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TREASURY LAWS AMENDMENT (ASIC ENFORCEMENT) 2018 BILL

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EXPOSURE DRAFT EXPLANATORY MATERIALS



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# Glossary

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The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
AFSL	Australian Financial Services License.
ASIC	Australian Securities and Investments Commission.
ASIC Act	<i>Australian Securities and Investments Commission Act 2001.</i>
Corporations Act	<i>Corporations Act 2001.</i>
Credit Act	<i>National Consumer Credit Protection Act 2009.</i>
Credit Code	Schedule 1 to the <i>National Consumer Credit Protection Act 2009.</i>
Criminal Code	The Schedule to the <i>Criminal Code Act 1995.</i>
the Guide	Attorney-General's Department's <i>A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</i> , September 2011 edition.
Insurance Contracts Act	<i>Insurance Contracts Act 1984.</i>
the Taskforce	The ASIC Enforcement Review Taskforce.



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# **Chapter 1**

## ***A Stronger Penalty Framework***

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### **Outline of chapter**

1.1 This Bill amends the Corporations Act, ASIC Act, Credit Act and Insurance Contracts Act to introduce a stronger penalty framework in response to a number of recommendations from the ASIC Enforcement Review Taskforce report.

1.2 The Taskforce was established following a recommendation from the Financial System Inquiry. The Taskforce recommended strengthening penalties for corporate and financial sector misconduct, and simplifying the access to, and the operation of, a number of civil penalty and criminal offence provisions.

1.3 The amendments made by this Bill will deter misconduct and improve community confidence in the corporate and financial sector.

### **Context of amendments**

#### **The establishment of the ASIC Enforcement Review Taskforce**

1.4 On 19 October 2016, the Government established the ASIC Enforcement Review Taskforce. The Taskforce was established in response to a recommendation of the Financial System Inquiry and in an environment of much public and political scrutiny of the corporate and financial sector.

1.5 The Taskforce was asked to review the enforcement regime available to ASIC and assess the suitability of the existing regulatory tools ASIC uses to perform its functions. The Taskforce developed a number of policy options to strengthen ASIC's powers and regulatory tools, including options that:

- address gaps or deficiencies to allow more effective enforcement of the regulatory regime;
- foster consumer confidence in the financial system and enhance ASIC's ability to prevent harm effectively;
- promote engagement and cooperation between ASIC and its regulated population without imposing undue regulatory burden on business; and

- promote a competitive and stable financial system that contributes to Australia’s productivity and growth.

## **The Taskforce’s findings**

1.6 The Taskforce grouped its policy options into eight chapters, which broadly made the following recommendations:

- enhance the requirement for financial services and credit licensees to report significant breaches to ASIC;
- harmonise and enhance search warrant powers;
- provide ASIC with access to telephone intercepts for the investigation and prosecution of corporate law offences;
- shift to a co-regulatory model in appropriate cases where industry participants are required to subscribe to an ASIC approved code;
- strengthen ASIC’s licencing powers;
- extend ASIC’s banning powers to ban individuals from managing financial services businesses;
- strengthen penalties for corporate and financial sector misconduct; and
- provide ASIC with a directions power to complement ASIC’s current powers to regulate an AFSL holder’s or credit licensee’s systems and conduct, reducing the time, resources and costs of investigating and preparing other enforcement action.

## **A stronger penalty framework**

1.7 This Bill implements the recommendations from Chapter 7 of the Taskforce’s report to strengthen penalties for corporate and financial sector misconduct.

1.8 The Taskforce separated its recommendations to implement a stronger penalty framework into two broad categories. A number of recommendations went to the quantum of penalties, increasing civil and criminal penalty amounts including terms of imprisonment. Others went to the second category, penalty ‘pathways’, or the scope of provisions determined by legislation to attract civil or criminal penalties or some form of administrative sanction.

1.9 The Taskforce broadly made the following recommendations:

- update the maximum penalties for certain offences in ASIC administered legislation;

- expand the civil penalty regime so that a number of new contraventions become civil penalty provisions;
- introduce ordinary criminal offences that sit alongside and complement a number of strict and absolute liability offences;
- introduce a new formula to calculate the maximum financial penalty for criminal offences in the Corporations Act;
- introduce and apply a new objective only test to all dishonesty offences under the Corporations Act;
- subject all offences with strict or absolute liability, and certain other offences, to a penalty notice regime;
- disgorgement remedies should be available in civil penalty proceedings brought by ASIC under the Corporations Act, ASIC Act and Credit Act; and
- require the courts to give priority to compensating victims over ordering the payment of financial penalties, aligning the Corporations Act with the ASIC Act and Credit Act.

