



FINANCIAL PLANNING  
ASSOCIATION of AUSTRALIA

24 November 2017

ASIC Enforcement Review  
Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Email: [ASICenforcementreview@Treasury.gov.au](mailto:ASICenforcementreview@Treasury.gov.au)

Dear Sir / Madam

### Strengthening Penalties for Corporate and Financial Sector Misconduct

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide comments in response to the ASIC Enforcement Review's Positions Paper 7: Strengthening Penalties for Corporate and Financial Sector Misconduct.

Ensuring there is a strong and flexible penalties regime available to the Regulator is vital for deterring misconduct and protecting consumers.

We would welcome the opportunity to discuss the matters raised in our submission with you further. If you have any queries, please do not hesitate to contact me on 02 9220 4500 or [heather.mcevoy@fpa.com.au](mailto:heather.mcevoy@fpa.com.au).

Yours sincerely

**Heather McEvoy**  
*Policy Manager*  
Financial Planning Association of Australia<sup>1</sup>

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<sup>1</sup> The Financial Planning Association (FPA) has more than 12,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and super for our members – years ahead of FOFA.
- An independent conduct review panel, Chaired by Mark Vincent, deals with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules required of professional financial planning practices. This is being exported to 26 member countries and 170,000 CFP practitioners of the FPSB.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. Since 1st July 2013 all new voting members of the FPA have been required to hold, or be working towards, an approved undergraduate degree as a minimum.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional designations, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board



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# Position Paper 7

## Strengthening Penalties for Corporate and Financial Sector Misconduct

**FPA submission to  
ASIC Enforcement Review**

**24 November 2017**



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## INTRODUCTION

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The FPA acknowledges that ASIC's enforcement activity has in some instances been restricted by the current penalty regime. There is a need to improve the penalties available to give ASIC greater flexibility to tailor penalties to suit the circumstances and level of the misconduct. Penalties should be designed to incentivise good conduct, and strongly disincentivise misconduct. Overall, incentives and disincentives ought to be purposefully designed to encourage and support the emergence of an independent financial planning profession in Australia. Professionalisation is the best strategy to ensure Australian consumers experience high quality financial advice in their best interest. Professionalisation is a powerful normative force for modifying individual behaviour.

To support professionalisation, the penalty regime needs to be tough on the perimeters. The unlicensed, unqualified, and inexperienced should face powerful sanctions to deter unlawful participation. In all areas, for the same breaches, the penalties for unlicensed operators should exceed those of licensed and authorised operators. The regime should also be tough on offenses of fraud and dishonesty.

However, those who meet the high entry standards and continuing participation standards necessary to earn the privilege to professionally advise, should be treated with dignity, justice and fairness. This includes tolerance for when they make unintentional mistakes. Tolerance for when their conduct is directed or controlled by others, or by systems of work they are obliged to follow. The strongest sanctions for those inside the profession should be reserved for offenses of fraud, dishonesty and gross professional misconduct. However, it is also important for the development of an independent profession, that professional bodies have a recognised role in setting professional norms and sanctioning their own members for the protection of the public and the profession.

There must be an appropriate balance between flexibility, deterrence, ensuring appropriate penalties are imposed for the misconduct, and the behavioural incentives provided by arrangements to protect and financially compensate consumers; with the need for a regulatory system that facilitates and encourages improvements in the quality of professional services and products for consumers rather than perpetuating an over-cumbersome focus on compliance.

The experience of the last 10 years shows that if the penalty for breaching consumer disclosure laws is too high, industry diverts resources to compliance. Consumers will be better served by professional quality advice in their best interests, than reams of incomprehensible disclosure. Such disclosure aims to address every possible technical risk of breaching the law and does not serve the consumer need for readable advice documentation.

The FPA in principle supports extending the penalty regime to provide ASIC with a range of regulatory tools to be applied based on the circumstances and severity of the misconduct. However the purpose of the changes must be to address wrongdoing, not to be heavy handed with compliance and penalising those providing quality professional services to consumers. The FPA believes the enforcement options within the law should incentivise individual professionalisation, rather than focus on imposing disproportionate penalties for disclosure matters of mere negligence, which will continue to feed the compliance driven culture of financial services.

The proposed changes will, in some cases, provide ASIC with a package of civil penalty and infringement notice enforcement options for specific provisions within the *Corporations Act 2001* (Cth) (the **Corporations Act**) and *ASIC Act 2001* (Cth) (the **ASIC Act**). The FPA supports this approach in



principle and emphasises the need to apply the new penalties appropriately scaled based on the severity and systemic nature of the breach, whether it was an intentional or unintentional act, and the consumer detriment caused.

An enhanced penalty regime should include significant penalties that clearly identify and create boundaries around those who are licensed to provide financial services and products to retail clients, and those who are not. The licensing regime holds entities to account to the consumer protections afforded under the Corporations Act. Unlicensed conduct leaves consumers exposed and with no course for redress. Penalties for unlicensed conduct - including providing financial advice without a license, authorisation or against a banning order, or holding out to be licensed or authorised - should be significant and attract the maximum penalty.

The FPA's submission focuses on proposals and provisions related to the provision of financial advice and the entities that provide this financial service to consumers.

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## CRIMINAL PENALTIES

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*Position 1: The maximum imprisonment penalties for criminal offences in ASIC-administered legislation should be increased as outlined in Annexure B*

The FPA notes the Taskforce view that:

*...as far as possible similar conduct should give rise to similar consequences. Accordingly, it has adopted the preliminary position that criminal penalties for the most serious criminal offences in the Corporations Act should be increased to the highest terms of imprisonment and fines available under that Act, which are currently applicable to market misconduct and insider trading. Offences of comparable seriousness given the nature of the offending and/or the consequences for the market or financial consumers should give rise to the same penalties.*

The FPA believes it is essential that the regulatory design and the penalties regime have appropriate balance. We have considered the proposed increases to each specific provision in Annexure B based on the following principles:

- the most serious and deliberate misconduct should receive the maximum penalty
- the penalties for each provisions must be proportionate to the offence, and consistent for similar offences
- people should not be held accountable to criminal standards for matters of mere negligence
- criminal penalties should be reserved for circumstances of fraud, dishonesty and intentional wrongdoing for personal reward, and
- there must be a degree of moral culpability to the wrongdoing to attract a criminal penalty.

