Chapter 6

Monetary penalties and disgorgement

6.1 A large number of inquiry participants expressed the view that current monetary penalties for white-collar crime and misconduct are currently inadequate, particularly in respect of non-criminal matters. This chapter considers arguments made in relation to the current settings of monetary penalties.

6.2 This chapter also considers arguments for multiple of gain penalties—that is, allowing monetary penalties to be set as a multiple of the benefit gained or loss avoided from the misconduct in question—and the possibility of introducing a mechanism for disgorgement alongside other penalties.

Adequacy of current maximum monetary penalties

Civil penalties

6.3 Inquiry participants generally agreed that maximum monetary penalties in non-criminal cases are currently inadequate.

6.4 ASIC highlighted the relatively low level of maximum penalties for non-criminal matters in the Corporations Act. For individuals, the maximum penalty of $200,000 for individuals was introduced in 2001; for body corporates, the maximum penalty of $1 million was introduced in 2004. Neither of these maximum penalties has been increased since their introduction. ASIC made the obvious point that these penalty levels 'have not kept pace with inflation', and added they 'are proportionately low given the seriousness and impact of civil penalty matters'.[1]

6.5 In its submission, ASIC provided a comparison of civil and administrative monetary penalties for individuals across various jurisdictions (Canada, Hong Kong, New Zealand, Singapore, the United Kingdom and the United States). Australian penalties for various white-collar offences are very much at the lower end of the scale, and indeed in most instances the lowest among the jurisdictions compared.[2]

6.6 ASIC also compared the civil penalties in the Corporations Act with the maximum penalties available for similar offences in the ASIC Act and National Credit Act. Maximum penalties under those pieces of legislation are set at a maximum $360,000 for individuals and $1.8 million for body corporate.[3]

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1 Australian Securities and Investments Commission, *Submission 49*, p. 14.

2 Australian Securities and Investments Commission, *Submission 49*, pp. 9–10.

3 Australian Securities and Investments Commission, *Submission 49*, p. 14.

6.7 ASIC noted that one of the factors it considers in determining its enforcement approach in a particular matter is the market impact of an investigation and an enforcement outcome. In cases where only low civil penalties were available (or low criminal penalties in criminal matters), ASIC advised that this might weigh against it pursuing a particular course of enforcement action.[4]

6.8 ASIC explained that increasing the maximum civil penalties available would better enable the courts to impose penalties proportionate to the severity of the offence and in line with community expectations, even in cases where the maximum penalty was not imposed:

> Historically, the courts have tended to apply civil penalties well below the maximum possible, reducing their impact and creating gaps between the levels of sanction the community expects should be handed down and what is given in practice. The reasons for this are complex and vary from one case to another (in itself reducing consistency), but often discounts are applied or the seriousness of the matter is not considered as warranting the maximum penalty (although it is unclear what level of seriousness would warrant the maximum penalty). Legislated maximum penalties should be set so as to take into account the worst cases, thus allowing reasonable penalties to be imposed in other cases.[5]

6.9 ASIC advised the committee that, while it considered maximum civil penalties of $200,000 for individuals and $1 million for corporations too low, it was not advocating an increase to a specific level:

> We certainly have advocated in this submission for increased penalties in the civil penalty regime, without being specific. I think it is a matter that is probably best left to the task force [ASIC Enforcement Review Taskforce] to do, which will assess those penalties both domestically and internationally to see whether they are consistent.[6]

6.10 Other inquiry participants also pointed to the apparent inadequacy of existing monetary penalties for non-criminal matters in the Corporations Act, and were prepared to make a submission on what an appropriate level of penalty might be. For example, Mr Golding from the Law Council of Australia suggested that Australia should not move to the level of penalties imposed by the United States, but that Australia's maximum penalties 'are low in international terms and should be reviewed upwards'.[7] Mr Golding told the committee that while it considered the civil penalty regime 'extremely effective and a very useful addition to the regulatory enforcement pyramid', it supported:

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4 Australian Securities and Investments Commission, *Submission 49*, p. 15.