1.10 In coming to its recommendations, the Taskforce considered the application of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, released by the Attorney-General's Department and developed to assist the framing of criminal offences, infringement notices and enforcement provisions that are intended to become part of Commonwealth law. The Guide is accessible on the Attorney-General's website.

1.11 On 16 April 2018, the Government agreed to all these recommendations, except the maximum civil penalty amounts, where the Government considered a stronger response was necessary.

## Summary of new law

1.12 The Bill introduces a stronger penalty framework to combat misconduct and improve community confidence in the corporate and financial sector.

1.13 The amendments made by the Bill:

- update the penalties for certain criminal offences in ASIC administered legislation, including:
  - increasing the maximum imprisonment penalties for certain criminal offences;

- introducing a formula to calculate financial penalties for criminal offences;
- removing imprisonment as a penalty and increasing the financial penalties for all strict and absolute liability offences;
- introduce ordinary criminal offences that sit alongside strict and absolute liability offences;
- modernise and expand the civil penalty regime by increasing financial penalties for contraventions and making a wider range of offences subject to civil penalties;
- harmonise and expand the infringement notice regime;
- introduce a new test that applies to all dishonesty offences under the Corporations Act;
- introduce relinquishment as a remedy available in civil penalty proceedings;
- clarify that the courts are to give priority to compensating victims over ordering the payment of financial penalties; and
- clarify that contraventions of section 184 of the Corporations Act can occur even when the relevant corporation gains an advantage from the contravention.

### Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The maximum imprisonment penalties for certain criminal offences in the Corporations Act, ASIC Act and Credit Act are increased to reflect the seriousness of the misconduct.	The maximum imprisonment penalties for certain criminal offences in the Corporations Act, ASIC Act and Credit Act do not reflect the seriousness of the misconduct.
The maximum financial penalties for criminal offences in the Corporations Act where the maximum term of imprisonment is less than 10 years, is calculated by multiplying the maximum term of imprisonment in months by 10 for individuals, and a further 10 for bodies corporate.	No equivalent.

<i>New law</i>	<i>Current law</i>
<p>The maximum financial penalties for criminal offences in the Corporations Act where the maximum term of imprisonment is 10 years' or more are:</p> <ul style="list-style-type: none"> <li>• for individuals, the greater of:               <ul style="list-style-type: none"> <li>– 4,500 penalty units; or</li> <li>– the benefit derived or detriment avoided because of the contravention, multiplied by three;</li> </ul> </li> <li>• for bodies corporate, the greater of:               <ul style="list-style-type: none"> <li>– 45,000 penalty units;</li> <li>– the benefit derived or detriment avoided because of the contravention, multiplied by three; or</li> <li>– 10 per cent of the annual turnover of the body corporate.</li> </ul> </li> </ul>	<p>No equivalent.</p>
<p>The default maximum financial penalty for the contravention of an offence that is not listed in Schedule 3 of the Corporations Act is 20 penalty units for individuals and 200 penalty units for bodies corporate, and is a strict liability offence.</p>	<p>The default maximum financial penalty for the contravention of an offence that is not listed in Schedule 3 of the Corporations Act is 5 penalty units for individuals and 25 penalty units for bodies corporate, and is a strict liability offence.</p>
<p>All strict and absolute liability offences do not carry imprisonment as a potential penalty.</p>	<p>Certain strict and absolute liability offences carry imprisonment terms as a potential penalty.</p>
<p>The maximum financial penalties for the contravention of strict and absolute liability offences listed in Schedule 3 range from 20 to 240 penalty units for individuals, multiplied by 10 for bodies corporate.</p>	<p>The maximum financial penalties for the contravention of strict and absolute liability offences listed in Schedule 3 range from 5 to 100 penalty units for individuals, multiplied by 5 for bodies corporate.</p>
<p>New ordinary criminal offences sit alongside existing strict and absolute liability offences.</p> <p>These offences attract a higher penalty than the equivalent strict and absolute liability offences.</p>	<p>No equivalent.</p>