As discussed in the Positions Paper, dishonesty is truly criminal in character and warrants a criminal sanction.



Annexure B proposes increasing the penalty for defective disclosure to the maximum penalty of 10 years imprisonment. In contrast, the proposed maximum penalty for unlicensed conduct is 5 years<sup>2</sup>. We disagree that the proposed penalty increases are in proportion to the dishonest and intentional conduct, and the consumer detriment related to a breach these provisions.

Unlicensed conduct shows intent to behave and act dishonestly and against the law – that is a person actively decides to provide a financial service with no licence, authorisation, or against a banning order. This conduct shows deliberate criminal intent for personal gain, to avoid the requirements of the law which have been put in place to protect consumers. This leaves retail consumers completely exposed to the wrongdoing by a person who more than likely does not meet the high competency requirements of the licensing regime, with no or little course for redress. Such behaviour warrants the maximum criminal sanctions, pecuniary penalties and disgorgement measures.

The current regulatory framework for financial advice has been built around a very compliance driven disclosure regime. However evidence shows that disclosure does not lead to improvements in the quality of financial advice.

As stated in the Financial System Inquiry Interim Report:

*“Although disclosure is an important part of the regulatory regime for providing financial products and services, alone it has not been sufficient to enable consumers to make informed decisions and consistently purchase financial products and services that meet their needs. Consumers are often disengaged and do not invest the time — and some consumers also lack the financial literacy skills — to understand disclosure documents. Disclosure has also been costly for industry. These problems remain despite numerous efforts to improve the regime.”<sup>3</sup>*

It is disappointing that the Taskforce is continuing the focus on the disclosure regime, proposing criminal penalties for breaches of financial advice disclosure provisions that are double the proposed imprisonment penalties for unlicensed conduct.

A breach of the financial advice disclosure provisions may not be intentional or even in the control of the provider. The onus of evidential proof is placed on the defender in relation to potential breaches of the disclosure requirements in the Corporations Act. For such potential breaches there may be circumstances where intent may not be able to be definitively determined which creates an element of doubt in such cases. It is concerning that the Taskforce has proposed to apply the maximum imprisonment penalty of 10 years imprisonment to a potential breach of such provisions. The FPA opposes the proposed increased to 10 years imprisonment for disclosure provisions.

**See Attachment 1 – Proposed changes to imprisonment penalties, for FPA’s response to the proposed increases in criminal penalties for specific provisions.**

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<sup>2</sup> S911A(1), s911B(1) and s911C

<sup>3</sup> <http://fsi.gov.au/publications/interim-report/06-consumer-outcomes/assessing-the-reg-framework/>



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**Position 2:** *The maximum pecuniary penalties for all criminal offences (other than the most serious class of offences – see Annexure B) in ASIC-administered legislation should be calculated by reference to the following formula:*

*Maximum term of imprisonment in months multiplied by 10 = penalty units for individuals, multiplied by a further 10 for corporations.*

The FPA opposes the proposed formula for determining pecuniary penalties for criminal offences.

The *Crimes Act* 1914 (Cth) (the **Crimes Act**) formula uses multiples of 5 for determining pecuniary penalties; the Taskforce is proposing to double this figure to multiples of 10. We question the justification for a formula that is double that used for breaches of the *Crimes Act*.

The FPA would support the use of the *Crimes Act* formula for determining pecuniary penalties under ASIC-administered legislation:

*Maximum term of imprisonment in months multiplied by 5 = penalty units for individuals, multiplied by a further 5 for corporations.*

This approach would provide consistency and simplicity to determining pecuniary penalties.

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**Position 3:** *The maximum penalty for a breach of section 184 should be increased to reflect the seriousness of the offence.*

The FPA supports the proposal to increase the maximum penalty for a breach of s184.

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**Position 4:** *The Peters test should apply to all dishonesty offences under the Corporations Act*

Under the '*Peters test*', conduct is criminally dishonest if the fact-finder concludes that 'ordinary, decent people' would consider the conduct to be dishonest. This objective definition retains a reference to ordinary community standards.

Whilst the *Peters test* is useful it has to be used specifically. For instance, it is not very useful to say that a director 'acted dishonestly'. It's more useful to say that the director 'used company funds dishonestly'.

The use of the *Peters test* for corporate offences provides less opportunity for 'creative compliance' – where transactions are structured to comply with the law, but the transaction itself goes against the spirit of what the law was trying to achieve.

It is logical to apply the same standards to commercial entities as are applied to individuals and communities.

The FPA supports the use of the *Peters test* for all dishonesty offences under the *Corporations Act*.



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## STRICT AND ABSOLUTE LIABILITY OFFENCES

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### *Position 5: Remove imprisonment as a possible sanction for strict and absolute liability offences*

The Taskforce proposes to remove imprisonment for strict liability offences and to give ASIC discretion to deal with such contraventions through the penalty notice regime in s1313 of the Corporations Act.

The FPA supports this position.

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### *Position 6: Introduce an ordinary offence to complement a number of strict and absolute liability offences as outlined in Annexure C*

The FPA supports this position in principle.

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### *Position 7: Maximum pecuniary penalties for strict and absolute liability offences should be a minimum of 20 penalty units for individuals and 200 penalty units for corporations*

The FPA supports this position.

The Taskforce has also proposed a consequential change for criminal pecuniary penalties for non-strict liability offences. “To reflect the additional seriousness of these offences (above strict liability offences), a threshold of 30 penalty units is proposed for individuals and a threshold of 300 penalty units for corporations.” The FPA supports this proposal.

