

17 November 2017

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

By email: ASICenforcementreview@treasury.gov.au

Dear Sir/Madam

Strengthening Penalties for Corporate and Financial Sector Misconduct

The Insurance Council of Australia (the Insurance Council) appreciates the opportunity to comment on the ASIC Enforcement Review Taskforce's (the Taskforce) Position Paper 7, *Strengthening Penalties for Corporate and Financial Sector Misconduct* (the Position Paper). The Insurance Council agrees that the penalties in the legislation administered by the Australian Securities and Investments Commission (ASIC) should be strengthened to provide a robust deterrent to misconduct and promote community confidence in the financial system.

The Insurance Council is, in principle, supportive of the proposals in the Position Paper and we agree with the principles underlying the Taskforce's recommendations. We acknowledge the observations made by the Taskforce around the period of time since the level of penalties were established and the inconsistencies in the magnitude of penalties for equivalent Commonwealth and State provisions. In particular, we strongly agree with the Taskforce's objective of making the penalties regime more clear and consistent.

We note that an effective penalties regime is but one component of ASIC's broader regulatory enforcement toolkit. In our experience, a regulatory regime that is responsive and nimble in encouraging good outcomes is not only fostered by strict adherence to the regulatory rules, but is outcomes focused and encourages innovation. In this regard, a robust penalties regime should complement the broader objective of facilitating good outcomes in the financial system, and not stifle a more innovative approach in areas such as consumer disclosure.

The Insurance Council's submission does not address each of the questions posed in the Position Paper. We are in-principle supportive of the Taskforce's preliminary positions, subject to the general comments noted in the remainder of our submission.

Penalties for Breaches of the Financial Services Disclosure Provisions

The Position Paper proposes to substantially increase and expand civil and criminal penalties in relation to breaches of the consumer disclosure provisions of the *Corporations Act 2001* (the Corporations Act) and *Insurance Contracts Act 1984* (the IC Act). For example, the Position Paper proposes to increase the imprisonment penalties for key provisions under Part 7.7 of the Corporations Act, as well as extending the civil penalty regime to a range of other financial services disclosure obligations.

While we agree that misconduct in relation to financial services disclosure should be subject to robust penalties, particularly in relation to intentional misconduct, the regulatory regime should not encourage an overly conservative compliance approach that would stifle innovation in consumer disclosure. We note that the proposed strengthening of penalties ranges from intentional misconduct through to minor non-compliance such as printing errors.

In 2015, the Insurance Council established an independent Effective Disclosure Taskforce (the ED Taskforce) to explore ways to enhance the effectiveness of disclosure, including Product Disclosure Statements (PDSs). The ED Taskforce found that the mandated disclosure regime encourages licensees to take a risk-averse approach to compliance, rather than providing disclosure material that is focused on consumer needs and preferences.

As part of the implementation of the ED Taskforce's recommendations, the Insurance Council is facilitating comprehensive industry efforts to improve the provision of information and engagement with consumers. While the Insurance Council does not object to the proposals in the Position Paper, we note that the strengthening of penalties should also be accompanied by a more facilitative approach by ASIC to these industry efforts underway.

Maximum Penalties

The Taskforce takes the general position that a corporation should be liable for ten times the pecuniary penalty amount for an individual. We query how the Taskforce has determined that the appropriate figure is a multiple of ten and would welcome further information as to why it is deemed an appropriate multiple.

Strict and Absolute Liability Offences

The Insurance Council is not supportive of all strict and absolute liability offences being subject to the penalty notice regime as proposed in Position 8. Whilst there is merit in including some strict and absolute liability offences in the regime, circumstances will exist where investigations into offences are required. In such circumstances, a 'speeding ticket' style regime is clearly inappropriate. We suggest that the Taskforce give greater consideration to which offences should and should not be included in the penalty notice regime.

Peer Disciplinary Review Panel

The position paper proposes the introduction of a Peer Disciplinary Review Panel (PDRP) as an alternative enforcement mechanism, akin to the existing Markets Disciplinary Panel (MDP). Unlike the MDP however, the scope of the PDRP appears to include the power to review core operational activities and to investigate the identity and capacity of insurance executives. We are concerned that comparisons between the MDP and the proposed PDRP are being drawn when it is envisioned that the PDRP will have a greater remit.

If you have any questions or comments in relation to our submission, please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on tel: (02) 9253 5121 or email: janning@insurancecouncil.com.au.

Yours sincerely



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