<i>New law</i>	<i>Current law</i>
<p>The maximum financial penalty for a contravention of a civil penalty provision in the Corporations, ASIC, Credit and Insurance Contracts Acts, and Credit Code, is:</p> <ul style="list-style-type: none"> <li>• for individuals, the greater of: <ul style="list-style-type: none"> <li>– 5,000 penalty units; or</li> <li>– the benefit derived or detriment avoided because of the contravention, multiplied by three;</li> </ul> </li> <li>• for bodies corporate, the greater of the following: <ul style="list-style-type: none"> <li>– 50,000 penalty units;</li> <li>– the benefit derived or detriment avoided by the body corporate because of the contravention, multiplied by three;</li> <li>– 10 per cent of the annual turnover of the body corporate, but to a maximum monetary value of 1 million penalty units.</li> </ul> </li> </ul>	<p>The maximum financial penalty for a contravention of a corporation/scheme civil penalty provision in the Corporations Act is \$200,000 for individuals or \$1 million for bodies corporate.</p> <p>The maximum financial penalty for a contravention of a financial services civil penalty provision in the Corporations Act, or the manipulation of financial benchmark provisions, is \$200,000 for an individual or \$1 million for a body corporate.</p> <p>The maximum financial penalty for a contravention of a civil penalty provision in the market integrity rules is \$1 million.</p> <p>The maximum financial penalty for a contravention of a civil penalty provision in the client money reporting rules is \$1 million.</p> <p>The maximum financial penalty is 1,000 penalty units for a contravention of a civil penalty provision in the following:</p> <ul style="list-style-type: none"> <li>• the derivative transaction rules;</li> <li>• the derivative trade repository rules.</li> </ul> <p>The maximum financial penalty is 5,550 penalty units for a contravention of a civil penalty provision in the following:</p> <ul style="list-style-type: none"> <li>• the financial benchmark rules;</li> <li>• the compelled financial benchmark rules.</li> </ul> <p>The maximum financial penalty for a contravention of a Part 7.7A civil penalty provision in the Corporations Act is either \$50,000 or \$200,000 for individuals, or \$250,000 or \$1 million</p>

<i>New law</i>	<i>Current law</i>
	<p>for bodies corporate.</p> <p>The maximum financial penalty for a contravention of a civil penalty provision in the ASIC Act is between 30 and 2,000 penalty units for individuals, or 150 and 10,000 penalty units for bodies corporate.</p> <p>The maximum financial penalty for a contravention of a civil penalty provision in the Credit Act is 2,000 penalty units for individuals or 10,000 penalty units for bodies corporate.</p> <p>The maximum financial penalty for a contravention of a civil penalty provision in the Credit Code is:</p> <ul style="list-style-type: none"> <li>• if the civil penalty provision is a key requirement, \$500,000; or</li> <li>• 2,000 penalty units.</li> </ul> <p>There is no equivalent in the Insurance Contracts Act.</p>
<p>A number of new provisions in the Corporations Act, Credit Act, Credit Code and Insurance Contracts Act are civil penalty provisions.</p>	<p>No equivalent.</p>
<p>The Insurance Contracts Act contains a civil penalty framework.</p>	<p>No equivalent.</p>
<p>All strict and absolute liability offences are subject to an infringement notice regime in the Corporations Act.</p>	<p>Strict and absolute liability offences are not subject to an infringement notice regime in the Corporations Act.</p>

<i>New law</i>	<i>Current law</i>
<p>Certain civil penalty provisions are subject to an infringement notice regime in the Corporations Act and Insurance Contracts Act.</p> <p>The maximum penalty for a single contravention of a civil penalty provision which is subject to an infringement notice regime is 12 penalty units for individuals and 60 penalty units for bodies corporate.</p>	<p>Civil penalty provisions are not subject to an infringement notice regime in the Corporations Act and Insurance Contracts Act.</p>
<p>‘Dishonest’ is specifically defined in the Corporations Act as “dishonest according to the standards of ordinary people”.</p>	<p>‘Dishonest’ takes its ordinary meaning, or as defined in sections 1041F and 1041G of the Corporations Act for the purposes of those sections.</p>
<p>Relinquishment is a remedy that is available in civil penalty proceedings under the Corporations Act, ASIC Act, Credit Act and Insurance Contracts Act.</p>	<p>No equivalent.</p>
<p>Courts are to give priority to compensating victims over ordering the payment of financial penalties in the Corporations Act and Insurance Contracts Act.</p>	<p>No equivalent.</p>
<p>A contravention of section 184 of the Corporations Act can still occur if the corporation has gained an advantage from the contravention.</p>	<p>Section 184 of the Corporations Act is contravened if an officer of a corporation uses their position or information known to them to gain an advantage for themselves or someone else, or cause a detriment to the corporation.</p>

## Detailed explanation of new law

### Updating the penalties for certain criminal offences in the Corporations Act, ASIC Act and Credit Act

#### *Increases to terms of imprisonment for certain criminal offences*

1.14 The Bill makes amendments to Schedule 3 to the Corporations Act, and to the ASIC Act and the Credit Act, to increase the maximum imprisonment term for certain criminal offences.