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### *Position 8: All strict and absolute liability offences should be subject to the penalty notice regime*

The FPA supports the proposal to make all strict and absolute liability offences subject to the penalty notice regime.

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## CIVIL PENALTIES

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### *Position 9: Maximum civil penalty amounts in ASIC-administered legislation should be increased, as follows:*

Act	Provisions	Individual	Corporation
ASIC Act	Consumer protection provisions consistent with the Australian Consumer Law (apart from offences relating to substantiation notices)	2,500 penalty units (currently \$525,000)	Greater of 50,000 penalty units (currently \$10.5m), 3 times the value of benefits obtained or 10% of annual turnover.
Corporations Act, and Credit Act	All other civil penalty provisions	2,500 penalty units (currently \$525,000)	Greater of 12,500 penalty units (currently \$2.625m), 3 times the value of benefits obtained or 10% of annual turnover.

The FPA supports the proposed increase of the maximum civil penalty amounts for individuals to be 2,500 penalty units (currently \$525,000) for the ASIC Act, Corporations Act and the *National Consumer Credit Protection Act 2009* (Cth) (the **Credit Act**).



However we question why there is such a significant difference between the proposed maximum civil penalty amount for corporations for the Corporations Act and Credit Act, and the planned amendment to the civil penalty amount for corporations in the Australian Consumer Law (**ACL**), which is:

*Greater of \$10 million, 3 times the value of benefits obtained or 10% of annual turnover*

There is also not a significant difference between the proposed maximum penalty in the Corporations Act for individuals versus corporations.

The Taskforce is proposing to extend the civil penalty regime to apply to provisions including unlicensed conduct. As discussed in our response to Position 12 below, the FPA believe unlicensed conduct is criminal in its nature and warrants the maximum criminal sanction, however we support the extension of a civil penalty to these unlicensed conduct provisions as it would give ASIC greater flexibility. Nevertheless, strict conditions should apply specifically to the civil penalties for 911A, 911B and 911C including that the maximum civil penalty should apply.

The FPA questions whether the proposed maximum penalty amount for corporations would provide a sufficient deterrent to unscrupulous operators who deliberately and knowingly provide financial advice without a license, authorisation or against a banning order.

The proposed amount is a maximum penalty. Therefore the Regulator has the flexibility to appropriately impose a lesser amount for a lower level wrongdoing.

The FPA recommends that the maximum penalty amount in the Corporations Act for corporations be set at the same level as that of the ACL. This will also ensure consistency and simplicity in the penalty regimes across the laws administered by ASIC.

It is important to note that the FPA's recommendations are made based on the fundamental principle that unlicensed conduct is a much higher level of misconduct than a breach of financial advice disclosure provisions. While unlicensed conduct should attract the maximum penalty, a breach of the disclosure provisions should be assessed based on the circumstances and consumer detriment of each case. A civil penalty should only be applied on a scale based on the severity and consumer detriment of the breach. Such penalties should only be considered for significant, intentional and systemic breaches of disclosure provisions.

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*Related additional ASIC request: ASIC considers that the maximum civil penalty for an individual should be increased to \$1million (or the equivalent in penalty units) or 3 times the value of the benefits obtained or losses avoided. The Taskforce has not adopted this as its preliminary position but seeks submissions on whether such a penalty would be appropriate.*

The FPA oppose ASIC's request for the maximum civil penalty for an individual to be increased to \$1million (or the equivalent in penalty units) or 3 times the value of the benefits obtained or losses avoided. The Taskforce proposal is a significant increase consistent with current or planned amounts in other Acts.

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**Position 10:** *Disgorgement remedies should be available in civil penalty proceedings brought by ASIC under the Corporations, Credit and ASIC Acts*

The FPA supports the position to make disgorgement remedies available in civil penalty proceedings brought by ASIC under the Corporations Act, the Credit Act and the ASIC Act, with priority given to consumer compensation and remediation (as per our response to Position 11 below).



As per our response to Position 11, priority must be given to compensating and remediating consumers including in relation to funds recovered through disgorgement remedies. Otherwise, the funds gained through disgorgement should be directed to ASIC's funding of its enforcement activity and deducted off the enforcement regulatory costs recovered via the ASIC Supervisory Cost Recovery Levy for the relevant sub-sector. Those doing the right thing by consumers should not have to pay for the misconduct of others.

If this recommendation is not supported by the Taskforce, the FPA would support the decision of the allocation of disgorged funds to be left to the court's discretion.

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*Position 11: The Corporations Act should require courts to give priority to compensation*

The FPA supports this position. This principle should not only apply in the court setting but as a priority in ASIC's investigations and decisions, and those of the new Financial Services and Credit Panel (FSCP).

Industry experience shows that penalising a licensee or authorised representative does not help a consumer who has experienced detriment. While the extension of civil penalties may provide greater efficiencies for the Regulator, the penalty, including the process required to be undertaken to impose the penalty, must not only be appropriate but give priority to compensating and remediating the consumer.

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*Position 12: Civil penalty consequences should be extended to a range of conduct prohibited in ASIC-administered legislation*

The proposal under Position 12 includes applying a civil penalty to sections 911A, 911B and 911C of the Corporations Act which relate to unlicensed conduct. As previously stated, unlicensed conduct shows intent to behave and act dishonestly and against the law – that is a person actively decides to provide a financial service with no licence, authorisation, or against a banning order. This means the person is providing a financial service to consumer without any of the consumer protections afforded by the Corporations Act. Therefore it is conduct that is criminal in its nature and warrants the maximum criminal sanction.

