



# Corporate and financial penalties update

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The Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth) (Act) amends existing acts such as Corporations Act 2001 (Cth) (Corporations Act), ASIC Act 2001 (Cth) (ASIC Act), National Consumer Credit Protection Act 2009 (Cth) (Credit Act) and Insurance Contracts Act 1984 (Cth) (Insurance Act) to:

- consolidate penalty frameworks under the acts; and
- increase the existing penalties – longer prison sentences for criminal offences;
- introduce new penalties,

for corporations and individuals.

Going forward, corporations, financial institutions and individuals will face far greater financial exposure for misconduct under the acts covered by the Act. The changes will

result in affected entities and individuals to:

- review current compliance and regulatory risk assessments and processes, and ensure that the processes meet the new standards;
- review how matters are prioritised, investigated and managed;
- implement processes to ensure that allegations of misconduct can be managed, investigated and where required, reporting or disclosures being made.

## What are the key changes?

The key changes made by the Act can be divided into the following categories:

- increase in severity of penalties for criminal offences for individuals and bodies corporate;
- increase in severity of penalties for civil breaches for individuals and bodies corporate;
- increase in scope of the civil penalty regime, to cover new provisions;
- increase in the range of scenarios for which infringement notices can be issued; and
- lowering of the threshold for establishing 'dishonesty' under dishonesty offences under the Corporations Act.

### Penalties

The new penalties which apply under the acts:

penalty Type	Details
<b>Imprisonment</b>	Serious criminal offences – increase to 15 years (previously limited offences carried a maximum penalty of 10 years but most carried a maximum penalty of 5 years). Serious offences includes: <ul style="list-style-type: none"><li>• directors in relation to acting in bad faith</li><li>• abuse of position or information (s184)</li><li>• failure to comply with certain financial reporting and audit obligations (s344)</li><li>• engaging in dishonest conduct in relation to financial services (s1041G)</li><li>• the provision of defective disclosure documents (ss 952D, 952F and 1021D)</li></ul>

penalty Type	Details
<b>Pecuniary</b>	<p data-bbox="391 201 553 233"><u>Individuals</u></p> <p data-bbox="391 285 553 317">Greater of:</p> <ul data-bbox="440 369 1511 495" style="list-style-type: none"> <li data-bbox="440 369 1463 401">• 4,500 penalty units (\$945,000) [previously 2,000 (\$420,000)]; or</li> <li data-bbox="440 411 1511 495">• if the court can determine – three times the benefit derived from (or detriment avoided by) the contravention</li> </ul> <p data-bbox="391 548 667 579"><u>Bodies Corporate</u></p> <p data-bbox="391 632 553 663">Greater of:</p> <ul data-bbox="440 716 1593 978" style="list-style-type: none"> <li data-bbox="440 716 1560 789">• 45,000 penalty units (\$9.45 million) [previously 10,000 (\$2,100,000), no equivalent under the insurance act];</li> <li data-bbox="440 800 1511 884">• If the court can determine – three times the benefit derived from (or detriment avoided by) the contravention; or</li> <li data-bbox="440 894 1593 978">• 10% of annual turnover ending at the end of the month in which the body corporate committed, or began committing, the offence.</li> </ul>

penalty Type	Details
Civil	<p data-bbox="394 201 553 233"><u>Individuals</u></p> <p data-bbox="394 285 553 317">Greater of:</p> <ul data-bbox="440 369 1609 642" style="list-style-type: none"> <li data-bbox="440 369 1609 548">• 5,000 penalty units (\$1.05 million) [previously under the Corporations Act - \$200,000 or between 50 (\$10,500) and 2,000 penalty units (\$420,000) under the ASIC Act and up to 2,000 penalty units (\$420,000 under the Credit Act)]; or</li> <li data-bbox="440 558 1609 642">• if the court can determine – three times the benefit derived from (or detriment avoided by) the contravention.</li> </ul> <p data-bbox="394 684 667 716"><u>Bodies Corporate</u></p> <p data-bbox="394 768 553 800">Greater of:</p> <ul data-bbox="440 852 1609 1220" style="list-style-type: none"> <li data-bbox="440 852 1609 1031">• 50,000 penalty units (\$10.5 million); [previously under the Corporations Act \$1 million or between 150 (\$31,500) and 10,000 penalty units (\$2,100,000) under the ASIC Act and up to 2,000 penalty units (\$2,100,000 under the Credit Act)];</li> <li data-bbox="440 1041 1609 1125">• if the court can determine – three times the benefit derived from (or detriment avoided by) the contravention; or</li> <li data-bbox="440 1136 1609 1220">• 10% of annual turnover, up to a maximum value of 2.5 million penalty units (\$525 million).</li> </ul>

the s912A general obligations of Australian financial services licensees (AFSL holders) under the Corporations Act; The civil penalty regime will be extended to cover a wider range of provisions in financial services laws, including:

- the obligation on AFSL holders to lodge breach reports with ASIC under s912D of the Corporations Act;
- the disclosure requirements in Chapter 7 of the Corporations Act;
- the general obligations of credit licensees imposed by s47 of the Credit Act;
- the duty to act in utmost good faith and the obligation to provide a key facts sheet imposed by s13(1) and s33C(1) of the Insurance Act; and
- a range of other provisions of the Corporations Act and Credit Act.

## Infringement notices:

The Act expands the existing infringement notice regime to include all strict and absolute liability offences in the Corporations Act, along with other prescribed offences and civil penalty provisions in that Act. It will also extend to include:

- certain additional provisions of the Credit Act; and
- s33C of the Insurance Act.

The penalties payable under an infringement notice will vary depending on the type of provision:

- For most offences (including strict and absolute liability offences), the maximum penalty payable will be half of the maximum pecuniary penalty payable for that offence.
- For most civil penalty provisions, the maximum penalty payable will be 12 penalty units for individuals (\$2520) and 60 penalty units for corporations (\$12,600).
- For Credit Act offences, the maximum amount payable is one fifth of the maximum penalty for that offence, and for Credit Act civil penalty provisions, the maximum amount payable will be 50 penalty units for individuals (\$10,500) and 250 penalty units for bodies corporate (\$52,500).

## Relinquishment orders:

The Act provides for orders to be made for relinquishment of any financial benefit gained from conduct that contravenes a civil penalty provision.

The Act allows for a court to make a relinquishment order in relation to the contravention of a civil penalty provision even if a pecuniary penalty order could be, or has been, made.

## Dishonesty:

A new definition of 'dishonesty' will be introduced under s9 of the Corporations Act, which will apply to all relevant offences under the Corporations Act (including s1041G).

The new test for dishonesty is a 'single limb' test which states that conduct is dishonest if it is 'dishonest according to the standards of ordinary people'. It will no longer be necessary to prove that the conduct was known by the person to be dishonest, according to the standards of ordinary people.

Key provisions affected by this change will be s1041G (the general prohibition on

dishonest conduct in relation to financial services) and s1041F (inducing persons to deal).

## Priority for compensation:

The new legislation amends the law to ensure that when orders are made in respect of breaches of civil penalty provisions, the courts must give preference to making a compensation order where a defendant does not have sufficient resources to pay both a pecuniary penalty order and/or a relinquishment order as well as a compensation order.

## What you need to do

- Directors and companies need to be aware of the changes.
- Implement training regarding the provisions.
- Company officers should also review their D&O insurance arrangements.

## Contact the article author for more info



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