1.15 Maximum penalties provide a court with guidance on how to punish criminal behaviour. They restrict the court’s sentencing discretion as the court is unable to order a penalty in excess of the prescribed maximum penalty. The maximum penalty is generally reserved only for the most egregious cases. The existing maximum imprisonment penalties for a number of criminal offences do not currently reflect the seriousness of those offences.

1.16 The maximum imprisonment penalty for a number of criminal offences in the Corporations Act, ASIC Act and Credit Act have been increased to reflect the seriousness of those offences, and to deter and punish such behaviour as appropriate. The increased penalties are consistent with penalties for similar offences in other jurisdictions.

1.17 Offences where the maximum term of imprisonment has been increased are listed in the table below.

**Table 1.1 – Offences where the maximum term of imprisonment has been increased**

<i>Offence provision</i>	<i>Current imprisonment term</i>	<i>New imprisonment term</i>	<i>Brief description</i>
<b>Corporations Act</b>			
206A(1)	1 year	5 years	Disqualified persons are not to manage corporations.
670A(3)	1 year	5 years	Documents relating to takeovers, compulsory acquisitions and buy-outs cannot be misleading or deceptive, or contain omissions, and are required to contain information that should have been included if a new situation has emerged.
708AA(10)	6 months	2 years	Right issues that do not need disclosure.
708A(9)	6 months	2 years	Defective documents.
792D(1)	6 months	2 years	Market licensee is obligated to assist ASIC.

821C(1), (3)	6 months	2 years	Clearing and settlement facility licensee is obligated to assist ASIC.
821D	6 months	2 years	Clearing and settlement facility licensee must give ASIC access to facility if requested.
821E(2)	50 penalty units	2 years	Clearing and settlement facility licensee must issue to ASIC an annual report.
892K	2 years	5 years	Operator of financial market must comply with notice.
905A	500 penalty units	2 years	The regulations may identify a class of derivative trade repositories as being required to be licensed, and if so, the requirements need to be met.
907A	500 penalty units	2 years	Prohibitions on holding out.
911A(1)	2 years	5 years	A person who carries on a financial services business must hold an AFSL or have an exemption.
911B(1)	2 years	5 years	A person who carries on a financial service on behalf of another person must have an AFSL or have an exemption.
911C	1 year	2 years	Prohibitions on holding out.
912C(3)	6 months	2 years	ASIC may request AFSL holders to provide a written statement.

912D(1B)	1 year	2 years	AFSL holders must notify ASIC of certain matters.
912E(1)	6 months	2 years	AFSL holders must provide assistance to ASIC if requested.
920C	6 months	5 years	If a banning order is made, the person cannot be granted an AFSL.
952C(3)	2 years	5 years	Failing to give a disclosure document or statement within the time required.
952L(2)	2 years	5 years	AFSL holders commit an offence if they are aware a defective Financial Services Guide is provided and they do not rectify the defect.
982D	6 months	2 years	AFSL holders must only use money as prescribed in the law.
991B(2)	6 months	1 year	AFSL holders must give priority to clients' orders.
991E(1) and (3)	6 months	1 year	AFSL holders have certain obligations in relation to dealings with non-licensees.
993C(3)	2 years	5 years	AFSL holders must comply with requirements relating to client money account.
1012DAA(10)	6 months	2 years	If a notice given in relation to rights issue is defective, and the issuer becomes aware it is defective, the issuer must in a reasonable time period rectify the defect.

