results.html

[6] We note that if the Taskforce is intending to use a definition of Annual Turnover similar to that used by the Australian Competition Law (https://www.australiancompetitionlaw.org/legislation/provisions/2010cca76.html) and exclude input taxed supplies this would carve out almost all earnings as it would remove earnings from loans and derivatives. This in turn would result in 10% of turnover penalties being relatively small in comparison to business size which we expect was not the intention of the Taskforce.

The proposals to increase the maximum fine for criminal offences and civil penalties for corporations to the greater of 3 times the benefit gained or loss avoided, or 10% of annual turnover in the preceding 12 months, are a significant departure from the existing approach in the corporations legislation and the *Competition and Consumer Act 2010* (Cth), which provides that the 10% of annual turnover sanction applies only when it is not possible to calculate the benefit gained or loss avoided. The Position Paper does not give sufficient practical or principled justifications as to why this change in approach is appropriate.

The distinction between fines for criminal offences and civil penalties is an important one. It is inconsistent with that distinction and the philosophy underlying the introduction of civil penalties for the maximum civil penalty to be the same as a maximum criminal sanction.

Proportionality to breach

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

The proposal would confer inordinate discretion or give inadequate guidance to judges imposing penalties. Consider, for example, a situation in which a wrong resulted in a benefit of $1 million and the wrongdoer had annual turnover of $500 million. By what objective standard is a judge to determine whether the maximum sanction should be $3 million or $50 million? And what if there were two wrongdoers in substantially the same position, one with annual turnover of $500 million and the other with turnover of $550 million. Why should the maximum sanction for one be $50 million dollars and for the other $55 million? And what if the conduct of the party with the lower turnover is objectively worse – how is the judge to weigh that party's greater culpability against the other party's greater turnover? And what of the situation in which a party's turnover in the past is not a reflection of its capacity to pay in the present? These are not questions that should be left unanswered unless and until they are tested through the incremental process of the common law.

The concept of scaling the punishment to the scale of the corporate offender is at odds with the 'punishment should fit the crime' ethic of the parity principle. As Mason J observed in *Lowe* (1984) 154 CLR 606, at 610:

> "Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice."

A similar principle can be applied when designing legislative penalty schedules as making the law discriminatory in respect to the business size of the offender would have the same effect on outcomes. Scaling penalties to the ability of the offender to pay similarly risks undermining notions of equality before the law and a rational and fair system of criminal justice, and in parallel to Mason J's concerns, risks erosion of confidence in the integrity of design of the legislative penalty system.

In this regard we also note the recommendation of the Attorney General's Department *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* that "a penalty as a percentage of turnover should generally be avoided because of a lack of connection between an organisation's total turnover and the contravening conduct."[7] The Taskforce has elsewhere noted the AGD guidelines as a valid point of reference but appears to be going directly against the recommendation of the Guide in relation to this penalty provision.

These outsized penalties for larger (based on turnover) firms could also convey a misleading picture to the public of the scale of wrongdoing that is being addressed – a larger firm penalised for more minor misconduct might appear a more important achievement to the casual observer than a smaller firm found guilty of a much more serious offence, which can distort incentives.

In the event the Government were to proceed with a penalty regime that made reference to revenue, this might be best done in the form of a scheme that still is based around a clearly defined and reasonable maximum, with cases benchmarked against each other around relevant factors including the seriousness of the breach, the extent to which the breach was deliberate or reckless, the conduct following the breach, the disciplinary record and compliance history of the person or firm, and whether action was also taken by other regulatory authorities. The revenue component could then be reflected in an adjustment for the financial circumstances of the person or firm.

We also note that while the Taskforce has found a comparison point in the increases Parliament approved in 2010 to insider trading, market manipulation and dishonest conduct penalties, compared to the rest of the criminal law the fines proposed are out of line with other fine schedules in Australia.

For example in Victoria the current schedule of penalties is shown below in Table 1.

[7] *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences%20.doc at 3.1.5.

Table 1 Victorian Schedule of Penalties

Level	Penalty	Penalty units	Monetary value (2017–18)	Crimes
Level 1	Life	There is no provision for a fine to be given for a Level 1 offence		Murder Trafficking in a drug of dependence (large commercial quantity)
Level 2	25 years	3,000	$475,710.00	Rape Sexual penetration of a child under 12 years Armed robbery Aggravated burglary Arson causing death
Level 3	20 years	2,400	$380,568.00	Manslaughter Intentionally causing serious injury Culpable driving causing death
Level 4	15 years	1,800	$285,426.00	Recklessly causing serious injury Handling stolen goods Trafficking in a drug of dependence (not a commercial quantity) Arson
Level 5	10 years	1,200	$190,284.00	Threats to kill Indecent assault Theft Negligently causing serious injury Knowingly possess child pornography
Level 6	5 years	600	$95,142.00	Recklessly causing injury Possession of a drug of dependence (for the purpose of trafficking)
Level 7	2 years	240	$38,056.80	Going equipped to steal
Level 8	1 year	120	$19,028.40	Cultivation of a narcotic plant (not for the purpose of trafficking) Possession of a drug of dependence (not for the purpose of trafficking)
Level 9	6 months	60	$9,514.20	Concealing the birth of a child
Level 10		10	$1,585.70	
Level 11		5	$792.85	
Level 12		1	$158.57	

We note that under the Victorian penalty system the maximum individual fine is less than half that proposed by the Taskforce for ASIC for many offences. This is a strong indicator that something may be misaligned.

Neither are the Victorian penalties small fines. Given that the average individual has a net wealth of $393,000[8] the top fine is more than capable of bankrupting most Australians. It is unclear why ASIC-administered fines need to be more than twice as large. If there are to be specifically higher penalties for ASIC and Corporations Act offences, these need to be justified.

[8] Australian Bureau of Statistics quoted in http://www.abc.net.au/news/2017-06-30/abs-data-shows-australians-have-never-been-wealthier/8665516

For corporations too, fines of 45,000 penalty units ($9.45 million) are likely to be out of line with the profitability of most businesses even within financial services. The likely effect of such fines might be bankruptcy for many firms. This outcome should be justified by the Taskforce as desirable for the community and the economy.

Imprisonment Penalties

There is further work to be done to justify and properly support the proposals to increase the maximum terms of imprisonment for offences in ASIC-administered Acts as proposed..

Need to justify all proposals

The Review does not present arguments for the proposed increases to the majority of the offences for which increases are proposed.[9] It is necessary for an informed debate that each offence is considered on its merits and the reasoning and justifications of the Taskforce presented for public review. As the Review presented some arguments for increases to select offences, we note also there is a risk of creating a misleading impression of the types of actions for which penalty increases were being proposed.

Further we note that while the Review states that "a complete list of increases in imprisonment penalties is provided at Annexure B"[10] a number of increases proposed in the body of the Review are not listed in the Annexure (for example - s596AB, s674(2), and s675(2)).

An example of a proposed increase not supported in the body of the paper is section 1310:

> "Obstructing or hindering ASIC etc.
> A person must not, without lawful excuse, obstruct or hinder ASIC, or any other person, in the performance or exercise of a function or power under this Act."[11]

This is proposed to change from a $1050 fine, to a penalty of 2 years in prison, a significant change in the nature and scale of the punishment.