The FPA understands that the current penalties of some provisions greatly restricts ASIC's ability to prosecute perpetrators. While the FPA believes a breach of 911A, 911B and 911C should attract a criminal penalty, we support the extension of a civil penalty to these provisions as it would give ASIC greater flexibility. However the following conditions should apply specifically to the civil penalties for 911A, 911B and 911C:

- the maximum civil penalty should apply
- disgorgement of profits, or avoidance of loss, resulting from the conduct must apply
- priority must be given to compensating consumers over payment of the civil penalty in cases where funds are limited, and
- where the fault elements of these provisions and/or the default fault elements in the Criminal Code can be established, the relevant contravention should be a criminal offence.

The FPA supports the extension of a civil penalty to the following financial services disclosure provisions, and ASIC compliance and breach reporting requirements sections, as proposed in the positions paper. However the civil penalty should only apply to systemic breaches of these provisions.



Combined with the proposal to extend the infringement notice regime to some these provisions, it will provide ASIC with a flexible enforcement toolkit to enable the Regulator to tailor the penalty to the circumstances and level of the breach. As stated above, the proposed package of enforcement penalties should be applied on a scale based on the severity, intent and systemic nature of the breach.

Financial services disclosure	
1012A	Obligation to give a PDS —personal advice recommending particular financial product
1012B	Obligation to give a PDS - situations related to issue of financial products
1012C	Obligation to give a PDS - offers related to sale of financial products
941A	Obligation on financial services licensee to give a FSG if financial service provided to person as a retail client
941B	Obligation on authorised representative to give a FSG if financial service provided to person as a retail client
946A	Obligation to give client a SoA
952E	Give a defective disclosure document (FSG, SoA etc) to a retail client
1021E	Give a defective disclosure document (PDS etc) to a retail client
Financial services and markets – failure to notify ASIC of breaches of obligations	
912D	Failure to notify ASIC of breach of obligations
792B	Failure to notify ASIC of breach of obligations
821B	Failure to notify ASIC of breach of obligations
Compliance with ASIC requirements	
912C(3)	Failure to comply with ASIC direction to provide a statement or audit report
ASICA 63(1)	Failing to comply with requirements made under Part 3 – Investigations and information gathering
NCCP 290	Failing to comply with requirements made under Chapter 6 – Compliance and enforcement

The FPA does not have a view on the proposal to extend civil penalty consequences to corporations or financial markets provisions, or Credit Code obligations.

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**Position 13:** *Key provisions imposing general obligations on licensees should be civil penalty provisions*

The FPA supports the position to apply civil penalty provisions to key provisions imposing general obligations on licensees.

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## INFRINGEMENT NOTICES

**Position 15:** *Infringement notices be extended to an appropriate range of civil penalty offences*

Extending the infringement notice regime to an appropriate range of civil penalty offences may offer the following benefits:

- provide an expanded suite of penalties for some of the provisions where the breach is less severe in its nature and in the consumer detriment caused
- some breaches that are currently not pursued by ASIC due to the restrictive nature of the current penalties regime, may potentially incur a penalty as there would be more flexible penalty options available to the Regulator
- combined with the proposal to introduce civil penalties, extending the infringement notice regime to certain provisions will provide greater flexibility for ASIC to tailor its enforcement activity to suit the circumstances and level of the conduct
- the infringement notice regime will introduce a remedial focus for appropriate provisions, which offers a better outcome for consumers, and



- the addition of this enforcement tool may act as a deterrent for individuals to breaching the relevant provisions.

However there is concern that expanding the infringement notice regime may not deliver the desired efficiency gains for penalising individuals and corporations for breaches. Statistics show the length of time that it takes to issue a penalty can be in excess of 250 days<sup>4</sup>. It may also have questionable deterrence benefit particularly for corporations where the infringement notice could become a business as usual type of cost. To overcome this issue, the penalty for corporations should be set at an appropriate level.

The FPA supports infringement notices being extended to the following civil penalty offences, as proposed:

912A	Obligations Of Financial Services Licensees – General Obligations
912D	Obligations Of Financial Services Licensees - Obligation to notify ASIC of certain matters
941A	Obligation on financial services licensee to give a Financial Services Guide if financial service provided to person as a retail client
941B	Obligation on authorised representative to give a Financial Services Guide if financial service provided to person as a retail client
946A	Obligation to give client a Statement of Advice
952E	Offence of giving a defective disclosure document or statement (whether or not known to be defective)
1012A	Obligation to give Product Disclosure Statement--personal advice recommending particular financial product
1012B	Obligation to give Product Disclosure Statement--situations related to issue of financial products
1012C	Obligation to give Product Disclosure Statement--offers related to sale of financial products

The Taskforce has also proposed that the infringement notice regime apply to s911C – *Prohibition on holding out*. The FPA oppose the extension of the infringement notice to this provision As previously stated, unlicensed conduct should attract a criminal penalty. The remedial approach of the infringement notice regime is not appropriate for unlicensed conduct provisions such as s911C.

The FPA does not have a view on the proposal to extend the infringement notices regime to corporations, markets, clearing and settlement facilities, or derivative trade repositories.

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**Position 16:** *Infringement notices should be set at 12 penalty units for individuals and 60 penalty units for corporations for any new infringement notice provisions*

The FPA supports the position that infringement notices be set at 12 penalty units for individuals and at least 60 penalty units for corporations for new infringement notice provisions.

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<sup>4</sup> Senate Standing Committee on Economics: Answers to questions on notice. Budget Estimates – 29 May – 31 May 2012



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## PEER DISCIPLINARY REVIEW PANELS

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The FPA supports the introduction of the Financial Services and Credit Panel (**FSCP**) as it will ensure industry expertise is integrated into ASIC's decision making in relation to investigations. Importantly, industry expertise will ensure consideration is given to the peer expectations and best practice standards alongside legal provisions and ASIC policies, specific to each profession or sector of financial services.