1012DA(9)	6 months	2 years	If a notice given in relation to sale amounting to indirect issue is defective, and the issuer becomes aware it is defective, the issuer must in a reasonable time period rectify the defect.
1017E(3) and (4)	2 years	5 years	Dealing with money received for financial product before the product issued.
1017G(1)	2 years	5 years	Certain product issuers and regulated persons must meet appropriate dispute resolution requirements.
1021C(3)	2 years	5 years	Offence of failing to give a disclosure document or statement.
1021J(2) and (3)	2 years	5 years	Offence if preparer of disclosure document or statement becomes aware that it is defective.
1101E	1 year	2 years	Person must not conceal, destroy, mutilate or alter a book.
1101F(1A) and (1)	1 year	2 years	Person must not engage in conduct that would result in the falsification of a book or register.
1307(1) and (2)	2 years	5 years	Person must not falsify books.
1308(4)	5 penalty units	2 years	Person must not provide false or misleading statements.

1308(8)	5 penalty units	5 years	Person must not provide false or misleading statements.
1310	5 penalty units	2 years	Person must not obstruct or hinder ASIC.
<b>ASIC Act</b>			
64(1)	2 years	5 years	A person must not give information or make a statement that is false or misleading.
64(2)	3 months	2 years	A person must not at a hearing give evidence that is false or misleading.
65(2)	6 months	1 year	If a person enters under a warrant, a person must not intentionally or recklessly fail to provide reasonable access.
66(1)	1 year	2 years	Person must not engage in conduct that would result in obstruction or hindering.
<b>Credit Act</b>			
82(2)	2 years	5 years	Person must not engage in conduct if a banning order is in place.
160D(2)	2 years	5 years	Person must not provide misleading information.
291(1)	2 years	5 years	Person must not provide false information.
291(2)	3 months	2 years	Person must not at a hearing give evidence that is false or misleading.

292(3)	6 months	1 year	If a person enters under a warrant, a person must not intentionally or recklessly fail to provide reasonable access.
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[Schedule 1, item 117, the table in Schedule 3 to the Corporations Act; Schedule 2, items 32, 33, 25 and 36, subsections 64(1), 64(2), 65(2), 66(1) of the ASIC Act; Schedule 3, item 43, subsections 82(2), 160D(2), 291(1), 291(2) and 292(3) of the Credit Act]

1.18 The most serious offences in the Corporations Act have had their maximum term of imprisonment increased from 5 years to 10 years. This has been done to ensure that the penalties reflect the seriousness of the offence. The following table outlines these offences.

**Table 1.2– Offences where the term of imprisonment has increased to 10 years**

<i>Offence provision</i>	<i>Brief description</i>
184	Duties and powers.
344(2)	Financial reports and audit.
601FD(4)	Officers of responsible entity.
601FE(4)	Employees of registered scheme.
601UAA(1)	Duties of officers.
601UAB(1)	Duties of employers.
727(1)	Fundraising.
728(3)	Fundraising.
952D(1) and (2)	Financial services disclosure.
952F(2), (3), (4)	Financial services disclosure.
952L(1)	Financial services disclosure.
993B(3)	Client money.
1021D(1) and (2)	Disclosure document.

1.19 Throughout the Corporations, ASIC and Credit Acts, the penalty stated for an offence is:

- for the Corporations Act:
  - the penalty specified in Schedule 3 to the Corporations Act for the provision under which the offence is created or included; or
  - the penalty stated in the provision under which the offence is created or included;

- for the ASIC Act:
  - the penalty specified in any provision of the ASIC Act for the offence.
- for the Credit Act:
  - the penalty specified in any provision of the Credit Act for the offence.

*[Schedule 1, item 95, section 1311D of the Corporations Act; Schedule 2, item 42, section 93F of the ASIC Act; Schedule 3, item 13, section 288E of the Credit Act]*

1.20 The maximum penalty that can be imposed is the penalty amount applicable to the offence. *[Schedule 1, item 95, section 1311A of the Corporations Act; Schedule 2, item 42, section 93C of the ASIC Act; Schedule 3, item 13, section 288B of the Credit Act]*

### *Calculating the maximum financial penalty for criminal offences*

1.21 In addition to increasing imprisonment terms, the Taskforce considered the financial penalty for criminal offences should also increase and be calculated through a new formula. The new formula ensures a simplified and consistent approach as the financial maximum penalty, expressed in penalty units, is determined by reference to the maximum term of imprisonment for the relevant offence.

1.22 There are two different financial penalty formulae. One formula is used if the term of imprisonment relating to the offence is less than 10 years. A different formula is used if the term of imprisonment is 10 years or more.