Yet section 1310 is a catch-all provision and is broadly drafted. Informed public debate would require the provision of reasons why it is in the public benefit to introduce a 2 year imprisonment term for this offence. We do not have the benefit of understanding of when ASIC would have used such a penalty and in what circumstances. It may be appropriate

[9] No specific arguments are presented for penalty increases proposed for Corporations Act Sections 184(1), 184(2), 184(3), 670A(3), 708AA(10), 708A(9), 792D(1), 821C(1), 821C(3), 821D, 821E(2), 892K, 905(A), 907A, 911B(1), 912D(1B), 912E(1), 982D, 991B(2), 993C(3), 1012DAA(10), 1012DA(9), 1017E(3), 1017E(4), 1017G(1), 1021J(2), 1021J(3), 1101E, 1101F(1A), 1101F(1), 1307(1), 1307(2), 1308(4), 1308(8), 1309(2), 1310, ASIC Act sections 64(2), 65(2), 66(1), National Consumer Credit Protection Act sections 82(2), 160D(2), 291(1).

[10] Review, p. 15.

[11] http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s1310.html

to consider refining the drafting of this section if a substantial imprisonment term is to be attached to it so that there is clarity around what is captured.

Need for sufficient arguments

Further work is required to justify and thereby soundly support the proposed changes. We provide some examples below where further analysis will help to clarify the reasons why larger penalties will help to create trust and confidence in financial services and those who provide them.

Example A - Defective disclosures

The Taskforce presents a brief argument for increasing the penalties for defective disclosures based on two arguments. For consumer disclosures the argument is that "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."[12]

There are significant differences between the sections, and the argument for a rough equivalence is not well made. Section 1041E covers a wide range of statements that are voluntarily made and for which there are no requirements against omission, other than the general statutory obligation not to be "materially misleading".

In contrast the offences under sections 952 and 1021 relate to disclosure documents and financial services guides.

These are regulatory mandated documents that are required of those wishing to raise capital or provide financial services to retail consumers. Given the key economic function of capital raising, and the importance of this activity for business, effectively businesses are required to make these statements.

Further there are many more statutory requirements around content and completeness with regard to these documents. Omissions of certain material can be a breach of the relevant regulations. This contrasts with section 1041E which is not limited to mandated information or statements.

The result of these differences is that it is far easier to breach sections 952 and 1021 than to breach section 1041E as merely a failure to state something in a document that is required by law to be issued could be a breach. In fact, constructing disclosure documents is a complex and difficult task that is usually undertaken only by experts. However, to abide by section 1041E one generally only needs to take care to only say true statements and not to be misleading.

[12] Review, p. 16.

Given these differences it may be appropriate that there are differences in the penalties for breaching these sections. Our concern is that the abbreviated justification based around a loose equivalence argument for the increase may not have considered in sufficient depth the issues differentiating the sections.

Example B – Section 912C

Section 912C of the Corporations Act requires provision of a statement containing specified information within a time specified by ASIC if that is a reasonable time. The Review argues for increasing the penalties on the basis that:

> "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."[13]

We are not aware of any evidence that firms pay fines simply as a cost of business. Before increasing the penalties for section 912C it may be appropriate to review and raise any issues encountered by ASIC in exercising its powers and the reasons that underlie these issues. Increasing the penalties is a blunt instrument to compel compliance.

The Review would benefit from engaging in the issues around section 912C more fully before recommending substantial increases the associated penalties.

Example C - Defective disclosure to ASIC

The Taskforce proposes increased penalties in relation to defective disclosures to ASIC from 2 years to 5 years, which is an increase of 250%.

The requirement for individuals to disclose matters to ASIC against their will was identified in 2015 by the Australian Law Reform Commission as an abrogation of the privilege against self-incrimination. In relation to this abrogation and others under Commonwealth legislation in light of the High Court's recently expressed concerns it finds:

> "The ALRC considers further review of the abrogation of self-incrimination in Commonwealth laws is warranted. Such a review could consider whether the abrogation in more than 40 Commonwealth laws has been sufficiently justified, and if so, what type of immunity is appropriate."[14]

As such it may be not appropriate to consider an increase in the penalties associated with these provisions at this time in the absence of the further review the ALRC recommends.

[13] Review p. 21.
[14] ALRC, *op. cit.,* p. 311.

Further, the Review justifies the increase through a comparison with other bodies with similar powers. The Review notes that "the range of maximum penalties applicable to this type of offending is varied"[15] but that "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)."[16]

While this is true, the more common penalty for Commonwealth Tribunals is lower than the current ASIC penalty e.g.:

- Defence Tribunal – 6 months or 10 penalty units or both[17]
- Administrative Appeals Tribunal – 12 months or 60 penalty units or both[18]
- Professional Services Review – 12 months or 60 penalty units[19]
- Social Services Officer – 12 months or 60 penalty units[20]

Further, there are significant differences between the level of offences dealt with by ACIC and ASIC. The most serious matters dealt with by ASIC rate on the Victorian scale as Level 5 matters (see Table 1) – typically fraud based offences with 10 year maximum gaol terms. Whereas ACIC deals with matters that rank as Level 1 offences such as "trafficking in a drug of dependence (large commercial quantity)" which carry a maximum sentence of life in prison. Similar considerations apply to Royal Commissions which can investigate a wide range of conduct.

Again our concern is that the Review should undertake a more wide-ranging analysis of the relevant issues particularly in the context where significant recommendations have been made by other Government reviews.

Example D - Section 727

The Taskforce has taken into account the actions of Parliament in 2010 to increase the penalties for insider trading, market manipulation and dishonest conduct in the provision of financial products and services to levels higher than the maximum penalties for other offences under the Corporations Act also involving dishonesty. This is not in itself a reason for similar increases in other penalties.

In 2010, Parliament increased the penalties for:

- insider trading;
- market manipulation;

[15] Review, p. 23.
[16] *Ibid.*
[17] https://www.legislation.gov.au/Details/C2017C00330
[18] http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/aata1975323/s62a.html
[19] https://www.legislation.gov.au/Details/C2017C00255 106ZPO
[20] http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ssa1999338/s217.html

- false trading and market rigging – creating a false or misleading appearance of active trading;
- false trading and market rigging – artificially maintaining a trading price;
- dissemination of information about illegal transactions;
- false or misleading statements;
- inducing persons to deal in financial products; and
- dishonest conduct in relation to a financial service or product.[21]

Parliament was aware it had the option of increasing other penalties at the time and chose not to do so. Without commenting on the merits of these increases, we note that the list of offences chosen at the time to be increased to the maximum does appear to be 'key' offences.

In contrast the Taskforce proposes to raise the penalties to the same maximum for many other offences that might arguably not be in the same category including:

- Section 344(2) Fail to take all reasonable steps to comply with prepare/keep financial records/reports and lodge with ASIC/certain auditor requirements;
- Section 727(1) Make an offer of securities without lodging disclosure document with ASIC; and
- Section 952F(4) Licensees provides incomplete disclosure information for preparation of disclosure document.

It is important that proportionality is maintained in penalty schemes, and on this basis it is not clear that failure to lodge documents with the regulator should receive the same penalty as the market manipulation or insider trading.

Other increases

While all the offences noted in the Review are serious it is important to arrive at proportionate outcomes in terms of penalties. To ensure this is the case, the arguments and justifications for any such increases should be robust.

While we will not conduct an analysis of every proposed increase for which a justification has been provided we do note that the arguments are generally quite abbreviated.