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*Would it be appropriate for ASIC to delegate to a peer review panel additional administrative functions in relation to financial services and credit sectors (apart from banning individuals from these industries as currently proposed by ASIC)?*

The FPA would support ASIC delegating to the FSCP additional administrative functions in relation to financial advice.

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*If so, should the Panel be able to exercise powers, such as the power to issue infringement notices and/or the power to accept enforceable undertakings?*

Yes. The FPA would support expanding the role and function of the FSCP to empower the Panel to issue infringement notices and/or accept enforcement undertakings.

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*Should the Panel be comprised of industry and non-industry participants (e.g. lawyers or academics) only or should members of ASIC be included?*

The Panel should be comprised of industry and non-industry participants only. Members of ASIC should not be on the FSCP.

ASIC is not a peer but the Regulator. Including ASIC on the Panel would change the nature of the Panel from a peer disciplinary review panel to an ASIC advisory type panel. Importantly, it would inhibit the decision-making of the panel and take away much of its independence.

With the Market Disciplinary Panel (**MDP**), ASIC set the guidelines for the MDP to independently make decisions about negotiated settlements between the parties (ASIC and the recipient) referred to it by the ASIC Deterrents Team. ASIC is not involved in the decision making or operations of the MDP.

The Financial Services and Credit Panel should operate under the same or similar structure, and be chaired by a senior independent lawyer to ensure it does not get bogged down in legal dispute.

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*Should the Panel be subject to minimum procedural standards? And, if so, what procedural standards are appropriate? For example, should publication of panel decisions be automatically stayed if an appeal is lodged?*

Yes, the FSCP should be subject to procedural standards.

The FPA suggests specific consultation should be undertaken on appropriate procedural standards for the FSCP. Regulatory Guide 225 - *Markets Disciplinary Panel practices and procedures* and Regulatory Guide 216 - *Markets Disciplinary Panel*, set a sound benchmark for the procedural standards of such panels.



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Yes, the FPA believe publication of panel decisions should be automatically stayed if an appeal is lodged.

The FPA believe the recipient should have the right to legal representation before the Panel.



## ATTACHMENT 1 – PROPOSED INCREASES TO IMPRISONMENT PENALTIES

Relevant criminal offence	Current criminal penalty	Proposed criminal penalty	FPA comment
<b>Corporations Act 2001</b>			
<b>Part 2D.1 – Duties and powers</b>			
184(1)	5 years	10 years	Support
184(2)	5 years	10 years	Support
184(3)	5 years	10 years	Support
<b>Part 2D.6 – Disqualification from managing corporations</b>			
206A(1)	1 year	5 years	Support
<b>Chapter 2M – Financial reports and audit</b>			
344(2)	5 years	10 years	Support
<b>Part 5C.2 – Responsible entity of registered scheme</b>			
601FD(4)	5 years	10 years	Support
601FE(4)	5 years	10 years	Support
<b>Part 5D.4 – Duties of officers and employees of licensed trustee companies</b>			
601UAA(1)	5 years	10 years	Support
601UAB(1)	5 years	10 years	Support
<b>Chapter 6B – Rights and liabilities in relation to Chapter 6 and 6A matters</b>			
670A(3)	1 year	5 years	Support
<b>Chapter 6D – Fundraising</b>			
708AA(10)	6 months	2 years	Support
708A(9)	6 months	2 years	Support
727(1)	5 years	10 years	Support
728(3)	5 years	10 years	Support
<b>Part 7.6 – Licensing of providers of financial services</b>			
REQUIREMENT TO BE LICENSED OR AUTHORISED			
911A(1) Need for an Australian financial services licence Subject to this section, a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.	2 years	5 years	Support a higher increase to 10 years.
911B(1) Providing financial services on behalf of a person who carries on a financial services business	2 years	5 years	Support a higher increase to 10 years.
911C Prohibition on holding out	1 year	2 years	Support a higher increase to 10 years.
OBLIGATIONS OF FINANCIAL SERVICES LICENSEES			
912C(3) Direction to provide a statement (3) The licensee must comply with a direction given under this section: (a) within the time specified in the direction if that is a reasonable time; or (b) in any other case--within a reasonable time.	6 months	2 years	Oppose. The proposed increase is out of proportion with



Relevant criminal offence	Current criminal penalty	Proposed criminal penalty	FPA comment
			penalties for other provisions. A doubling of the current maximum penalty to 1 year would be more appropriate.
912D(1B) Obligation to notify ASIC of certain matters	1 year	2 years	Support
912E(1) Surveillance checks by ASIC	6 months	2 years	Support
<b>Part 7.6 – Licensing of providers of financial services</b>			
920C Effect of banning orders	6 months	5 years	Support
<b>Part 7.7 – Financial services disclosure (financial services guide, general advice warning, statement of advice etc)</b>			
952C(3) Offence of failing to give a disclosure document or statement (3) A person (the providing entity) commits an offence if: (a) the providing entity is required by a provision of this Part to give another person a disclosure document or statement (the required disclosure document or statement ); and (b) the providing entity does not give (within the meaning of section 940C) the other person anything purporting to be the required disclosure document or statement by the time they are required to do so.	2 years	5 years	Oppose If it is proven to be an intentional and systemic breach, it would be appropriate to impose significant penalties. However a breach of this provision may be unintentional, or may not be within the control of the adviser, and may not involve intentionally dishonest behaviour. Therefore the proposed penalty is too high in proportion to other provisions.
952D(1) Offence of giving a disclosure document or statement knowing it to be defective	5 years	10 years	Oppose A disclosure document could be defective unintentionally or in a minor way therefore the proposed penalties are too harsh. The doubling of this penalty is disproportionate to the offence, and inconsistent with similar offences. It is higher than penalties of much more severe and detrimental offences such as