5 Australian Securities and Investments Commission, *Submission 49*, p. 15.

6 Mr Chris Savundra, Senior Executive Leader, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 59.

7 Mr Greg Golding, Chair, Foreign Corrupt Practices Working Group, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 6 December 2016, p. 15.

> …an increase in the maximum penalties that can be imposed for a civil penalty prosecution. Currently it is $200,000 for individuals and $1 million for corporations. It has been at that level since the introduction of the civil penalties regime in 1994. It has not kept pace with inflation and it certainly has not kept pace with community expectations around that area. So we would support, particularly in the area of corporate penalties, an increase to that $1 million threshold.[8]

6.11 Mr Stephen Mayne, Director of the ASA, also argued that civil penalties were too low, suggesting that instead of the current maximum penalties of $200,000 for individuals and $1 million for corporations, penalties of $1 million for individuals and $5 million for corporations would be appropriate.[9]

6.12 The ASA explained that existing civil penalties were particularly low when considered in relation to the levels of remuneration directors within the corporate sector typically receive. It noted that the maximum civil penalty for directors and officers who breach their directors' duties is $200,000, which it suggested was low given the amounts CEOs and non-executive directors were typically paid:

> We believe that unless the $200,000 penalty is increased to reflect the potential gravity of the offence, courts will continue to be reluctant to impose anything more than a normal penalty (if any) on directors breaching their duties, even though shareholders may have suffered severely as a result.[10]

6.13 Dr Overland also told the committee that she supported ASIC's call of increased maximum civil penalties in the Corporations, suggesting that the penalties were 'very low'.[11]

Setting civil penalties as multiples of the benefit gained

6.14 In addition to being low, ASIC noted that civil penalties in Australia cannot currently be set as multiples of the benefit gained, as is the case in some other jurisdictions.[12]

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8 Mr Greg Golding, Chair, Foreign Corrupt Practices Working Group, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 6 December 2016, p. 15.

9 Mr Stephen Mayne, Director, Australian Shareholders' Association, *Proof Committee Hansard*, 6 December 2016, p. 37

10 Australian Shareholders' Association, *Submission 34*, pp. 4–5.

11 Dr Juliette Overland, Private capacity, *Proof Committee Hansard*, 6 December 2016, p. 19.

12 Australian Securities and Investments Commission, *Submission 49*, p. 7. For some criminal offences under the Criminal Code Act 1995 (the Criminal Code), corporate bodies face a maximum penalty that is set as a multiple of the benefit gained or, where the benefit cannot be determined, as a certain percentage of the annual turnover of the body corporate in the period the offending occurred. Attorney-General's Department, *Submission 52*, p. 10.

6.15 While ASIC did not suggest a specific multiple that should apply to civil penalties, a number of witnesses (as noted below) discussed the possibility of introducing a multiple of three times the benefit made or loss avoided. As ASIC noted, provision for setting civil penalties at three times the benefit gained would be consistent with penalty settings in several other jurisdictions. Moreover, similar provisions already for certain criminal offences in the Corporations Act (specifically, certain market misconduct offences) and in other Australian legislation.[13]

6.16 Several witnesses expressed support setting civil penalties as a multiple of the benefit gained. For example, Dr Zirnsak, JIMU, told the committee that he supported the idea of setting penalties at three-times the value of ill-gotten gains.[14] In its submission, the Uniting Church (JIMU) recommended that civil penalties for white-collar crime should be increased where necessary to ensure that persons committing the crime are not able to financially profit from the crime.[15] The Uniting Church (JIMU) submitted:

> Currently civil penalties for white collar crime can be less than the proceeds of the crime which means that white collar criminals still end up ahead financially, unlike other countries where the penalties can include the sum of the gain plus a penalty of triple the amount of damages. Such a large penalty may prevent potential white collar criminals from committing an offence.[16]

6.17 Noting that civil penalties for insider trading were low by international standards, Dr Overland recommended increasing these penalties 'to a maximum of $765,000 or three times the profit made or loss avoided, whichever is greater'. The increase, she suggested, would be consistent with monetary penalties available for criminal convictions of insider trading (which also carries a maximum penalty of 10 years imprisonment), and reasonably consistent with fines available in foreign jurisdictions. Dr Overland further recommended that the ability to impose fines at multiples of the profit earned or loss avoided, as currently applied in criminal proceedings, should also apply to civil proceedings.[17]

6.18 The ASA also argued in support of penalties set as multiples of the wrongful gain. It submitted:

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13 Mr Tim Mullaly, Senior Executive Leader, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 59; Mr Chris Savundra, Senior Executive Leader, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 59.