For example, the section 184 increases are justified by stating they are appropriate "to reflect the seriousness of the offence." In relation to disqualified persons the Taskforce states "the current penalty is not sufficient to meet community expectations with misconduct of this kind". The penalty for banned persons is proposed to increase from 6 months to 5 years (an increase of 10 times) on the basis that these regulations are "an important protection".

[21] Explanatory Memorandum http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4448_ems_0af254e3-d6ed-4271-bf1c-b01fd270ad72/upload_pdf/347552.pdf;fileType=application%2Fpdf p. 15.

While we would agree with the statements of the Review as to the seriousness and importance of the offences and protections there is no clarity on why the correct balance is reached by the proposed new penalties. Further, they raise questions such as how the 'seriousness' of offences should be determined in a systematic way so as to lead to logical outcomes when comparisons are made to other offence.

In relation to client monies – an important area – an increase from the 5 year penalty is argued for as "a substantial penalty…is required". Most people faced with the prospect of five years imprisonment would consider it a 'substantial penalty'.

Cost-benefit analysis

More generally we suggest it would benefit the analysis of the appropriate balance in a penalties regime to look at estimates in the gains expected from the proposed reforms and the likely costs both for the taxpayer and the associated risks and compliance costs. Establishing such a baseline of expectations would allow the actual effect of the changes to be studied and if ineffective, allow the changes (and their associated costs) to be rolled back.

For example, it may not be safe to assume that increases in penalties will reduce non-compliance. Professor Mirko Bagaric, Professor of Law, Swinburne University of Technology stated to the Senate Economics Committee:

> "Ninety-three per cent of criminologists around the world know that there is no correlation between the severity of the penalty and a reduction in crime…We could escalate white-collar sentences to a mandatory 30 years imprisonment for every white-collar crime. Do you know how much crime that would reduce? Zero. The only thing that will reduce white-collar crime is to increase the perception in people's minds that if they do something wrong they will get caught."[22]

Regulatory offences

It may also be of benefit to examine the different categories of regulatory offence when considering the appropriate level of penalty that should be applicable. Some actions might more tend on the spectrum towards categorisation as "primarily concerned to facilitate the achievement of collectivist goals by discouraging behavior which is considered to be inimical to those goals and thus detrimental to collective welfare"[23] (sometimes termed 'regulatory offences') such as failures to keep proper records as opposed to variations on traditional criminal offences which raise moral opprobrium such as theft and fraud which might be considered equivalent to market manipulation.

[22] Committee Hansard, 6 December 2016, p. 21.
[23] http://www.austlii.edu.au/au/journals/MelbULawRw/1999/18.html

Some commentators argue that "the punishment of regulatory offences is a practical means of controlling an activity, without necessarily implying the element of social condemnation which is characteristic of traditional crimes"[24] which has implications for variances in the penalties depending on where on the spectrum offences fall.

[24] *Ibid.*

Corporate fraud offences

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

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

Corporate fraud offences are an important part of the regulatory infrastructure to help to ensure the integrity of the behaviour of company officers and directors.

It is critical to get the balance right in terms of penalties associated with section 184 so that the appropriate benefits are gained while excessive costs are avoided. If penalties are set correctly then their proper purposes stand the best chance of being achieved.

The Victorian Sentencing Advisory Council lists the following purposes for maximum penalty setting in statutes:

> "There are two overarching principles that inform the setting of maximum penalties: the rule of law and the principle of proportionality or 'just punishment'. From these principles flow four commonly accepted purposes or functions of maximum penalties. A maximum penalty should:
>
> 1. place a clear, legally defined upper limit on the sentencing court's power to punish, deter and rehabilitate an offender…;
> 2. clearly and accessibly set out the maximum consequence…;
> 3. indicate the views of parliament (and thereby the community) and provide guidance to the judiciary about the relative seriousness of an offence…; and
> 4. establish the outer or upper limits of the punishment that is proportionate to the offence…;
>
> A fifth purpose that has been contemplated is that a maximum penalty should be set at a sufficient level to deter would-be offenders from committing the offence (general deterrence)."[25]

The arguments given by the Review paper appear to be:

1. While it is a federal regulator ASIC has powers to prosecute the same action twice due to overlaps between federal and state law[26];
2. "In determining which offences to prosecute, ASIC considers the likely penalty arising out of the prosecution"[27] – we read this to say the Taskforce believes ASIC prefers to prosecute the maximum sentence offence where an offence is covered by federal and state law;
3. Prosecuting state-based offences is inconvenient for ASIC as it does not have the same ability to override the rights and protections of the common law against self-

[25] Sentencing Advisory Council, *op. cit.,* p. vii.
[26] Review, p.28, para. 62.
[27] *Ibid.*

incrimination, the 'right to silence', etc. and sometimes it requires ASIC to run multiple trials for the same actions;

4. ASIC pursuing an individual for the same offence in separate trials at the state and federal level has "a significant impact on the alleged offender";[28] and
5. To address the inconvenience to ASIC and the detriment to the alleged offenders of double trials, it would be easier if the federal penalty was doubled as ASIC could then focus on prosecuting the federal offence only and with the benefit of all of its powers.

In reviewing this argument we find there may be benefit in considering a wider range of matters to ensure the argument is soundly based.

Firstly in relation to point 2 above it is not clear why it is suggested that ASIC bases its decisions on which of overlapping offences to prosecute on "the likely penalty arising". ASIC publishes an information sheet on its approach to enforcement[29] which does not list this as a consideration. The penalty arising can be a guide to the priority the Parliament has placed on particular offences. However, where the offences are broadly the same this reasoning cannot apply. An equanimous regulator may be unlikely to base its decision on the punity of the penalties in such circumstances.

In relation to point 3 above and ASIC's powers in relation to federal legislation the ALRC review has observed that "these powers are intended to facilitate the timely exposure of wrongdoing and prevent further harm."[30] The ALRC also observed that these powers are not without controversy: "The High Court has said that such questioning has the potential to 'fundamentally alter the accusatorial judicial process.'"[31]

The argument that the inconvenience to ASIC of the absence of similar powers at the state level justifies the Commonwealth increasing its penalties to make the absence of such powers at the state level redundant is not compelling. If it were the case that the states wished to empower bodies like ASIC with similar powers in relation to their laws it is within their remit to do so. The argument proposes a strategy to make duplicate state laws irrelevant by making the penalties for federal laws always the harshest. A more optimal approach to setting federal penalties would be to look at all the considerations relevant to the offence.

In relation to point 4 it is obviously undesirable for the same actions to be prosecuted at both the federal and state level. A better solution to this issue might be to provide guidance to ASIC to prioritise federal law where the same conduct is substantially covered by both state and federal law. If the concern was addressed in this way, it would allow the

[28] *Ibid., para. 63.*

[29] http://download.asic.gov.au/media/1339118/INFO_151_ASIC_approach_to_enforcement_20130916.pdf

[30] ALRC, *Traditional Rights and Freedoms— Encroachments by Commonwealth Laws,* https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf, p. 310.

[31] *Ibid.*

Taskforce to conduct a more holistic analysis of where the federal penalty levels should be set in order to achieve the correct balance and a proportionate outcome.

Dishonesty test

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

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

The prevailing approaches to dishonesty in Australia include the Criminal Code reflecting *Ghosh*[32], the *Peters* test[33] and *Salvo*[34]. Internationally, definitions of dishonesty vary and it does not exist in some jurisdictions.