#### *Formula where term of imprisonment is less than 10 years*

1.23 Where the term of imprisonment is less than 10 years, the individual fine formula is the imprisonment term in months multiplied by 10. *[Schedule 1, item 95, sections 1311B and 1311C of the Corporations Act; Schedule 2, item 42, sections 93D and 93E of the ASIC Act; Schedule 3, item 13, section 288C and 288D of the Credit Act]*

1.24 The financial penalty applicable to an individual for an offence where the term of imprisonment is less than 10 years, is either:

- if there is a fine state, the fine stated; or
- if the offence has an imprisonment component, an amount worked out by the new individual fine formula;

unless the Acts state otherwise and there is a contrary intention.

*[Schedule 1, item 95, sections 1311B and 1311C of the Corporations Act; Schedule 2, item 42, sections 93D and 93E of the ASIC Act; Schedule 3, item 13, sections 288C and 288D of the Credit Act]*

1.25 If the penalty is for a body corporate, the applicable penalty is either:

- if there is a fine stated, the fine stated multiplied by 10; or
- if the offence has an imprisonment component, the amount worked out by using the new individual fine formula, multiplied 10 (the body corporate formula);

unless the Acts state otherwise and there is a contrary intention.

*[Schedule 1, item 95, sections 1311B and 1311C of the Corporations Act; Schedule 2, item 42, sections 93D and 93E of the ASIC Act; Schedule 3, item 13, sections 288C and 288D of the Credit Act]*

1.26 The following table provides examples of how imprisonment terms are converted to a financial penalty using the individual and body corporate formulae.

**Table 1.3 – Examples of the new individual and body corporate financial penalty formulae**

<i>Imprisonment term</i>	<i>Individual fine (penalty units)</i>	<i>Body corporate fine (penalty units)</i>
3 months	30	300
6 months	60	600
1 year	120	1,200
2 years	240	2,400
5 years	600	6,000

*Formula where the term of imprisonment is 10 years or more*

1.27 The financial penalty formula that applies where the term of imprisonment for an offence is 10 years or more is:

- for individuals:
  - 4,500 penalty units; or
  - the benefit derived or detriment avoided because of the offence multiplied by three; and
- for bodies corporate:
  - 45,000 penalty units;
  - the benefit derived or detriment avoided because of the offence multiplied by three; or
  - 10 per cent of the annual turnover of the body corporate.

*[Schedule 1, item 95, subsections 1311B(4) and 1311C(3) of the Corporations Act; Schedule 2, item 42, subsections 93D(4) and 93E(3) of the ASIC Act; Schedule 3, item 13, subsections 288C(4) and 288D(3) of the Credit Act]*

1.28 The amendments made by this Bill do not increase terms of imprisonment for any offences to more than 10 years. However, the

drafting ensures that should penalties increase in the future, the formula continues to operate as intended.

1.29 Annual turnover has the same meaning as it has in Chapter 7 of the Corporations Act, and is calculated for the 12 month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision. *[Schedule 1, item 1, section 9 of the Corporations Act; Schedule 3, item 1, subsection 5(1) of the Credit Act]*

1.30 Benefit derived or detriment avoided is the sum of:

- the total value of all benefits that the person obtained that are reasonably attributable to the contravention; and
- the total value of all detriments that the person avoided that are reasonably attributable to the contravention.

*[Schedule 1, item 95, subsection 1311B(5) and 1311C(4) of the Corporations Act; Schedule 2, item, 42, subsections 93D(5) and 93E(4) of the ASIC Act; Schedule 3, item 13, subsections 288C(5) and 288D(4)]*

1.31 This ‘imprisonment of 10 years or more’ penalty framework provides flexibility in the range of penalties that can be given for the most egregious offences, and ensures that the consequences of a criminal action are not just considered to be a cost of doing business.

*Machinery and technical amendments to support the financial penalty formula frameworks*

1.32 Schedule 3 of the Corporations Act has been simplified and amended to reflect either the imprisonment term, or penalty amount. Likewise the ASIC and Credit Acts have also been amended to reflect either the imprisonment term or penalty amount. If there is an imprisonment term, the individual fine formula is engaged. If relevant, the body corporate formula is also engaged. The imprisonment term or penalty amounts are stated throughout the relevant offence provisions in the ASIC and Credit Acts. *[Schedule 1, item 95, section 1311D of the Corporations Act; Schedule 2, item 42, section 93F of the ASIC Act; Schedule 3, item 13, section 288E of the Credit Act]*