14 Dr Mark Zirnsak, Director, Justice and International Mission Unit, Uniting Church in Australia, Synod of Victoria and Tasmania, *Proof Committee Hansard*, 6 December 2016, p. 6.

15 The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 39*, p. 6.

16 The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission 39*, p. 11.

17 Dr Juliette Overland, *Submission 9*, pp. 3, 9, 10.

> In our view, these penalties should at a minimum be at least the amount of the wrongful gain, and have the potential to be proportionately higher (for example, up to 10 times the financial benefit). Where there is no clear quantifiable wrongful gain, ASIC should have the power to order that the wrongdoer pay a penalty, for example up to $5 million for a body corporate and $1 million for an individual.[18]

6.19 The NSW Young Lawyers Business Law Committee also explained that having fixed civil penalties made it harder to prevent offenders from profiting from their conduct:

> The lower degree of flexibility in the non-criminal regime [in Australia, as compared to other jurisdictions] means that it may not always be possible to ensure a wrongdoer does not profit from their conduct, since the maximum fine that may be imposed may be substantially lower than the financial benefit obtained as part of the conduct.[19]

6.20 Although not addressing civil penalties specifically, the Tasmanian Small Business Council referred to alleged incidences of financial misconduct by Australian banks, and submitted that monetary penalties must be 'proportionate to the amount of wrongful gains by banks and bankers that have acted deceitfully and dishonestly'.[20]

Monetary penalties for criminal offences

6.21 Some inquiry participants also suggested that the maximum monetary penalties available in criminal matters involving white-collar crime were inadequate.

6.22 In its submission, ASIC argued that while criminal penalties in Australia for white-collar crime were broadly consistent with those available in comparable foreign jurisdictions (including the maximum fines available), Australia had 'significantly lower fines available' to punish particular contraventions, including those related to continuous disclosure obligations and unlicensed conduct.[21]

6.23 Professor Adams, Dr Hickie and Mr Lloyd QC, who as noted in chapter four registered doubts regarding the efficacy of imprisonment for white-collar criminals, suggested that penalties needed to focus on the 'hip-pocket' of offenders:

> By definition the motive of a white collar criminal is financial gain. The 'hip-pocket' argument as a major goal of sentencing of a white collar criminal must be correct. The integrity of business institutions and probity in individual and corporate enterprises can only be enhanced by sentencing

18 Australian Shareholders' Association, *Submission 34*, p. 2.

19 NSW Young Lawyers Business Law Committee, Submission 137, p. 7.

20 Tasmanian Small Business Council, *Submission 42*, p. 7.

21 Australian Securities and Investments Commission, *Submission 49*, pp. 7–8.

> options which include the imposition of large and effective fines together with retrieving the proceeds of crime from a white collar offender.[22]

6.24 Professor Adams, Dr Hickie and Mr Lloyd QC noted that while the level of fines in Australia for white-collar offending had increased (particular in relation to cartels) they did not allow for the imposition of the level of fines that apply in the United States, which can run into the tens of millions of dollars. They submitted that:

> …the most effective sentence to be imposed upon a white collar criminal would be, if appropriate, the imposition of a short custodial term of imprisonment together with the imposition of a higher level of fine and a thorough application of proceeds of crime legislation. In this way, the purposes of sentencing, in particular personal and general deterrence, would be achieved. Consideration should also be given to extended parole periods and conditions of parole aimed at limiting the offender's ability to re-offend and aimed at the offender 'giving back' to the community such as the imposition of an intensive correction order and/or some form of community service when released on parole.[23]