The *Peters* test is a reasonable candidate to be the standard in the Corporations Act in the Australian context given its approval by the High Court. The High Court's position in *Peters* has been described in detail by Professor Alex Steel in a 2010 article[35] which provides a summary of the complexity around the subject and suggests that ultimately it may be appropriate to resolve the issue via legislative means.

The resolution of which concept of dishonesty should prevail in the Corporations Act is a complex and important issue for Australian jurisprudence and as such we suggest would be best resolved by wider consultation within the legal and business community.

[32] *R v Ghosh* [1982] 2 All ER 689.
[33] *Peters v The Queen* (1998) 192 CLR 493
[34] R v Salvo [1980] VR 401.
[35] Alex Steel, "Describing Dishonest Means: The Implications Of Seeing Dishonesty As A Course Of Conduct Or Mental Element and the Parallels with Indecency", (2010) 31 *Adelaide Law Review* 7-46. Accessed http://www.austlii.edu.au/au/journals/AdelLawRw/2010/1.pdf pp. 44-45.

Strict and absolute liability offences

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

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

AFMA supports the removal of imprisonment from all strict and absolute liability offences in the Corporations Act.

This is in line with the ALRC guide [36], the Attorney Generals *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* [37], and the Senate Standing Committee for the Scrutiny of Bills Sixth Report in 2002[38].

Imprisonment for actions without malicious intent is likely, we believe, to be at odds with longstanding public understandings of justice, the presumptions under common law and the principles of law in many European countries.

However, we point out that this may be a lost opportunity for more comprehensive *mens rea* reform in line with that being considered currently[39] in other jurisdictions. Criminality should require intention whether the punishment is a fine or a gaol term. To be labelled a 'criminal' in society is primarily to be cast as an individual who has intentionally done or attempted to do serious harm. It is an entirely incompatible label for someone who, through a corporate structure, is associated with an action or omission that is entirely accidental and unintended, particularly in an area of complex law such as corporations law, while operating a modern complex business. A comparison with other jurisdictions where regulatory systems are successful without strict liability might be instructive.

[36] https://www.alrc.gov.au/publications/justifications-imposing-strict-and-absolute-liability
[37] https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx p. 24.
[38] 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.
[39] http://www.businessinsider.com/criminal-justice-reform-congress-debate-2017-10?IR=T

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?

We believe this question to have an error and that it is meant to be about "criminal pecuniary penalties for non-strict liability offences"[40] under the proposed arrangements.

AFMA does not agree with the proposal for a minimum penalty unit level for non-strict liability offences. The justification in the paper is to say strict liability offences should be lower than non-strict liability offences. But this is not an argument for lifting all non-strict liability offences. At best the proposed minimum is an unsophisticated mechanism to iron out logical inconsistencies.

We would suggest instead that each offence be considered separately on its merits and the penalty regime as a whole. Where a non-strict liability offence has a low penalty this may be a reason to consider whether the level of penalty suggests it should be a strict liability offence subject to the penalty notice regime, rather than artificially inflating its penalty to remove the inconsistency. This may be a more logical response to the inconsistency.

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?

No, AFMA does not agree with the bulk creation of new 'ordinary' offences as outlined in Annexure C.

While it is appropriate to remove imprisonment for strict liability offences as discussed above given the long-standing inconsistency with the 2002 Scrutiny of Bills Report, AGD Guide and ALRC report as noted above, this is not an argument for creating ordinary offences with imprisonment penalties four to ten times longer (and in some cases an imprisonment penalty where there was none before[41]) and fines up to 48 times higher.

The justification for the large increases given in the paper is that "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". This view would benefit from arguments in favour and supporting evidence.

Further there is no reasoning given for the large quantum of the increases (or the final penalty figures).

[40] Review, p. 34.
[41] As proposed for Section 307A and 989CA.

As will be discussed in the Appendix the process for determining appropriate penalties is properly careful and complex. The arguments in this section would need further development to justify such large increases.

If this proposal were to proceed we would seek clarification on what would constitute "minor contraventions"[42] that would be dealt with via the penalty notice regime. For example, would there be a threshold based on intention or something other consideration?

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

AFMA supports the extension of the penalty notice regime to all strict and absolute offences.

However, AFMA does not support the nonconformity with the Attorney General's guidelines that the penalty should be one fifth of the maximum pecuniary penalty:

> "Infringement notice provisions should generally ensure that the amount payable under a notice for a natural person is 1/5th of the maximum penalty that a court could impose on the person under the relevant offence provision, but not more than 12 penalty units. Infringement notice provisions should generally ensure that the amount payable under a notice for a body corporate is 1/5th of the maximum penalty that a court could impose on a body corporate under the offence provision, but not more than 60 penalty units."[43]

The only justification to support the proposed deviation apart from the statement that "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."

Removal of the imprisonment component merely removes the non-conformance with the long-standing Scrutiny of Bills Report, Attorney Generals Guide and the ALRC recommendations, but it is not a justification to then avoid conformance with an Attorney Generals recommendation in relation to penalty ratios.

If there is evidence to suggest the penalty notice regime would not function effectively at one fifth maximum pecuniary penalties it would benefit the Review to support informed debate. At this stage the case for divergence from the AGD standard is yet to be fully formed.

[42] Review, p. 3, para 10.
[43] AGD Guide, *op.cit.,* p. 59.

Civil penalty amounts

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

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

AFMA supports setting maximum civil penalty amounts in penalty units as a means of keeping them consistent over time.

The Review notes that the civil penalties in the Corporations Act have not kept pace with inflation. AFMA supports adjustments to the penalties to keep their financial burden constant with respect to inflation, and we note that the indexation of the penalty units will address this issue in the future.

The core argument presented in the Review in support of increasing the penalties for civil matters is an appeal to the seriousness of the offences because "current penalties could in any case be considered too low, given the seriousness of the civil penalty financial services and markets matters."[44] The Review would benefit from further discussion of how the relative seriousness should be assessed, and a full exploration by way of comparison of the offences for which increases are proposed with the seriousness of other offences.

Two arguments are then presented in support of the position. The first is that the current maximum civil penalty may be lower than the potential for profit. The argument is then made that because the probability of detection is less than 100% even a penalty the size of the potential profit may not be enough.

Given that potential profits in finance can be very large, they may not form a reasonable or consistent basis for the setting of penalties. If a behaviour under certain circumstances has the potential to net a billion dollars we suggest that would not be a proper basis for setting the correct civil penalty maximum. Further, the Review proposes disgorgement of profits in civil matters (and such orders are already available for criminal matters) which would presumably address the concern about profits.

The Review notes the differences between the maximum amounts in the Corporations Act and the ASIC Act, and the Credit Act and the Competition and Consumer Act 2010. The Review also notes large increases proposed in penalties to the Australian Consumer Law (more than 2 times for individuals and 9 times for corporations or 3 times the value of benefits or 10% of annual turnover).

Differences between the Acts are reflections of the different penalties that have been considered appropriate for different offences from time to time. Even if a program of

[44] Review, p.41.

equalisation were to be supported it is not necessarily appropriate to increase all maximums to match those of the Act with the highest amount. The penalties under each need to be considered in the context of the objectives and purpose of that Act.

