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The Treasury
Langton Crescent
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via email to ASICenforcementreview@treasury.gov.au

Dear Mr Mason

**Reforms to strengthen penalties for corporate and financial sector misconduct –
Draft Legislation**

Thank you for the opportunity to provide a submission responding to draft legislation and accompanying materials proposed by the Australian Government to strengthen penalties for corporate and financial sector misconduct.

The Australian Institute of Company Directors (**AICD**) has a membership of more than 43,000 including directors and senior leaders from business, government and the not-for-profit sectors. We aim to be the independent and trusted voice of governance, and to build the capability of a community of leaders for the benefit of society.

The AICD strongly supports the government's aim of ensuring that the Australian Securities and Investments Commission (**ASIC**) has the right tools to combat corporate and financial sector misconduct. In particular, it is critical that the legislation administered by ASIC, and penalties imposed in the courts, represent an effective deterrent for misconduct, and are consistently applied throughout ASIC-administered legislation.

The AICD recognises that some penalties for corporate misconduct within ASIC-administered legislation do not represent an adequate deterrent for wrongdoing. In addition, the AICD also acknowledges the challenges faced by ASIC in obtaining successful enforcement outcomes. Bringing civil and criminal actions in the context of corporate misconduct can be slow, highly complex, expensive, and involve multiple stakeholders, such as the Commonwealth Director of Public Prosecutions and the Australian Taxation Office.

For these reasons, the AICD supports a number of measures proposed by the government which will result in substantial increases in penalties for a variety of offences and contraventions in ASIC-administered legislation. The AICD also supports the expansion of the civil penalty regime, and the strengthening of s 184 of the Corporations Act. While these

are significant reforms, the AICD supports them because they will strengthen ASIC and help to build community trust in in the corporate sector.

It is also important to acknowledge that deterrence will only be achieved if market participants know the relevant regulators have the necessary resourcing, capability and will to initiate civil or criminal proceedings where appropriate. As Commissioner Hayne observed in his interim report, "enforcement generates the moral suasion that underpins regulatory authority".¹ Absent enforcement, there is a risk that little market impact will be felt from the strengthened penalties regime.

This notwithstanding, the AICD is concerned about some of the measures proposed in the exposure draft, particularly the proposed expansion of the infringement notice regime. The AICD considers that the expansion of infringement notices to the contraventions proposed are not appropriate for administrative assessment. Consistent with government guidelines, only very minor offences should be subject to administrative rather than judicial assessment, and the expansion of the infringement notice regime in the manner proposed will result in a number of relatively serious offences being incorporated into the regime. We encourage the government to reconsider this proposal.

The AICD's responses to the specific measures proposed by the government have been set out in **Annexure A** to this submission.

We hope our comments will be of assistance to you. If you would like to discuss any aspect of this submission, please contact Matt McGirr, Policy Adviser, on (02) 8248 8431 or mmcgirr@aicd.com.au.

Yours sincerely,



CHRISTIAN GERGIS
Head of Policy

¹ Kenneth M Hayne, *Interim Report: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, 28 September 2018, 287.

ANNEXURE A

1. Updating the penalties for certain criminal offences in the Corporations Act, ASIC Act and Credit Act

The AICD supports increases to the maximum imprisonment terms and financial penalties terms for offences involving dishonesty or deliberate misconduct, noting the court oversight involved.

However, in respect of offences that do not involve any element of dishonesty, there should be no increase to these imprisonment terms as proposed, as the existing maximum terms adequately reflect the gravity of the conduct involved.

2. Formula for calculating maximum financial penalty for criminal offences

The AICD supports the maximum pecuniary penalty for criminal offences being calculated by reference to a formula.

However, the AICD is not supportive of one aspect of the proposed formula adopted by the government in the exposure draft. In our view, the formula should be amended to only permit the court to impose a penalty based on turnover in circumstances where the value of the benefits gained cannot be easily determined. We note that this approach is consistent with Part IV of the *Competition and Consumer Act 2010* (Cth).

In addition, the AICD recommends the government implement the formula as was suggested by the Taskforce Report for all criminal offences with less than 10 years imprisonment. This ensures a consistent approach to maximum pecuniary penalties is achieved across ASIC-administered legislation. For more serious offences which attract a penalty of 10 years' imprisonment or more, the AICD recommends that the financial penalty be determined on a case-by-case basis. This would preclude the need to create two separate formulae, which unnecessarily complicates the provisions.