6.25 The BFCSA, which as noted in chapter 4 argued that white-collar criminals should be exposed to higher custodial sentences, suggested that fines and other monetary penalties represented 'pocket money' to the wealthy, and thus were inadequate as a deterrent 'for the determined and serious white-collar criminal'. Moreover, the fines typically issued were 'not in line with the tragic loss and damage we see every day in the mortgage scams and associated bank scandals'.[24] It might be noted, however, that the BFCSA was not arguing for higher monetary penalties for criminal offences per se, but rather a shift from the use of monetary penalties to stronger custodial sentences for white-collar offenders.

Multiples of benefit penalties for criminal offences

6.26 While some submitters expressed concern about the level and type of monetary penalties that can be imposed in criminal matters, it is worth noting here that the committee also received evidence highlighting the value of multiple of benefit penalties that currently apply in relation to certain criminal offences.

6.27 For corporate bodies, certain criminal offences in the Criminal Code, such as domestic bribery offences, foreign bribery offences and false accounting offences, can be punished through the application of a monetary penalty set as a multiple of the benefit gained or, where the benefit cannot be determined, as a percentage of the annual turnover of the corporate body in the period the offending occurred. This approach, the Attorney-General's Department argued:

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22 Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, *Submission 5*, pp. 4–5.

23 Professor Michael Adams, Dr Tom Hickie and Mr Ian Lloyd QC, *Submission 5*, p. 5.

24 Banking and Finance Consumers Support Association, *Submission 23*, p. 15.

> …allows for flexibility in determining penalties for white-collar crime, ensuring that the penalty imposed on corporations is proportional to the wrongful gain obtained by this corporate body. This means of calculating the maximum penalty for a corporation helps to ensure that the penalty imposed is sufficiently high to deter and punish financial crime and promote good governance, the rule of law and confidence in corporate practices.[25]

Limitations of monetary penalties in cases involving bankruptcy

6.28 The Australian Financial Security Authority (AFSA), which has responsibility (inter alia) for administering and investigating offences under the *Bankruptcy Act 1966*, submitted that it had:

> …received feedback from personal insolvency practitioners to the effect that the penalties imposed by the courts for offences under the Bankruptcy Act do not effectively deter bankrupts and others from committing offences under the Act.[26]

6.29 AFSA noted, in this regard, that fines were regularly being imposed upon offenders under the Bankruptcy Act who:

> …in the majority of cases, are or have been in financial difficulty and have sought relief through the bankruptcy process. The imposition of a fine in such circumstances presents practical difficulties in ensuring the penalty is complied with in a timely manner, as a person who is an undischarged bankrupt is likely to face difficulties in raising funds to pay a fine.[27]

6.30 AFSA therefore submitted that alternative penalties, such as Community Service Orders/Community Protection Orders, 'may provide a more appropriate sentence outcome for bankrupts who are prosecuted for offences under the Bankruptcy Act than the imposition of fines'.[28] AFSA noted that such a sentence is currently available under the *Crimes Act 1914*.

Disgorgement powers

6.31 A central theme of the evidence received by the committee was that efforts to tackle white-collar crime must take the profit out of the crime. While the *Proceeds of Crime Act 2002* (POC Act) provides a mechanism for recouping a wrongful gain in a criminal case, there is currently no comparable power to force the forfeiture of gains when someone has committed a civil offence. A number of submitters recommended introducing a disgorgement power that would apply in non-criminal matters.

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25 Attorney-General's Department, *Submission 52*, pp. 10–11.

26 Australian Financial Security Authority, *Submission 25*, p. 2.

27 Australian Financial Security Authority, *Submission 25*, p. 3.

28 Australian Financial Security Authority, *Submission 25*, p. 3.

6.32 Disgorgement, as ASIC explained, refers to:

> …the removal of financial benefit (such as profits illegally obtained or losses avoided) that arises from wrongdoing, or the act of paying these monies, on demand or by legal compulsion. For example, any profit made by wrongdoing is 'disgorged' from those involved in the wrongdoing in addition any penalties that are imposed.[29]

6.33 ASIC further explained that disgorgement provides a:

> …vehicle for preventing unjust enrichment. This means that disgorgement orders can offer significant deterrent value by reducing the likelihood that wrongdoers can consider penalties to be merely a business cost.[30]

6.34 This section of the report briefly summarises the powers that currently exist to recoup the gains of white-collar crime and misconduct—including under the POC Act—and in turn considers arguments in relation to the introduction of a disgorgement power.