In this regard we note some concerns with the process used to reach the proposed changes to the Australian Consumer Law (ACL). This process was undertaken by the senior consumer law officials from Commonwealth, state and territory agencies (Expert Administrators in Fung's taxonomy[45]). The recommendation around penalties was then supported by the relevant Ministers without a regulatory impact assessment.[46]

The discussion on penalties in the ACL Final Report[47] lacks depth. The significant break proposed from the long-standing principle of the punishment being proportionate to the offence was dismissed with the argument that ultimately it would still be up to the courts to determine the penalty. This is clearly an inadequate basis for overturning such a fundamental legal principle. Given the limitations of the ACL process we would advise in relation to the adoption of penalties regimes produced by it.

The Review also notes the lack of limits on penalties in some jurisdictions and gives the example of the fining of JP Morgan for the 'London Whale Trades' of well over $1 billion by various US and UK regulators. Yet as noted earlier in this submission, the FSI specifically concluded that these sorts of oversize penalties should be avoided.

The Review then concludes "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."

The concern to make the regime broadly consistent with overseas regulators may not have yet been explored in sufficient depth as will be discussed in the Appendix. Further, in our view there is more for the Taskforce to do in terms of considering the potential impact of the increases proposed on the sector at large.

Finally, courts should be and are rightly empowered to impose penalties that reflect the actual seriousness of offences. This assessment may be more consistent over time than perceptions of seriousness which may be more subjective and variable.

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[45] Fung, A. (2006), "Varieties of Participation in Complex Governance" (PDF), Public Administration Review Washington DC, 66: 66–75. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.689.414&rep=rep1&type=pdf

[46] http://consumerlaw.gov.au/communiques/meeting-9-2/

[47] https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf pp. 88-90.

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?

We are not in a position to give support to this proposal in the absence of the further review work that we believe needs to be undertaken.

The proposals from the ACL in relation to penalties that equate to 10% of turnover have the issues we have identified previously in this submission of arbitrariness, removing the link between the seriousness of the crime and the scale of the punishment and effectively removing limits for some alleged offenders.

As discussed it may be appropriate consider the impact of increased penalties and powers for ASIC in the context of the operational impacts.

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

The case has not been made to support the increases proposed. The arguments and analysis presented should be further developed for the reasons stated in the discussion above and in previous sections.

Further as noted previously if the correct balance is not achieved there is a risk to the business environment, and there should be an appropriate consideration of the potential impact to ASIC's operations.

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?

As discussed previously there has been no quantitative justification provided for why a $1 million penalty is appropriate. 2500 penalty units aligns better with the total net worth of the average Australian and with the maximum penalties under state law for the most serious offences.[48]

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

AFMA agrees with the Taskforce that greater certainty in the law is provided by a fixed monetary amount which is particularly appropriate for individual offenders. Calculations of benefits gained or losses avoided are difficult in practice and have led to significant issues where they have been used overseas.

[48] Except those for which life imprisonment is the maximum penalty for which there are no fines.

We note the Taskforce considers ASIC's views at paragraph 31. It may be inappropriate to increase penalties for ASIC administered Acts before conducting an assessment of the impacts on ASIC's operational arrangements.

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?

AFMA does not support the alignment of the Corporations Act with the proposed increases to the Australian Consumer Law based only on the reasons presented in the Review paper. These are very different areas of law and an implied claim of equivalence is not a sufficient basis to proceed with these changes. In our view, further analysis is required.

Disgorgement in civil penalty proceedings

Disgorgement in non-criminal proceedings overseas

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

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

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

Conceptually, the purpose of disgorgement is to ensure that institutions do not benefit financially from their misconduct. While attractive in principle practical difficulties associated with determining amounts to be disgorged experienced in other jurisdictions caution against its extension to non-criminal proceedings. There is a risk given the difficulties and associated arbitrariness that the credibility of the approach could be undermined. Given this risk the higher thresholds of criminality are appropriate.

In a material number of cases, it is difficult to identify the profit or revenue associated with the misconduct in question. For example, deficiencies may have been identified in an institution's systems or controls, but it may be difficult to show that those deficiencies have caused poor consumer outcomes or harm to the relevant market.

Similar difficulties arise if an institution has failed to put into place adequate measures to ensure the security of its data, or to prevent balance sheet misstatements or mismarking. Or there may be failings in a complaints handling systems, which lead to the late payment of redress to affected customers (for which interest has been paid). There are also cases where an institution receives no funds, such as in the case of closed funds that are difficult to reconcile with the disgorgement paradigm.

In other cases it is difficult, and in some cases inherently unfair, to extrapolate across an entire population from a sample. For example, the question might arise as to whether it should be the profit or revenue generated from specific individually identified mis-sales of financial products that is to be disgorged or the profit from the entire business division in which the mis-sales occurred (including profit from suitable sales). It is more difficult to extrapolate where there is no clear trend or outcomes are unpredictable.

It is worth noting that there are differences in the way institutions account for revenue and profit, which may be shared or amalgamated across business divisions, only some which are affected by regulatory failings. Revenue figures should ordinarily be prepared in accordance with the firm's own audited accounting policies unless there are strong and compelling reasons not to do so. For example, a question that might arise is should 'revenue' be net or gross of commission?

Similarly, questions would need to be determined around whether it should be revenue for the whole of a business division, or revenue generated by a smaller unit of the firm or a particular product line. In many cases it may not be easy to identify the gravamen of

the breach, and where there are systemic control failings could result in disproportionate penalties given the actual harm caused if they result in total revenue being used in the penalty calculation.

The period over which revenue is to be calculated could also be an issue. Should this be while the breach is occurring or during its impact? For investment mis-selling this could be over the life of product, or of trail commissions.

The various corporate structures can also generate issues. Particular business units such as trading desks or subsidiary companies might generate revenue for other entities within a group. The question then is whether it is just the revenue generated by the particular entity or all entities within the group, which could produce radically different penalty amounts.

Adding to these difficulties the experience of courts in the US is that disgorgement can include amounts for 'intangibles'.

Recently the US Supreme Court in *Kokesh v. SEC* determined that at least in US law disgorgement is not a remedy but a punishment. This was due to a number of considerations, including that the sanction is often applied as a correction to a wrong to the public, that it is intended to deter others and that it has been used to punish individuals, such as those who have provided inside information without profit, who have been forced to pay disgorgement equal to the trading profits of others. The court concluded "in such cases, disgorgement does not simply restore the status quo; it leaves the defendant worse off."[49]

The Review notes that in the US the SEC now typically takes in more money from disgorgement orders than from fines, having taken in more than $1.8 billion in each of the last four years.

While this may be attractive to regulators it may be perceived as an increasing risk of doing business in Australian markets by operators of legitimate and well intentioned businesses. If the net effect of a doubling of penalties is similar in Australia, this is likely to negatively impact the international view of the risk profile of Australia as a jurisdiction.

On these bases and given the need for more detail in the proposal we are opposed to the proposal for disgorgement in regard to civil penalty cases.

[49] *Kokesh v. SEC*, 137 S. Ct. 1645.

Priority for compensation

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

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?

AFMA agrees in principle that compensation should be prioritised over civil pecuniary penalties by the courts where financial resources are insufficient to cover both.

However, this prioritisation should not be available as a mechanism to increase the threat or risk of incarceration for defendants that are unable, having paid compensation, to then pay a fine.

Expanding the civil penalty regimes

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

Should the provisions in Table 6 be civil penalty provisions?