3. Clarifying the operation of section 184 of the Corporations Act

The AICD supports the proposed amendments to s 184 of the Corporations Act to clarify that it is an offence against subsections 184(2) and 184(3) of the Corporations Act if the person acted dishonestly or recklessly and by doing so gained an advantage for the corporation. The AICD also supports the increase to the maximum penalty under s 184 of the Corporations Act.

However, the AICD does not support the removal of the word 'intention' from s 184 of the Corporations Act. The lengthy imprisonment term which attaches to s 184 demands that the prosecution ought to be required to prove intentional dishonesty or recklessness.

4. Defining dishonesty in the Corporations Act

The AICD supports, in principle, amendments to legislation so that, generally speaking, the *Peters* test will apply to appropriate offences with an element of dishonesty in the

Corporations Act.² Given the difficulties with the alternative *Ghosh* test,³ the AICD considers it generally preferable that dishonesty should simply be decided by the standards of ordinary, decent people.⁴

However, a purely objective test of dishonesty will not always be appropriate. For offences which attract imprisonment terms of 10 years or more, such as s 184 of the Corporations Act, the AICD recommends that the prosecution be required to establish *intentional* dishonesty.

5. Removing imprisonment as a penalty for strict and absolute liability offences

The AICD strongly supports removing imprisonment as a penalty for strict and absolute liability offences in the Corporations Act. This will ensure that imprisonment is only imposed where there is a mental element to the relevant offence, in accordance with well-established legal principle.

6. New ordinary criminal offences

The AICD supports the introduction of ordinary offences that sit alongside strict and absolute liability offences in the Corporations Act. This change ensures that more serious and intentional breaches of these offences can attract higher penalties, including imprisonment.

7. Increases to maximum civil penalty amounts in ASIC-administered legislation

The AICD supports the proposed increases to maximum civil penalty amounts in ASIC-administered legislation. The AICD agrees that the current maximum civil penalty amounts are too low and are in need of revision.

However, we again recommend that the proposed pecuniary penalty provisions should be amended to only permit the court to calculate the maximum penalty by reference to a company's turnover in circumstances where the value of the benefits gained cannot be easily determined.

8. Introduction of relinquishment orders

The AICD supports the introduction of a relinquishment order. It is important that the courts are provided with the necessary remedies to address breaches of the law where the wrongful act has resulted in a large windfall to the wrongdoer (through a benefit gained, or loss avoided). A restitutionary remedy is also useful to courts where it is difficult, if not impossible, to ascertain any loss or damage caused by a breach.

9. Preference given to compensation as a remedy for a pecuniary penalty order

The AICD supports the proposal that the Corporations Act should require courts to give priority to compensation. This ensures priority will be given to compensation victims who

² *Peters v R* (1998) 192 CLR 493.

³ *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143.

⁴ *R v Ghosh* [1982] EWCA Crim 2.

suffer loss or damage as a result of misconduct, and is consistent with existing provisions in the ASIC Act and Credit Act.

10. Expanding the civil penalty regime

The AICD supports the harmonisation of the underlying framework of the civil penalty framework in the Corporations Act, *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), and the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**).

The AICD also supports the expansion of the civil penalty regime in the manner proposed in the exposure draft. While this is a substantial change to a number of provisions in ASIC-administered legislation, given the challenges faced by ASIC in securing a successful enforcement outcome through the criminal courts, it is important that ASIC has the flexibility to pursue misconduct through enforcement of civil penalty provisions, where appropriate.

We anticipate that a more expansive range of enforcement options available to ASIC will assist ASIC's work in deterring misconduct in the corporate sector.

11. Infringement notices

The AICD is concerned about the expansion of the infringement notice regime in ASIC-administered legislation. In particular, a number of offences which are being considered for inclusion in the infringement notice regime would not fall within the Attorney-General Department's Guide to Framing Commonwealth Offences, Infringement Notices, and Enforcement Powers. Specifically, the Guide states:⁵

An infringement notice scheme may be employed for relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective. The offences should be such that an enforcement officer can easily make an assessment of guilt or innocence. An infringement notice scheme should generally only apply to strict or absolute liability offences.

The AICD considers all of the provisions proposed to be subject to the infringement notice regime as relatively serious offences. For instance, the AICD does not consider a breach of s 912D of the Corporations Act to be a minor offence, and there are a number of other obligations in the exposure draft which are offences relating to the provision of credit or financial services to retail consumers. A breach of these more serious offences is not a minor matter, and should be prosecuted in court, and "should not be capable of being excused by an administrative assessment".⁶

For these reasons, the AICD recommends against the proposed expansion of the civil penalty regime.

⁵ Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, 58.

⁶ *Ibid.*, 58.