Relevant criminal offence	Current criminal penalty	Proposed criminal penalty	FPA comment
			unlicensed conduct.
<p>952D(2) (a)...Authorised representative ...</p> <p>(i) gives (see <a href="#">subsection (3)</a>) a person a disclosure document or statement in circumstances in which the document or statement is required by a provision of this Part to be given to the person; or</p> <p>(ii) gives (see <a href="#">subsection (3)</a>), or makes available to, a person a disclosure document or statement, being a Financial Services Guide or a Supplementary Financial Services Guide, reckless as to whether the person will or may rely on the information in it; and</p> <p>(b) the representative knows that the disclosure document or statement is defective.</p>	5 years	10 years	<p>Oppose</p> <p>A disclosure document could be defective unintentionally or in a minor way therefore the proposed penalties are too harsh.</p> <p>The doubling of this penalty is disproportionate to the offence, and inconsistent with similar offences. It is higher than penalties of much more severe and detrimental offences such as unlicensed conduct.</p> <p>There can be no absolute certainty to determining intent or knowledge in relation to this provision. Where there is an element of doubt it is not reasonable to impose excessive penalties.</p>
<p>952F(2) Offences of financial services licensee knowingly providing defective disclosure material to an authorised representative</p> <p>(2) A financial services licensee commits an offence if:</p> <p>(a) the licensee provides disclosure material (being a disclosure document or statement) to an authorised representative of the licensee as mentioned in <a href="#">paragraph (1)(a)</a> or (b); and</p> <p>(b) the licensee knows that the disclosure document or statement is defective.</p> <p>(1) For the purposes of this section, a financial services licensee provides disclosure material to an authorised representative of the licensee if:</p> <p>(a) the licensee authorises the distribution by the representative of a disclosure document or statement, being a Financial Services Guide or a Supplementary Financial Services Guide; or</p> <p>(b) the licensee provides the representative with a disclosure document or statement, being a Statement of Advice, or information, a statement or a copy of a record required by <a href="#">subsection 941C(5)</a> or (7), <a href="#">941D(2)</a>, <a href="#">946AA(5)</a>, <a href="#">946B(3)</a>, (6) or (8) or <a href="#">946C(2)</a>; or</p>	5 years	10 years	<p>Oppose</p> <p>A disclosure document could be defective unintentionally or in a minor way therefore the proposed penalties are too harsh.</p> <p>The doubling of this penalty is disproportionate to the offence, and inconsistent with similar offences. It is higher than penalties of much more severe and detrimental offences such as unlicensed conduct.</p>



Relevant criminal offence	Current criminal penalty	Proposed criminal penalty	FPA comment
			<p>There can be no absolute certainty to determining intent or knowledge in relation to this provision. Where there is an element of doubt it is not reasonable to impose excessive penalties.</p>
<p>952F(3) A financial services licensee commits an offence if:</p> <p>(a) the licensee provides disclosure material (being information) to an authorised representative of the licensee as mentioned in <a href="#">paragraph (1)(c)</a>; and</p> <p>(b) the licensee knows that, if the information is included by the representative as mentioned in that <a href="#">paragraph</a>, the disclosure document or statement concerned will be defective.</p> <p>(1) (c) the licensee provides the representative with information:</p> <p>(i) for the purpose of it being included by the representative in a disclosure document or statement, being a Statement of Advice, or information, a statement or a copy of a record required by <a href="#">subsection 941C(5) or (7), 941D(2), 946AA(5), 946B(3), (6) or (8) or 946C(2)</a>; or</p> <p>(ii) knowing that it is likely that it will be so included in such a document.</p>	<p>5 years</p>	<p>10 years</p>	<p>Oppose</p> <p>Disclosure documents such as an SOA which is tailored to each client's needs, can include specific client details that the licensee may not be aware of. This information may impact on the relevance of and the client interpretation of the information provided by the licensee for inclusion in the document. The purpose of the SOA is to provide client specific financial advice. We are concerned that preparing a client specific SOA could lead to an unintentional breach of this provision.</p> <p>The doubling of this penalty is disproportionate to the offence, and inconsistent with similar offences. It is higher than penalties of much more severe and detrimental offences such as unlicensed conduct.</p> <p>There can be no absolute certainty to determining intent or knowledge in relation to this provision. Where there is an element</p>



Relevant criminal offence	Current criminal penalty	Proposed criminal penalty	FPA comment
			of doubt it is not reasonable to impose excessive penalties.
<p>952F(4) A financial services licensee commits an offence if:</p> <p>(a) the licensee provides disclosure material (being information) to an authorised representative of the licensee as mentioned in <a href="#">paragraph (1)(c)</a>; and</p> <p>(b) the information relates to a matter or matters, but the licensee knows that it is only some of the information relating to the matter or matters that the disclosure document or statement concerned is required to contain; and</p> <p>(c) the licensee is reckless as to whether the representative will or may prepare the disclosure document or statement on the basis that the information is all the information relating to the matter or matters that the disclosure document or statement is required to contain.</p>	5 years	10 years	<p>Oppose</p> <p>The doubling of this penalty is disproportionate to the offence, and inconsistent with similar offences. It is higher than penalties of much more severe and detrimental offences such as unlicensed conduct.</p> <p>There can be no absolute certainty to determining intent or knowledge in relation to this provision. Where there is an element of doubt it is not reasonable to impose excessive penalties.</p>
<p>952L(1) Offences if financial services licensee or authorised representative becomes aware that a Financial Services Guide (or Supplementary FSG) is defective</p> <p>(1) A financial services licensee commits an offence if:</p> <p>(a) the licensee has authorised an authorised representative of the licensee to distribute a Financial Services Guide or a Supplementary Financial Services Guide; and</p> <p>(b) the licensee becomes aware that the Financial Services Guide, or the Supplementary Financial Services Guide, is defective; and</p> <p>(c) the licensee does not, as soon as practicable, give the representative a direction that satisfies one or more of the following subparagraphs:</p> <p>(i) a direction not to distribute the Financial Services Guide or the Supplementary Financial Services Guide;</p> <p>(ii) a direction not to distribute the Financial Services Guide unless it is accompanied by a Supplementary Financial Services Guide that corrects the deficiency;</p> <p>(iii) a direction not to distribute the Financial Services Guide or the Supplementary Financial Services Guide without first altering it in a way that is specified in the direction, being a way that corrects the deficiency and that complies with section 942E or 943F.</p>	5 years	10 years	<p>Oppose.</p> <p>The doubling of this penalty is disproportionate to the offence, and inconsistent with similar offences. It is higher than penalties of much more severe and detrimental offences such as unlicensed conduct.</p>
<p>952L(2) An authorised representative commits an offence if:</p> <p>(a) the representative is given a direction under <a href="#">subsection (1)</a>; and</p> <p>(b) the representative does not comply with the direction.</p>	2 years	5 years	<p>Oppose.</p> <p>This penalty is disproportionate to the offence, and inconsistent with similar offences. It is higher than penalties of much</p>



