



ASIC

Australian Securities & Investments Commission

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Ms Sophie Dunstone
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
The Senate
Parliament House
CANBERRA ACT 2600

Dear Ms Dunstone

Inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

Thank you for the invitation contained in your letter of 1 April 2015 to provide a submission addressing issues in the abovenamed Bill that may be of relevance to the Australian Securities and Investments Commission (ASIC).

ASIC is, among other things, a criminal law enforcement agency. Its functions extend to the investigation and prosecution of a range of Commonwealth offences, including serious and complex crime such as financial services fraud (e.g. ponzi schemes and superannuation fraud), corporate fraud, insider trading and market manipulation.

Having reviewed the Bill, ASIC has identified two issues of particular relevance:

1. The introduction (by Schedule 5 of the Bill) of the concept of "knowingly concerned" as an additional form of secondary liability in s11.2 of the *Criminal Code*; and
2. The addition (by Schedule 7 of the Bill) of general deterrence as a matter that a court is required to take into account in determining sentence under s16A(2) of the *Crimes Act 1914*.

ASIC supports both of these amendments.

The following comments briefly set out the reasons why the amendments would enhance ASIC's law enforcement function - a function which is integral to achieving ASIC's strategic priorities of promoting investor and financial consumer trust and confidence, and ensuring fair, orderly and transparent markets.

Knowingly concerned

ASIC submits that the introduction of "knowingly concerned" as a supplementary form of secondary liability will provide greater clarity in this sometimes complex and technical area of the criminal law.

The traditional common law formula "aid, abet, counsel or procure" currently contained in the *Criminal Code* carries with it various potential limitations that have attached to each term in the past. Furthermore, each term operates with a special legal meaning that is not necessarily readily understood by juries called upon to apply them.

By contrast, it is submitted that the phrase "knowingly concerned" is more adaptable to the infinitely variable circumstances of secondary participation in crime and is also more comprehensible. The phrase, as it previously appeared in the *Crimes Act 1914*, has been interpreted by Australian courts, in a straightforward fashion, as requiring a practical connection that in truth implicates or involves the defendant in the offence (see e.g. *Ashbury v Reid* [1961] WAR 49, *R v Tannous* (1987) 10 NSWLR 303 and *Kennedy v Sykes* (1992) 93 ATC 4012).

Accordingly, "knowingly concerned" can be viewed as addressing the fundamental gravamen of secondary criminal liability across a variety of factual circumstances and in terms that are less technical and therefore more likely to be properly applied. These issues are particularly apposite in the context of the serious criminal offences that are investigated by ASIC and ultimately prosecuted by the Commonwealth Director of Public Prosecutions. These offences regularly involve secondary participants (including instances of a corporation being the principal or secondary offender) and are often already legally and factually complex.

General Deterrence

Although the common law of Commonwealth sentencing has developed its own response to the omission of general deterrence from s16A(2) of the *Crimes Act 1914* (see e.g. *DPP v El Karhani* (1990) 21 NSWLR 370), ASIC supports explicit legislative recognition of this important sentencing consideration.

It has been recognised and accepted that general deterrence is of "particular significance" in sentencing white collar offenders: *DPP v Bulfin* (1998) 4 VR 114 at 131-132. A variety of characteristic aspects of this type of offending lead to this conclusion, including:

- the planned or calculated nature of the offending;
- the sustained nature of the offending, often involving repeated deliberate dishonest acts;
- that the offending is difficult to detect and its investigation and prosecution lengthy and complex;
- the impact of the offending on the community, frequently involving the loss of substantial amounts of money; and
- the offending commonly involves the abuse of a position of trust attained through prior good character.

These characteristics mean that general deterrence has a critical role to play in protecting the Australian community by seeking to ensure that potential offenders are dissuaded from offending by the clear expectation of condign punishment. In the realm of offending that is often motivated by greed, it is essential that there is a genuine countervailing fear of detection, prosecution and sanction. For this reason, general deterrence will assume greater significance than the personal mitigatory factors of white collar offenders.

Given the primacy of general deterrence as a sentencing consideration in the law enforcement work that ASIC performs, ASIC submits that it is appropriate formally to recognise general deterrence in s16A(2) of the *Crimes Act 1914*.

ASIC would be happy to provide further information in relation to these matters if the Committee would be assisted.

Yours sincerely,

Michael Kingston
Chief Legal Officer