6.35 The related question of compensation for victims of white-collar crime and misconduct is not addressed in any detail in this chapter, or elsewhere in this report. However, the committee notes that this matter will be considered as part of the committee's current inquiry into consumer protection in the banking, insurance and financial services sector.

Proceeds of Crime Act 2002 (POC Act)

6.36 The Attorney-General's Department explained that, where an individual retains a wrongful gain after the imposition of a fine under offences within Criminal Code (set out in the *Criminal Code Act 1995*), it is open to the CDPP and AFP to recoup this wrongful gain by bringing a forfeiture order under the POC Act.[31] The POC Act provides 'a comprehensive scheme to trace, investigate, restrain and confiscate proceeds generated from Commonwealth indictable offences, foreign indictable offences and certain offences against State and Territory law'. POC Act proceedings are civil proceedings, and do no impose a criminal conviction.[32]

6.37 Significantly, the POC Act, in addition to allowing for proceedings where a conviction has been secured ('conviction based forfeiture'), also allows for proceedings independent of the prosecution process or even where there has been no criminal conviction. The Attorney-General's Department explained that this system enables Australian authorities to better target the assets of individuals suspected of white-collar crime, particularly those at the top of criminal organisations. These

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29 Australian Securities and Investments Commission, *Submission 49*, p. 10.

30 Australian Securities and Investments Commission, *Submission 49*, p. 10.

31 Attorney-General's Department, *Submission 52*, p. 10.

32 Attorney-General's Department, *Submission 52*, p. 11.

individuals, the Attorney-General's Department further explained, had the resources to distance themselves from individual criminal acts, 'thereby evading conviction and placing their profits beyond the reach of conviction-based laws', and that:

> Generally, before assets can be seized under the non-conviction scheme in the POC Act, it must be established that the asset is the proceeds or an instrument of crime and that the asset was under the effective control of a person. The POC Act also contains a range of restraining orders and freezing orders which are designed to prevent an individual from disposing of an asset before a forfeiture application is resolved.[33]

6.38 A number of inquiry participants highlighted the importance of mechanisms to remove the proceeds of crime from white-collar criminals. The AFP, for instance, submitted that the confiscation of criminal assets 'is a vital tool in taking the profit out of crime and preventing the reinvestment of criminal profits into further criminal activity'.[34] The AFP advised that it can pursue asset confiscation, including in cases involving 'white-collar' offending such as insider trading and fraud, through the joint Criminal Assets Confiscation Taskforce (CACT), which combines the expertise and resources of the AFP, ACC and ATO.[35]

6.39 ASIC noted that in criminal matters it can brief the AFP and the CDPP to bring an action to confiscate the proceeds of crime under the POC Act. [36] However, ASIC also told the committee that, because it did not have access to disgorgement powers itself, and because it was required to go to the AFP or CDPP to seek action under the POC Act, this sometimes made recovery actions more difficult. Such actions needed to align with the AFP's or CDPP's priorities, and while those agencies have generally been 'very supportive' of ASIC's requests to take POC Act actions, there may be cases where ASIC sees 'a pressing need for disgorgement [but] other agencies may not'.[37]

6.40 ASIC placed more emphasis still on the fact that it does not have any equivalent disgorgement powers for civil penalty proceedings.[38] The issue of a disgorgement regime that would apply in non-criminal matters is discussed below.

Arguments for a disgorgement regime for non-criminal matters

6.41 Whereas monetary penalties, as ASIC explained, might sometimes be considered a 'cost of business'—particularly when those penalties are not set in

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33 Attorney-General's Department, *Submission 52*, p. 11.