Relevant criminal offence	Current criminal penalty	Proposed criminal penalty	FPA comment
			more severe and detrimental offences such as unlicensed conduct.
<b>Part 7.8 – Other provisions relating to conduct</b>			
982D DEALING WITH CLIENTS' MONEY			
Permitted use of loan	6 months	2 years	Support
991B(2) Financial services licensee to give priority to clients' orders	6 months	1 year	Support
991E(1) Obligations of financial services licensee in relation to dealings with non-licensees	6 months	1 year	Support
991E(3)	6 months	1 year	Support
993B(3) Offence of failing to pay client money into an account as required	5 years	10 years	Support
993C(3) Offence of failing to comply with requirements relating to client money account	2 years	5 years	Support if the act is proven to be intentional. However we question why a breach of this provision does not attract the same penalty as that proposed for 993B(3). s993C(3) states that the licensee commits an offence if they do not comply with regulations made for the purposes of section s981C. This includes requirements for complying with certain matters in relation to s981B including matters covered by s981B(1). Under s993B(3) the licensee commits an offence if they do not comply with s981B(1).
<b>Part 7.9 – Financial product disclosure – issue, sale and purchase</b>			
<i>Part 7.9 Division 2 – Product disclosure statements</i>			
1012DAA(10) Rights issues for which Product Disclosure Statement is not required	6 months	2 years	Support
1012DA(9) Product Disclosure Statement not required for sale amounting to indirect issue	6 months	2 years	Support
<i>Part 7.9 Division 3 – Other obligations of the issuer</i>			
1017E(3) Dealing with money received for financial product before the product is issued	2 years	5 years	Support a higher increase.



Relevant criminal offence	Current criminal penalty	Proposed criminal penalty	FPA comment
1017E(4) – dealing with money provisions	2 years	5 years	Support
1017G(1) Certain product issuers and regulated persons must meet appropriate dispute resolution requirements	2 years	5 years	Support Given the limited implications for not paying an EDR determinations, consideration should be given to the adequacy of this proposed maximum penalty. Given unpaid EDR determinations may in the future be referred to a Compensation Scheme of Last Resort to be paid by the members of the industry doing the right thing, this penalty should act as a significant deterrent for breaching dispute resolution requirements in the circumstances of the provision.
<i>Part 7.9 Division 7 - Enforcement</i>			
1021C(3) Offence of failing to give etc. a disclosure document or statement (3) A person (the providing entity ) commits an offence if: (a) the providing entity: (i) is required by a provision of this Part to give another person a <a href="#">Product Disclosure Statement</a> or a <a href="#">Supplementary Product Disclosure Statement</a> (the required disclosure document or statement ); or (ii) is required by <a href="#">paragraph</a> 1012G(3)(a) to orally communicate information (the required disclosure document or statement ) to another person; and (b) the providing entity does not: (i) if subparagraph (a)(i) applies--give (in accordance with section 1015C) the other person anything purporting to be the required disclosure document or statement by the time they are required to do so; or (ii) if subparagraph (a)(ii) applies--orally communicate to the other person anything purporting to be the information required by <a href="#">paragraph</a> 1012G(3)(a) by the time they are required to do so.	2 years	5 years	Oppose. An offence of this provision could be unintentional. This penalty is disproportionate to the offence, and inconsistent with similar offences. It is higher than penalties of much more severe and detrimental offences such as unlicensed conduct.
1021D(1) Offence of preparer of defective disclosure document or statement giving the document or statement knowing it to be defective	5 years	10 years	Oppose. A disclosure document could be defective unintentionally or in a minor way therefore the



Relevant criminal offence	Current criminal penalty	Proposed criminal penalty	FPA comment
			<p>proposed penalties are too harsh.</p> <p>The doubling of this penalty is disproportionate to the offence, and inconsistent with similar offences. It is higher than penalties of much more severe and detrimental offences such as unlicensed conduct.</p>
<p>1021D(2) Offence of preparer of defective disclosure document or statement giving the document or statement knowing it to be defective</p>	<p>5 years</p>	<p>10 years</p>	<p>Oppose.</p> <p>A disclosure document could be defective unintentionally or in a minor way therefore the proposed penalties are too harsh.</p> <p>The doubling of this penalty is disproportionate to the offence, and inconsistent with similar offences. It is higher than penalties of much more severe and detrimental offences such as unlicensed conduct.</p>
<p>1021J(2) Offences if preparer etc. of disclosure document or statement becomes aware that it is defective</p>	<p>2 years</p>	<p>5 years</p>	<p>Oppose.</p> <p>A disclosure document could be defective unintentionally or in a minor way therefore the proposed penalties are too harsh.</p> <p>This penalty is disproportionate to the offence, and inconsistent with similar offences. It is higher than penalties of much more severe and detrimental offences. For example the proposed increase</p>