In relation to the Table 6 proposals the key principle of concern is the risks to the business environment from the lack of a threshold for Government intervention. Granting ASIC the power to bring actions for any shortfall from perfection may cause risks to the environment for business. It is critical to preserve the checks and balances to ASIC's powers that lie in the criminal materiality threshold to breaches that is in the *status quo*. Criminality, with its *mens rea* (for non-strict liability offences) and typically higher standard of proof requirements, creates a balance in favour of the preservation of civic freedoms.

The potential impacts to the business environment that would follow the introduction of civil penalties for the provisions listed in Table 6 could be significant. We discuss some of the implications below.

Disclosure and takeover documents

In regards to failure to provide, and defective disclosure in, takeover documents the key risks would lie in failure to meet the requirement 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"[50]. With the full clarity of hindsight a case could be made against almost any document that it failed to meet this standard of perfection, particularly where the investment has not performed as hoped. The protection available in the section that the person responsible for the omission or misleading prospectus "in the circumstances ought reasonably to have obtained the information by making enquiries" is minimal.

The current arrangements create a threshold for action that creates the right balance for regulatory intervention.

The implications of empowering ASIC to address all variations from perfection with a civil penalty could be to decrease interest in raising capital. If this were to occur it would raise the cost of capital and damage the business environment, the economy and Australia as a centre for financial services.

We note the comparison the Review observes with respect to the Takeovers Panel, which cannot make punitive orders and is designed to facilitate business.

Financial Services Disclosure

[50] Review, p. 52. Also Corporations Act Section 710.

We note our previously discussed concerns about strict liability criminal offences.

In relation to the ordinary offence while the current penalties might be considered excessive, the requirements of criminal prosecution creates a threshold for action by the regulator that discourages excessive intervention. We would expect, consistent with the intention, ASIC to undertake many more civil actions. The case has not been made that this would be a net benefit for the economy. The Taskforce should consider more work to understand the potential impacts of introducing civil penalties for offences such as this to the business environment.

Financial services and markets – unlicensed conduct

Our concern with the proposals in relation to unlicensed conduct in financial services and markets is that this will result in negative outcomes for the business environment due to the lack of threshold for ASIC action that could result.

The requirement to hold a licence for certain activities may not be clear cut – particularly where an activity is an extension of an existing business and involves multiple jurisdictions.

In relation to license issues, the preferred model for interactions with businesses is a cooperative regulator that works with businesses to ensure compliance. Introducing civil penalties may risk tipping the balance in a way that may result in a more adversarial approach, with an increased likelihood of prosecution given the availability of civil penalties. This may result in businesses taking a more legalistic approach to ASIC interactions. Such a result could also have implications for Australia's reputation as a place that welcomes financial businesses.

Failure to notify ASIC of breach of obligations

The current breach reporting test is subjective and the breach must be 'significant' to be reportable. Only proven rather than suspected breaches need to be reported.[51]

Breach reporting by firms requires careful consideration of information relating to a potential breach, legal opinion on whether the actions constitute a breach and whether it is significant given the considerations listed in the Act. The process can require careful judgement in grey areas and can take time to resolve.

It may not be appropriate for ASIC to prosecute for civil penalties if its views of how the decision making process should have occurred differ slightly from what the process the firm followed.

[51] Subject to any changes to the regime that may be implemented as a result of the consultation conducted through the Taskforce's Consultation and Position Paper 1 on self-reporting of contraventions by financial services and credit licensees earlier this year.

If civil penalties for breach reporting obligations are enacted there is a risk it could lead to an increasingly legalistic environment and costs for firms in managing their breach reporting obligations.

Any civil penalty needs to be considered in the context of the new reporting test and should be limited to a clearly defined "significant" breaches.

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?

There does not appear to be much in the way of discussion of this proposal in the paper and we are unsure as to whether the proposal is about the introduction of new criminal penalties or the clarification of the existing arrangements via clearer drafting.

If this question relates to making the current arrangements clearer as a drafting exercise then we would agree there may be merit in it. If the question relates to the bulk creation of new criminal offences then we would not agree with the proposal particularly given the limited discussion. This would properly require its own discussion paper if this were the case.

Should any of the provisions in Table 7 be civil penalty provisions?
Should any other provisions of ASIC-administered Acts be civil penalty provisions?

Given the limited available information AFMA does not support the provisions in Table 7 being civil penalty provisions or propose any other provisions of ASIC-administered Acts to be given civil penalties provisions.

Generally again we note the protections that accompany these provisions being criminal matters discussed in relation to Table 6. These prevent ASIC from undertaking frequent prosecutions for civil penalties for deviations from what ASIC considers perfection in such matters as following its instructions made under ASIC Act Section 63(1) including "to give to ASIC all reasonable assistance in connection with the investigation".

For certain provisions, such as 205G, 606 and 671B 205G, 606 and 671B, compliance is ultimately up to the individuals, so making these civil penalties directed at individuals is not inherently problematic.

However, the other provisions in Table 7 relate to functions carried out by employees of a firm. AFMA is concerned that circumstances may arise where an individual may be held responsible for shortcomings of the firm. Similar concerns would apply to any other ASIC-administered Act provisions that could not be reasonably directly attributed to the individual.

The Review would benefit from a detailed explanation of the reasons supporting the creation of each item in Table 7. The public review would then be better informed to support a sound justification framework where appropriate.

Position 13: Key provisions imposing obligations on licensees should be civil penalty provisions.
Should the provisions that impose general obligations on licensees be civil penalty provisions? If so, should this only apply to some obligations?

The Review paper acknowledges the duplication problem that would arise from making section 912A a civil penalty and an infringement notice provision (chapter 4, paragraph 86). The solution proposed is that only certain parts of section 912A would attract that sanction. The paper does not, however, follow this argument to its logical conclusion.

The elimination of duplication would, presumably, result in the obligation in section 912A(1)(c) to comply with the financial services laws being excluded from any new civil penalty and infringement notice regime. There does not appear, however, to be any other provision that overlaps with or duplicates the obligation in section 912A(1)(a) to "do all things necessary to ensure that the financial services covered by the license are provided efficiently, honestly and fairly". Accordingly, it would appear that the position paper proposes that this obligation should attract its own civil penalties and/or infringement notices. However, the obligations in section 912A(1)(a) are broad and it is not clear by what objective measure is a court or regulator will decide whether a service is efficient or not. It is also not clear in what context could there be conduct that is dishonest and unfair but not contrary to another specific rule such as the existing prohibitions on misleading or deceptive conduct and unconscionable conduct.

The better approach is to preserve the status quo, which is that contraventions of section 912A are matters that ASIC can properly take into account in deciding whether or not a person is fit and proper to hold an Australian financial services licence but are not the subject of punishment in and of themselves.

If civil penalties are applied to general obligations then ASIC should not be able to seek civil penalties under both specific provisions and the general licensee obligation provisions.

We note in passing given our remit that in relation to the Credit Code provisions we query whether applying civil penalty provisions to section 154 of the Credit Code is required as this may already be adequately covered by the ASIC Act.

We note the example provided in the Review concerning the proposal to create civil penalties for licence breaches in relation to market operators. AFMA holds that where services are contestable (such as in broking) there is no need for regulatory mandating of the provision of service or the availability level of that service. Firms are free to select

their provider or providers of choice and make contractual arrangements amongst themselves to ensure an appropriate level of service.

It is undesirable for regulation to set service levels between firms as these targets are best set by the firms themselves. Firms in a free market economy know the costs and trade-offs best and there is a risk that regulatory intervention could create inefficiently high targets for service reliability. Regulators are incentivised to reduce outages but have no natural counterbalancing incentive to reduce costs.