34 Australian Federal Police, *Submission 54*, p. 9.

35 Australian Federal Police, *Submission 54*, p. 10.

36 Australian Securities and Investments Commission, *Submission 49*, p. 16.

37 Mr Chris Savundra, Senior Executive Leader, Australian Securities and Investments Commission, *Proof Committee Hansard*, 6 December 2016, p. 60.

38 Australian Securities and Investments Commission, *Submission 49*, p. 16.

reference to any benefit gained or loss avoided—disgorgement provides a means of removing the financial incentive to engage in misconduct.[39]

6.42 ASIC compared the disgorgement powers available in Australia in non-criminal cases—or, more precisely, the lack of such powers—with those available in comparable economies in *Report 387* (as referred to in chapter 2). ASIC noted that in all the other jurisdictions it considered, regulators or the courts have the ability to remove the financial benefit obtained from corporate wrongdoing in non-criminal settings. The mechanism for disgorgement, ASIC further explained, varied among jurisdictions. However, the 'fundamental feature of disgorgement in all jurisdictions is that the illegal profits gained or losses avoided are removed from the wrongdoer'. This is achieved, ASIC noted, by:

> (a) having legislated maximum penalties that are a multiple of the financial benefit obtained from the wrongdoing (New Zealand, Singapore and the United States);
>
> (b) taking into account the financial benefit obtained from the wrongdoing when determining the quantum of penalty that should be imposed (Hong Kong and the United Kingdom); or
>
> (c) having a disgorgement power that is distinct from the ability to impose non-criminal penalties (Canada, Hong Kong, the United Kingdom and the United States).[40]

6.43 In contrast to other jurisdictions, in Australia maximum non-criminal penalties for corporate wrongdoing are fixed amounts, meaning that it 'may not be possible for ASIC or courts to remove the financial benefit obtained from corporate wrongdoing in non-criminal settings even if the maximum penalty is imposed'.[41]

6.44 ASIC produced a table in its submission comparing the availability of disgorgement powers across jurisdictions in relation to non-criminal proceedings:

Table 6.1: Availability of disgorgement in non-criminal proceedings

Country	Insider trading	Market manipulation	Disclosure	False statements	Unlicensed conduct	Inappropriate advice
Australia	No	No	No	No	No	No
Canada	Yes	Yes	No	Yes	Yes	Yes
Hong Kong	Yes	Yes	No	Yes	No	No
New Zealand	No	No	No	No	No	No

39 Australian Securities and Investments Commission, *Submission 49*, p. 10.

40 Australian Securities and Investments Commission, *Submission 49*, p. 17.

41 Australian Securities and Investments Commission, *Submission 49*, p. 17.

Singapore	No	No	No	No	No	No
United Kingdom	Yes	Yes	Yes	Yes	No	Yes
United States	Yes	Yes	Yes	Yes	Yes	Yes

Source: Australian Securities and Investments Commission, *Submission 49*, p. 11.

6.45 ASIC has raised the need for disgorgement powers in relation to non-criminal matters on a number of occasions, including in *Report 387*.[42] In its submission to this inquiry, ASIC argued:

> Having access to disgorgement increases the flexibility regulators have to address wrongdoing efficiently and effectively. Disgorgement orders can offer significant deterrent value by removing the benefits gained from the wrongdoing and reducing the likelihood that wrongdoers can consider penalties to be merely a business cost.[43]

6.46 ASIC's call for the creation of a disgorgement power in non-criminal cases was supported by a number of inquiry participants. For example, Dr Zirnsak, JIMU, suggested ASIC's lack of disgorgement powers was a 'gap' in the system that should be rectified. In this connection, Dr Zirnsak emphasised that taking the profit out of crime 'acts as a massive deterrent' to criminal activity.[44]

6.47 Dr Overland, referring specifically to penalties for insider trading, also suggested the lack of a disgorgement power in relation to civil penalties was out of step with other jurisdictions, including Canada, Hong Kong, New Zealand, the United Kingdom and the United States. Dr Overland also noted the deterrent effect of the confiscation of profit made or losses avoided for those who might engage in insider trading.[45]

6.48 The Law Council of Australia also expressed support for disgorgement remedies 'as an additional penalty that can be imposed in a civil penalty context'. Australia, it observed, was 'quite out of step by international comparison' in this regard. [46]

6.49 The ASA submitted that in cases of white-collar crime, 'where a financial benefit is gained by the wrongdoer, including in non-criminal proceedings, and profits

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42 ASIC, *Report 387*, p. 19.