1.33 Amendments have been made to update either the imprisonment term or penalty amounts in Schedule 3 to the Corporations Act, and to the offence provisions in the ASIC and Credit Acts. *[Schedule 1, item 117, the table in Schedule 3 to the Corporations Act; Schedule 2, items 24, 25, 28, 30, 32, 33, 34, 35, 36, 38, 39, 43, 44, 46, 47, 50 and 51, subsections 39A(2), 39C(8), 63(1), 63(3), 64(1), 64(2), 65(1), subsection 65(2), 66(1), 67(1), 69(3), 125(3) 124(4E), (4EA), (4EB), (4F), 199(1), 200(1), 219(4) and 220(1) of the ASIC Act; Schedule 3, item 43, Part 3-amendments of penalties under offences of the Credit Act]*

1.34 If a penalty amount is not stated in Schedule 3 to the Corporations Act, then the penalty that applies for contravening a certain part of the Corporations Act is 20 penalty units for individuals and is a

strict liability offence. For a body corporate, the fine is 200 penalty units. *[Schedule 1, item 95, section 1311E of the Corporations Act]*

1.35 If the penalty is not stated for an offence in the ASIC and Credit Acts, the penalty is 20 penalty units for individuals and is a strict liability offence. For a body corporate, the fine is 200 penalty units. *[Schedule 2, item 42, section 93G of the ASIC Act; Schedule 3, item 13, section 288F of the Credit Act]*

1.36 The new individual and body corporate fine formulae do not apply to offences that do not have an imprisonment component. Instead, these offences have been updated if the individual fine amounts were less than 30 penalty units. Accordingly the body corporate fine amounts have increased to 300 penalty units. If the offence is over 30 penalty units, no changes have been made. However the new body corporate fine formula applies; that is, the new body corporate fine is the individual fine multiplied by 10. *[Schedule 1, item 13, 64, 65, 66, 111, 121 and 122, subsection 198G(2), 921L(7)m 921M(1), (2) and (3), 921P(2), subsection 35-5(2) of Schedule 2, paragraph 36(2)(i) of Schedule 4, paragraph 26(2)(j) of Schedule 4 of the Corporations Act; Schedule 2, item 16, subsection 12GBD(5) of the ASIC Act]*

1.37 The new individual fine formula does not apply to offences that calculate the fine amounts by reference to the number of days for which the offence continues. However the new body corporate fine formula applies; that is, the new body corporate fine is the individual fine multiplied by 10. *[Schedule 1, item 117, the table in Schedule 3 to the Corporations Act]*

1.38 In the situation where there is a continuing contravention, subsection 1314(5) provides that the penalty applicable is a fine of half a penalty unit multiplied by the number of days the contravention continues. This provision is not being amended by this Bill as it would be inappropriate for a person to be subject to the maximum financial penalties calculated under the individual fine formula and body corporate fine formula for each new daily contravention.

#### ***Amendments to the penalties for strict and absolute liability offences***

1.39 The Bill makes amendments to increase financial penalties, and remove imprisonment as a penalty, for strict and absolute liability offences.

1.40 Financial penalties for all strict and absolute liability offences have increased to reflect the seriousness of the offence. Where a strict and absolute liability offence currently carries an imprisonment term as a penalty, the penalty has been converted to a financial penalty using individual and body corporate fine formulae, explained above.

1.41 Criminal offences have a number of elements that form part of the offence. For some criminal offences, strict liability attaches to only certain elements of the offence. Criminal offences, which include physical

elements to which strict liability applies, may still attach a penalty with an imprisonment component for the ordinary offence.

1.42 Removing imprisonment for strict and absolute liability offences is consistent with the Guide. The Taskforce concluded that individuals should not be subject to imprisonment for inadvertent breaches of the law or offences where there is no fault element.

1.43 Strict and absolute liability offences with no imprisonment component and fewer than 20 penalty units have increased to 20 penalty units for individuals and 200 penalty units for body corporates.