As the Australian Government noted in *Rethinking Regulation* (2006) "many of the costs of regulation are diffuse and 'off-budget'…Accordingly, the compliance costs are 'hidden' to those promulgating regulations, and are thus less likely to be taken in to account or given due weight".[52]

When reliability is over-emphasised the barriers to moving to new software and particularly innovative software become ever larger and agility and innovation, which are key policy priorities, may suffer.

Modern trading systems of market participants are extremely complex systems. A certain level of unavailability (albeit very low) is likely to be an outcome of an efficient balancing of system cost, system flexibility and customization, and dynamism. Figure 1 gives an indication of the type of non-linear relation between different levels of risk appetite and the impacts for system cost, system inflexibility, and the cost of innovation.

If the Government penalizes imperfection this will push down the risk appetite of these entities, moving them to the left on the graph. This will produce inefficient higher costs for investors and the economy.

[52] Rethinking Regulation, 2006, p. 15.

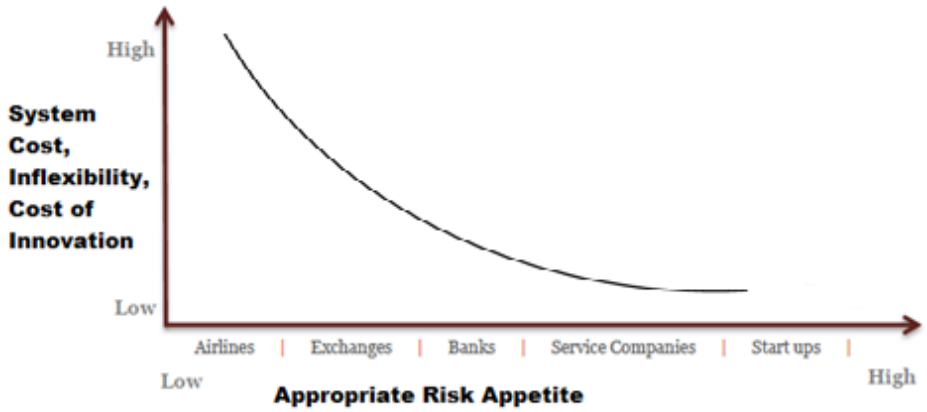

Figure 1 Indicative Costs vs Risk Appetite

Market systems can be made as reliable as aerospace control systems but the costs will be much higher than they are now, and once they are in place the additional costs of innovation and upgrade would constrain these activities.

Credit Code Provisions

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

AFMA does not offer an opinion on matters relating to the Credit Code beyond our general observations and concerns about the process noted above.

Insurance Contracts Act 1984 (ICA)

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

AFMA does not offer an opinion on matters relating to the Insurance Contracts Act beyond our general observations and concerns about the process noted above.

Infringement notices

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

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

Are the 12 penalty unit (individuals) and 60 penalty unit (corporations) default levels for infringement notices appropriate? Is the Credit Act model of a default proportion of the maximum penalty more appropriate for all ASIC-administered Acts?

The Review paper acknowledges the ALRC's serious reservations about the appropriateness of infringement notices. It does not, however, attempt to reconcile the proposed expansion of infringement notice regimes with those reservations.

Infringement notice regimes should not be expanded unless there is a compelling need to do so. The position paper does not evidence any such need. It appears to proceed on the basis that flexibility in enforcement is an end in itself.

The cost of successfully defending the subject matter of an infringement notice may very well be greater than the cost of paying the notice. As a result, regulated persons pay the penalty even if the better view is that they have done no wrong. This flaw in the regime would be exacerbated by its expansion to contraventions which have a highly subjective or evaluative content, such as section 344(1) and section 601FC(5) of the Corporations Act. Reasonable minds will differ about what constitutes taking reasonable steps or the exercise of reasonable care. Individuals responsible for taking the steps or exercising that care ought not be subject to the exercise of discretion by the executive branch of government.

The proposal to extend the infringement notice regime to contraventions of section 674(2A) is of particular concern. Section 674(2A) is concerned with a contravention by a person 'involved' in a contravention. 'Involvement' is defined in section 79. It is well-established that proof of involvement requires proof of knowledge or intent. Applying infringement notices to such a provision is directly inconsistent with the views of the ALRC referred to in paragraph 3 of chapter 7 of the paper.

We therefore oppose the extension of the infringement notice regime to any of the existing or proposed civil penalty provisions.

We support the existing level of infringement penalties and strongly oppose any arbitrary increase to a proportional model in line with the Credit Act model.

If this proposal were to proceed, noting our strong opposition, as with the use of penalty notices for strict liability offences, we would seek greater clarity on what threshold test would be used to determine "less serious contraventions"[53].

[53] Review, p. 71.

Peer disciplinary review panels

Would it be appropriate for ASIC to delegate to a peer review panel additional administrative functions in relation to financial services and credit sectors (apart from banning individuals from these industries as currently proposed by ASIC)?
If so, should the Panel be able to exercise powers, such as the power to issue infringement notices and/or the power to accept enforceable undertakings?
Should the Panel be comprised of industry and non-industry participants (e.g. lawyers or academics) only or should members of ASIC be included?
Should the Panel be subject to minimum procedural standards? And, if so, what procedural standards are appropriate? For example, should publication of panel decisions be automatically stayed if an appeal is lodged?

In general AFMA does not support judicial-type powers to be exercised by non-judicial bodies as non-judicial bodies are unlikely to provide the same level of procedural fairness as the judicial system. There can still be an appropriate role for peer review panels in reaching administrative agreements where the resulting efficiency of the process produces net gains for the regulated community.

Peer review panels can serve useful functions by bringing legitimacy to the exercise of market discipline. However, they must be carefully constituted and managed to be successful and this success is not guaranteed.

Improvements have been made in recent times to the ASIC Market Disciplinary Panel (MDP) process and there are expectations that this trend will continue.

The compromises inherent in non-judicial systems can be an appropriate when judicial processes would ensure that 'the process is the punishment'. Where this can be avoided and the parties can have confidence in the process there can be a net benefit.

Where non-judicial bodies are established their findings should be binding on the regulator. Proceeding against the findings of such a panel risks creating a type of 'double jeopardy' whereby firms might in certain circumstance reasonably expect to be 'tried' twice.

Critically all such determinations should be subject to judicial review by appeal and have their reasoning carefully recorded for the confidence of those participating in the process.

The workings of such processes should be subject to regular review by the adjudicated population to assist in ensuring there is a net benefit from the arrangements.

ASIC Act – false or misleading statements

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.

AFMA opposes extension of ASIC powers over statements outside Section 12DB of the ASIC Act.

Section 12DB casts a wide net and together with the other relevant sections of the Corporations Act provides appropriate coverage for the purposes of ensuring conduct of financial services is conducted appropriately.

The *status quo* arrangements seek to create a balance between capturing the key activities that constitute financial services related matters within the extra protections of the ASIC Act.

It is important to avoid regulating almost every communication by a company to anyone external, as this would strike the wrong balance. If the drafting is revised as proposed to include statements that could be characterised as misleading as to a company's "prospects" this outcome may be risked. This is particularly concerning in the context of the increasing reading of 'misleading' as meaning in the particular rather than as general and subject to a reasonable person test.