43 Australian Securities and Investments Commission, *Submission 49*, p. 16.

44 Dr Mark Zirnsak, Director, Justice and International Mission Unit, Uniting Church in Australia, Synod of Victoria and Tasmania, *Proof Committee Hansard*, 6 December 2016, p. 6.

45 Dr Juliette Overland, *Submission 9*, p. 10. Also see Dr Juliette Overland, Private capacity, *Proof Committee Hansard*, 6 December 2016, p. 19.

46 Mr Greg Golding, Chair, Foreign Corrupt Practices Working Group, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 6 December 2016, p. 15.

made or losses avoided should at a minimum be disgorged'.[47] Mr Stephen Mayne, appearing on behalf of the ASA, told the committee that disgorgement powers was one of the more obvious reforms that would assist ASIC better fulfil its enforcement role.[48]

6.50 NSW Young Lawyers submitted that an examination of the disgorgement arrangements in comparable jurisdictions revealed that the:

> …utility, flexibility, effectiveness, and overall appeal of disgorgement in relation to white collar crime offences not only has a remedial function but also an important deterrent function.[49]

6.51 It is worth noting here that in addition to arguments put in favour of disgorgement powers for ASIC in non-criminal matters, the Attorney-General's Department advised the committee that the matter is being considered by the ASIC enforcement review taskforce.[50] Significantly, no inquiry participant made a case against allowing for disgorgement in non-criminal matters.

Committee view

6.52 The committee considers there is overwhelming evidence and support for increasing the current levels of civil penalties for white-collar offences in the Corporations Act. The committee is reluctant to specify a particular penalty amount, and notes that the ASIC Enforcement Taskforce may be better placed to comment on this matter. Nonetheless, the committee suggests that the government should have regard to the level of non-criminal penalties in other jurisdictions for similar offences, and in this connection notes that the fivefold increase (or greater) suggested by some witnesses would not be inconsistent with penalty settings in foreign jurisdictions.

6.53 The committee notes the importance of multiples of benefit penalties in ensuring that white-collar offenders are not able to profit from their crimes and misconduct. In this respect, the committee considers there is a need to introduce multiple of benefit penalties in relation to non-criminal offences.

6.54 The committee agrees that the lack of disgorgement powers in non-criminal matters represents a significant gap in ASIC's enforcement toolkit. Noting that this is a matter that the ASIC Enforcement Taskforce is likely to address, the committee nonetheless considers that the government should move to address this gap and introduce disgorgement powers in relation to non-criminal matters.

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47 Australian Shareholders' Association, *Submission 34*, p. 2.

48 Mr Stephen David Mayne, Director, Australian Shareholders' Association, *Proof Committee Hansard*, 6 December 2016, p. 38.

49 NSW Young Lawyers Business Law Committee, *Submission 137*, p. 3.

50 Ms Kelly Williams, Assistant Secretary, Criminal Law Enforcement Branch, Attorney-General's Department, *Proof Committee Hansard*, 6 December 2016, p. 45.

Recommendation 4

6.55 The committee recommends that the government amend the *Corporations Act 2001* to increase the current level of civil penalties, both for individuals and bodies corporate, and that in doing so it should have regard to non-criminal penalty settings for similar offences in other jurisdictions.

Recommendation 5

6.56 The committee recommends that the government provide for civil penalties in respect of white-collar offences to be set as a multiple of the benefit gained or loss avoided.

Recommendation 6

6.57 The committee recommends that the government introduce disgorgement powers for the Australian Securities and Investments Commission in relation to non-criminal matters.

Senator Chris Ketter
Chair