

Submission from:
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ASIC Enforcement Review
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**ASIC ENFORCEMENT REVIEW TASKFORCE
SUBMISSION ON POSITIONS PAPER 7:
STRENGTHENING PENALTIES FOR CORPORATE AND FINANCIAL SECTOR MISCONDUCT**

Thank you for the opportunity to make a submission to the Taskforce.

My work at the University of Sydney Business School focuses on the regulation of corporate crime, particularly insider trading and misconduct within securities markets. The recommendations contained in this submission are based on my academic research, the findings of which have been published in a variety of refereed papers and other publications.¹

In March 2016, I made a submission to the Senate Inquiry into Penalties for White Collar Crime and I appeared at the public hearing to discuss my submission in December 2016. The recommendations I make in this submission are consistent with those I have previously made to the Senate Inquiry.

I note that the Taskforce's seeks comment on a variety of issues, and puts forward a number of proposed positions, the majority of which I broadly support. The particular positions on which I wish to comment are:

- (a) the increase of penalties for offences under section 184 of the *Corporations Act*;
- (b) the use of penalty units to set maximum civil penalties;
- (c) the availability of disgorgement in civil penalty proceedings;

¹ In particular, J Overland, 'Insider Trading, Materiality and the Reasonable Person: Who Must Be Influenced for Information to have a "Material Effect"?' (2017) 45 *Australian Business Law Review* 213; J Overland, 'Re-evaluating the Elements of the Insider Trading Offence: Should there be a Requirement for the "Possession" of Inside Information?' (2016) 44 *Australian Business Law Review* 256; J Overland, 'Insider Trading, General Deterrence and the Penalties for Corporate Crime' (2015) 33 *Company and Securities Law Journal* 317; J Overland, 'The Possession and Materiality of Information in Insider Trading Cases' (2014) 32 *Company and Securities Law Journal* 353. For a full list of my publications on the topic of insider trading and corporate crime, please see: <http://sydney.edu.au/business/staff/juliettee>

- (d) the retained status of section 180 of the *Corporations Act* as a civil penalty provision; and
- (e) the use of automatic banning orders for breaches of certain civil penalty provisions.

1. *Is it appropriate that the penalty for offences under section 184 of the Corporations Act be increased?*

I support the proposal to increase the maximum penalty for criminal breaches of directors' duties under section 184 of the *Corporations Act*, in order that there be consistency with the maximum penalties for other forms of "corporate fraud" and other comparable offences. I note that Positions Paper recommends an increase to the maximum liability for a breach of section 184 for both individuals and corporations (at paragraph 65, on page 28). However, as section 184 applies only to offences committed by natural persons (those who are directors, officers and employees of corporations), the reference to an increase in penalties for corporations is not relevant in this context.

2. *Should maximum civil penalties be set in penalty units in the Corporations Act, ASIC Act and Credit Act?*

I support the setting of maximum civil penalties by reference to penalty units in order that the relevant amounts can easily be regularly reviewed and updated. The consistency of maximum civil penalties under the *Corporations Act*, *ASIC Act* and *Credit Act* is desirable and appropriate for all ASIC-administered legislation.

I consider that the current maximum civil penalties under the *Corporations Act*, of \$200,000 for an individual and \$1,000,000 for a corporation, to be too low to promote compliance or to be an effective deterrent for non-compliance. I also consider that the proposed maximum civil penalty of 2,500 penalty units for individuals is too low, and support ASIC's recommendation that it instead be raised to approximately \$1,000,000. It would be appropriate to express the monetary value of the maximum civil penalty as 5,000 penalty units, which would (at the current penalty unit rate of \$210) represent a maximum civil penalty of \$1,050,000.

I also recommend consistency in the maximum civil penalty for corporations, and support it being set at 50,000 penalty units (being ten times the recommended maximum for individuals), which would (at the current penalty unit rate of \$210) represent a maximum civil penalty for corporations of \$10,500,000.

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

The confiscation of benefits obtained or the amount of losses avoided provides an additional deterrent effect to those who may otherwise be tempted to breach the law, and provides consistency with the position in overseas jurisdictions. I support the proposal to make disgorgement available in civil penalty proceedings brought by ASIC under the *Corporations Act*, *ASIC Act* and the *Credit Act*. Any necessary balancing of compensation

payments, civil penalty payments, and disgorgement payments arising from the same conduct should be left to the discretion of the relevant court.

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

Section 180 of the *Corporations Act* should remain a civil penalty provision. In recognition that this section relates primarily to “negligent” conduct of directors or officers, it is the only statutory “directors’ duty” that does not have potential criminal consequences under section 184 of the *Corporations Act*. Australian corporate law places increasing reliance on directors taking appropriate steps to ensure that the corporations they manage do not breach the law, and enables civil penalty proceedings under section 180 to be brought against those directors and officers who fail to take appropriate action (such as in *ASIC v Cassimatis (No 8)* [2016] FCA 1023). Retaining section 180 as a civil penalty provision makes civil penalty available where there is a proved breach, which is a strong incentive for directors to ensure compliance with relevant laws. Accordingly, I am strongly of that view that section 180 should be retained as a civil penalty provision to provide further incentive to directors and officers to ensure that they take all reasonable care in the circumstances to ensure their corporations do not breach the law.

There is an additional issue on which I would also like to make a recommendation, that was not raised in the Positions Paper:

5. *The use of automatic banning orders resulting from breaches of civil penalty provisions*

A person who is convicted of criminal offence under the *Corporations Act* which is punishable by imprisonment for a period of greater than 12 months is automatically disqualified from managing a corporation for a period of five years, due to the operation of section 206B(1)(b)(i) of the *Corporations Act*. However, there is no automatic disqualification from managing corporations for a person found liable for insider trading in civil penalty proceedings, although may apply to the Court under section 206C of the *Corporations Act* seeking disqualification of such a person.

In order to increase the penalty and deterrent effect (both specific and general) for those who might be tempted to breach civil penalty provisions, I recommend that a person found liable of a breach of civil penalty proceedings should also be automatically disqualified from managing a corporation under section 206B of the *Corporations Act* for five years, if the civil penalty proceedings are serious. Like criminal offences, the seriousness of the civil penalty proceedings could be determined by the length of the maximum possible penalty, which I recommend be set at 1,000 penalty units (which is the current equivalent of a fine of \$210,000). Accordingly, I recommend that section 206B of the *Corporations Act* be amended to also provide for automatic disqualification of a person where:

a declaration is made under: (i) section 1317E (civil penalty provision) that the person has contravened a civil penalty provision that carries a maximum civil penalty of 1,000 penalty units or more.

I appreciate the opportunity to make this submission. I would be happy to elaborate further on any of the issues raised. Please feel free to contact me if I can be of any further assistance.

Yours sincerely

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