Relevant criminal offence	Current criminal penalty	Proposed criminal penalty	FPA comment
			to just 2 years for concealing or falsifying records.
<p>1021J(3) A regulated person commits an offence if:</p> <p>(a) a disclosure document or statement (not being information required by <a href="#">paragraph</a> 1012G(3)(a)) has been provided to the person for distribution; and</p> <p>(b) the person becomes aware that the disclosure document or statement is defective; and</p> <p>(c) the person does not take reasonable steps to notify the person by whom, or on whose behalf, the disclosure document or statement was prepared of the particulars of the deficiency.</p>	2 years	5 years	<p>Oppose</p> <p>This penalty should not be increased.</p> <p>This provisions relates to a defective document that the person did not produce. The proposed increased penalty of 5 years is too high for this provision and disproportionate to the offence, and inconsistent with similar offences. For example the proposed increase to just 2 years for concealing or falsifying records.</p>
<b>Part 7.12 – Miscellaneous</b>			
1101E Concealing etc. of books	1 year	2 years	<p>Support a higher increase.</p> <p>This provision relates to a deliberate act of dishonesty and should attract a penalty in proportion to similar provisions of deliberate dishonest acts. The penalty for this provision should be increased to 5 -10 years.</p>
1101F(1A) Falsification of records	1 year	2 years	<p>Support a higher increase.</p> <p>This provision relates to a deliberate act of dishonesty and should attract a penalty in proportion to similar provisions of intentional dishonest acts. The penalty for this provision should be increased to 5 -10 years.</p>



Relevant criminal offence	Current criminal penalty	Proposed criminal penalty	FPA comment
<p>1101F(1) If matter that is used, or intended to be used, in connection with:</p> <p>(a) the keeping of a book required to be kept by a provision of this Chapter; or</p> <p>(b) a register or any accounting or other record referred to in section 1101C;</p> <p>is recorded or stored in an illegible form by means of a mechanical device, an electronic device or any other device, a person must not:</p> <p>(c) record or store by means of that device matter that the person knows to be false in a material particular or materially misleading; or</p> <p>(d) destroy, remove or falsify matter that is recorded or stored by means of that device, or has been prepared for the purpose of being recorded or stored, or for use in compiling other matter to be recorded or stored, by means of that device; or</p> <p>(e) fail to record or store matter by means of that device, with intent to falsify any entry made or intended to be compiled, wholly or in part, from that matter.</p>	1 year	2 years	<p>Support a higher increase.</p> <p>This provision relates to a deliberate act of dishonesty and should attract a penalty in proportion to similar provisions of deliberate dishonest acts. The penalty for this provision should be increased to 5 -10 years.</p>
<b>Part 9.3 - Books</b>			
1307(1) Falsification of books	2 years	5 years	<p>Support a higher increase.</p> <p>This provision relates to a deliberate act of dishonesty and should attract a penalty in proportion to similar provisions of deliberate dishonest acts. The penalty for this provision should be increased to 5 -10 years.</p>
1307(2)	2 years	5 years	<p>Support a higher increase.</p> <p>This provision relates to a deliberate act of dishonesty and should attract a penalty in proportion to similar provisions of deliberate dishonest acts. The penalty for this provision should be increased to 5 -10 years.</p>
<b>Part 9.4 - Offences</b>			
<p>1308(4) (4) A person who, in a document required by or for the purposes of this Act or lodged:</p> <p>(a) makes or authorises the making of a statement that is false or misleading in a material particular; or</p>	5/25pu	2 years	<p>Support a higher increase</p> <p>If intent of a deliberate dishonest act is proven, as per this</p>



Relevant criminal offence	Current criminal penalty	Proposed criminal penalty	FPA comment
<p>(b) omits or authorises the omission of any matter or thing without which the document is misleading in a material respect; without having taken reasonable steps to ensure that the statement was not false or misleading in a material particular or to ensure that the document did not omit any matter or thing without which the document would be misleading in a material respect, as the case may be, is guilty of an offence.</p>			<p>provisions, this increase should be in proportion to similar offences and attract a maximum penalty higher than the proposed 2 years.</p>
<p>1308((8) A person must not, in connection with an application for an Australian CS facility licence, Australian financial services licence or Australian market licence: (a) make a statement that is false or misleading in a material particular knowing it to be false or misleading; or (b) omit to state any matter or thing knowing that because of that omission the application is misleading in a material respect.</p>	5/25pu	5 years	<p>Support if deliberate dishonest act with intent is proven and there is an unwillingness to cooperate. The penalty for breaching this provision should only apply in cases where the licence applicant has not responded to ASIC requests to amend or provide further information in relation to a licence application. Applying for a licence for the first time is a daunting, complicated and drawn out process which can involve unintentional errors and omissions. ASIC should be required to work with potential licensees throughout each step of the licence process.</p>
1309(2) False information etc	1 year	2 years	<p>Support if deliberate dishonest act with intent is proven.</p>
1310 Obstructing or hindering ASIC etc.	5 penalty units	2 years	<p>Support a higher increase. If an intentional act of obstruction is proven, as per this provision, this increase should be in proportion to similar offences and attract a maximum penalty higher than the proposed 2 years.</p>



Relevant criminal offence	Current criminal penalty	Proposed criminal penalty	FPA comment
<b>Australian Securities and Investments Commission Act 2001</b>			
<b><i>Part 3 – Investigations and information gathering</i></b>			
ASICA 64(1) – in examination, make statement false/misleading	2 years	5 years	Support
ASICA 64(2) – at a hearing, give false/mis. info	3 months	2 years	Support a higher increase. A breach of this provision shows intent of dishonest behaviour and should attract a maximum penalty in proportion to similar offences, such as 5 years.
ASICA 65(2) – warrant – must give reasonable assistance	6 months	1 year	Support
ASICA 66(1) – contempt of ASIC	1 year	2 years	Support a higher increase. A breach of this provision shows intent of dishonest behaviour and should attract a maximum penalty in proportion to similar offences, such as 5 years.