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ASIC Enforcement Review  
Financial System Division  
The Treasury  
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## ASIC Enforcement Review, Position Paper 7: Strengthening Penalties for Corporate and Financial Sector Misconduct

Thank you for the opportunity to comment on Strengthening Penalties for Corporate and Financial Sector Misconduct. We share the Taskforce's concerns that the penalties in the legislation administered by the Australian Securities and Investment Commission (**ASIC**) are not currently effective and they do not reflect community perceptions as to the seriousness of engaging in certain forms of misconduct. In order for ASIC to effectively carry out its regulatory role it needs to have broad and effective enforcement tools.

The Financial Rights Legal Centre (**Financial Rights**) strongly supports most of the proposed penalty increases. The current penalty regime is clearly not acting as a sufficient deterrent for financial service providers that are engaging in misconduct. It appears that many major players have simply made a business calculation that continued misconduct and contravention of the consumer protections outlined in the *Corporations, NCCP and ASIC Acts* is more profitable even with the risk of ASIC enforcement. This is why in addition to supporting increased civil penalties we strongly support ASIC being able to seek disgorgement remedies in civil penalty proceedings. In fact, we agree with ASIC that disgorgement should be available not only in civil penalty proceedings but in other civil proceedings brought by ASIC for contraventions of the legislation it administers (**Position 10**). The proposed penalty increases are quite significant, and we believe are completely justified in light of the types of financial services misconduct Australia has witnessed in recent years.

Financial Rights is particularly supportive of extending civil penalty consequences to insurers that contravene certain obligations under the *Insurance Contracts Act* (**Position 14**). Through the operation of our national Insurance Law Service we have seen insurers regularly behave in ways that we consider in breach of their duties of utmost good faith. If section 13 were a civil penalties provision we believe ASIC could more regularly take action against insurers for these breaches and hopefully deter additional misconduct in the future. We are particularly encouraged that such penalties would not only apply in relation to insurance claims handling, but also in relation to pre-contractual and post-contractual conduct by insurers.

However, we support the recommendations made by ASIC in its own submission to this Position Paper which consider that some of the proposals do not go far enough in addressing the gaps in penalties in the current legislation and in ASIC's regulatory toolkit more broadly. We support ASIC's recommendation that the maximum term of imprisonment for all criminal offences should be

multiplied by 15 instead of 10 (**Position 2**). We also support the recommendation that the pecuniary penalties for strict and absolute liability offences should be doubled for individuals as well as for corporations (**Position 7**).

There are also two Taskforce Positions that ASIC disagrees with in its written submission (**Positions 5 and 16**). We support ASIC's alternative recommendations on these two points. First in relation to removing imprisonment as a possible sanction for strict and absolute liability offences we agree with ASIC that this would send the wrong message. Section 190 of the *Corporations Act* currently bears imprisonment as a possible sanction for strict and absolute liability offences and even though the Attorney General's Department guide stipulates these offenses should not be punishable by imprisonment, removing this penalty altogether might undermine ASIC's prosecution of these offenses. Second, in relation to new infringement notices, we support ASIC's proposal that all new infringement notice provisions in the *Corporations Act* should utilise the ration currently in use under the *Credit Act*, being one-fortieth of the maximum penalty that a court could impose for civil penalty provisions.

Finally, Financial Rights encourages the Taskforce to go even further in relation to civil penalties for *NCCP Act* contraventions and *Corporations Act* Financial Services (Chapter 7) contraventions. These penalties should be aligned with the *ASIC Act* and the *Australian Consumer Law* contraventions, given that these are all about consumer protection.

Thank you again for the opportunity to comment in this Initial Consultation. If you have any questions or concerns regarding this submission please do not hesitate to contact the Financial Rights Legal Centre on (02) 9212 4216.

Kind Regards,



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