Section 12DB focuses ASICs powers on matters related to the "supply or possible supply of financial services" – for example securities and investments. Moving away from this restriction may change the focus for ASIC.

While from a regulator's perspective such an extension may appear desirable, it may extend ASICs jurisdiction in a way that requires more careful consideration. If ASIC is to evolve into a general business communications regulator then this will need careful exploration and consideration by more detailed consultation.

Appendix - What could be considered

It is important that the Review is designed to lead to the introduction of balanced and appropriate maximum penalty outcomes. While it is beyond the scope of this submission to create a complete alternative analysis, this section considers some of other matters that could be considered by the Taskforce to assist in ensuring better coverage of the relevant issues. While the Taskforce correctly notes "it 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"[54] this does not mean that recommendations can reasonably shortcut a proper analysis of the well-recognised issues in relation to penalty setting.

General penalty considerations

The Terms of Reference are for the most part stated in terms of the adequacy of penalties and powers but this begs the questions – sufficiency for what purpose(s)? or for what outcome(s)?

A full consideration of these wider questions invited by the Terms of Reference is necessary to avoid results that are not aligned with Government priorities.

There are many examples of documents and processes that have given thoughtful attention to the aims and considerations appropriate to balancing the relevant principles to determine maximum sentences. We refer, for example, to the *Maximum Penalties: Principles and Purposes Preliminary Issues Paper*[55] by the Victorian Sentencing Advisory Council which carefully considers many relevant issues including, amongst others:

- Rule of law;
- Just punishment and the principle of proportionality:
    - Proportionate punishment;
    - Measuring offence seriousness;
    - Balancing harm and culpability;
- General deterrence (including whether this is itself appropriate factor for criminal sanctions);
- Denunciation;
- Community protection (incapacitation);
- Continuing detention and supervisions;
- Parsimony; and
- Special categories of offence (e.g. offences that risk harm, aggravation, repeat offences).

Given the specific nature of the penalties under consideration by the Taskforce a range of relevant matters are appropriate to consider, including:

[54] Review p. 13.

[55] https://www.sentencingcouncil.vic.gov.au/publications/maximum-penalties-principles-and-purposes-preliminary-issues-paper

Empirical targets

- What the target should be for offending rates in order to avoid inefficient trade-offs with liberty and costs;
- Current outcomes in terms of offending;
- Reoffending rates of Corporations Act and ASIC Act offenders;
- Empirical work on the likely impacts on outcomes of the proposed changes; and
- Empirical work on what are the perceptions and drivers of perceptions of treatment of Corporations and ASIC Act crimes.

International trends

- The trends in over-criminalization and over-incarceration both here and overseas; and
- The costs of incarceration versus the benefit to the community.

The boundaries between governments and the markets

- What areas should be left for business and the markets?
  - What is the correct role for government in markets?

Philosophical and jurisprudential foundations

- Philosophical foundations of penalties:
  - The philosophical validity of general deterrence;

- Criminal jurisprudence matters including:
  - The proportionality principle;
  - Equality before the law and its applicability to corporations of various sizes, including a consideration of the impact of reputational damage on corporations;
  - Whether white collar crimes should be treated differently; and
  - To what extent should Corporations and ASIC Act crimes line up with sentences for other crimes.

This would not be a simple undertaking. A detailed and considered analysis is appropriate for recommendations that affect the liberty and level of threat placed over the community.

We expand below on two of these areas – empirical targets and international trends.

Empirical targets

Reference is made in the opening sentence of the Terms of Reference "to assess[ing] the suitability of the existing regulatory tools available to it to perform its functions

adequately"[56] but again this begs the question of how would we know that ASIC's functions are being adequately performed?

Given that ASIC's role is to administer and enforce the law, a key metric might be the extent to which the law is being followed. One indicator of this, although not perfect, is the level of prosecutions being undertaken by ASIC. All things being equal this measure would be expected to trend upwards if laws are being broken more frequently, and downwards if fewer laws are being broken.

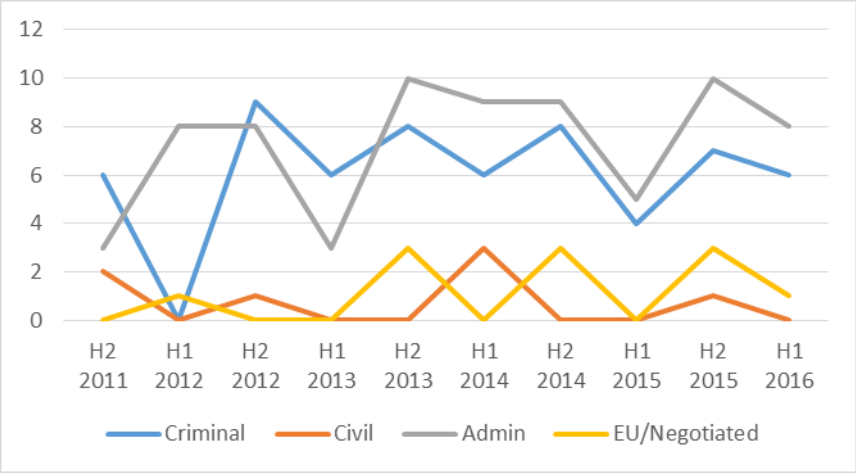

Figure 2 Market integrity enforcement outcomes by enforcement type 2011-16

Figure 4 shows the last 5 years of data in this regard as applied to market integrity enforcement – a key area of interest to AFMA. Two points are readily apparent - (1) total numbers are relatively low, and (2) there is no trend of significance either upwards or downwards.

This would suggest if we assume ASIC's approach to enforcement is relatively stable[57] that there is no trend upwards or downwards in law breaking in relation to market integrity rules. If we assume ASIC is a reasonably competent enforcer then it would also suggest that law breaking in relation to market integrity is low.

Similar but more detailed analysis could be undertaken by the Taskforce in each legislative area for which ASIC has responsibility. This could help prioritise the revision of penalties to areas where issues are apparent, it could also work in a consideration of the advances in surveillance and detection technology that are relevant to each area. Where improvements in surveillance are significant such as in market integrity with ASIC's leading-edge MAI system, and given the support in the literature for the importance of perceptions of detection to deterrence, this may leave less heavy lifting to be done by heavy penalties and hence less costs for taxpayers and investors. A review of ASIC's detection capabilities, their evolution, and potential future improvements for each of the areas for which ASIC has responsibility may identify other efficiencies.

[56] Review, p. 94.
[57] Regardless of whether it was comprehensive or not, the trend should still show.

International comparators

While the Taskforce does include a static comparison of Australian penalties with four jurisdictions (Ontario – Canada, Hong Kong, the United Kingdom and the United States) there is benefit to be gained from a more thoroughgoing analysis.

It is worth expanding the selection of jurisdictions as the comparisons with certain pecuniary penalty levels are used to justify increases in Australia by the Taskforce. Countries within the region and with markets of similar scale are particularly relevant comparators as these are the countries with which Australian markets most directly compete.

The comparison should also extend beyond common law countries. The Corporations and ASIC Acts maximum penalties are set by statute so the role of the common law is more limited. Non-English speaking countries could add further perspective.

Further we note that care should be taken in the selection of countries for comparison as there is an implication that they represent penalty norms to which we should aspire. The appropriateness of each candidate comparator country should be assessed by reference to its penalty outcomes and whether these are warranted, desirable or sustainable in the Australian context.