1.44 The amendments to update the penalty units for strict and absolute liability offences, and to remove imprisonment, have been made to Schedule 3 to the Corporations Act and to certain provisions in the Corporations Act. While Schedule 3 to the Corporations Act lists most of the offence provisions in the Corporations Act, some penalty amounts are stated in the provisions themselves. The amendments to the ASIC Act and the Credit Act have been made to the provisions themselves. *[Schedule 1, items 110, 112, 113, 114 and 117, subsection 30-1(5) of Schedule 2, subsection 65-40(3) of Schedule 2, subsection 70-10(4) of Schedule 2, subsection 70-25(4) of Schedule 2, Schedule 3 to the Corporations Act; Schedule 2, items 21, 22, 23, 26, 27, 29, 31, 37, 40, 41, 45, 48, 49, 52, 53, subsections 22(2), 25(2), 26(1), 47(2), 56(3), 63(2), 63(4), 66(2), 75(5), 91(3), 198(1), 200(2), 216(7), 220(2) and 225A(9) of the ASIC Act; Schedule 3, items 12 and 43, subsection 207(2) and part 3-amendments of penalties under offences of the Credit Act]*

1.45 Section 250SA of the Corporations Act is now a strict liability offence. Section 250SA of the Corporations Act provides that at the listed company's Annual General Meeting, the chair must allow for a reasonable opportunity for members to ask questions or make comments on the remuneration report at the annual general meeting. Section 250S is a strict liability offence and is a similar provision except it is in relation to asking questions and making comments on the management of the company. Sections 250S and 250SA of the Corporations Act are similar and therefore a breach should result in the same maximum penalty. The penalty for contravening sections 250S and 250SA of the Corporations Act is 20 penalty units for an individual and is reflected in Schedule 3 of the Corporations Act. *[Schedule 1, items 16 and 17, section 250SA, and at the end of section 250SA of the Corporations Act]*

## **Ordinary criminal offences that sit alongside strict and absolute liability offences**

1.46 The amendments in the Bill introduce ordinary criminal offences into the Corporations Act that sit alongside existing strict and absolute liability criminal offences.

1.47 Currently, a number of criminal offences in the Corporations Act have strict and absolute liability attached to them. These offences do

not have fault elements and committing the offence occurs simply by contravening the physical elements of the offence. Due to the nature of strict and absolute liability offences, penalties are considerably lower because fault elements do not need to be established. The lower penalties recognise that a person can be guilty of the offence even if they did not intend to commit the offence.

1.48 In circumstances where a person commits the physical elements of a strict or absolute liability offence, and does so knowingly, intentionally or recklessly, the maximum penalty that can be given to that person remains the same as for a person who only commits the physical elements of the offence. This means that penalties for strict and absolute liability offences do not increase commensurately with the level of culpability.

1.49 The introduction of ordinary criminal offences that sit alongside strict and absolute liability offences addresses the situation where a person commits both the physical and fault elements of the offence. The amendments recognise that some existing strict and absolute liability offences should be treated as an ordinary criminal offence if the fault elements can be established, and as a result, a higher penalty should be imposed. The amendments create a tailored and flexible framework that allows a sufficient response to the culpability of an offence, depending on the circumstances in which the offence is committed.

1.50 The following table outlines the ordinary criminal offences that will sit alongside existing strict and absolute liability offences.

**Table 1.4 – New ordinary criminal offences**

<i>Reference (Corporations Act)</i>	<i>Current strict or absolute liability penalty (individual/body corporate)</i>	<i>New strict or absolute liability penalty (individual/body corporate)</i>	<i>New criminal offence (individual/body corporate)</i>
205G(1), (3) and (4)	3 months and/or 10/50 penalty units	30/300 penalty units	2 years and/or 240/2,400 penalty units
286	6 months and/or 25/125 penalty units	60/600 penalty units	2 years and/or 240/2,400 penalty units
307A	50/250 penalty units	50/500 penalty units	2 years and/or 240/2,400 penalty units
606(1), (2) and (4)	6 months and/or 25/125 penalty units	60/600 penalty units	5 years and/or 600/6,000 penalty units
671B(1)	6 months and/or	60/600 penalty	2 years and/or

	25/125 penalty units	units	240/2,400 penalty units
989CA	50/250 penalty units	50/500 penalty units	2 years and/or 240/2,400 penalty units

*[Schedule 1, items 14, 15, 18, 19, 27, 30, 31 and 78 sections 205G, 286, 307A, 606, 671B and 989CA of the Corporations Act]*

1.51 The ordinary offences do not specify the fault element for each of the physical elements. As a result, the default fault elements in section 5.6 of the Criminal Code apply to these new offences. This means that:

- if the physical element of the offence consists of only conduct, intention is the fault element for that physical element; or
- if the physical element of the offence consists of a circumstance or a result, recklessness is the fault element for that physical element.

1.52 Applying default fault elements is consistent with part 2.2.4 of the Guide.

1.53 For these ordinary criminal offences, and for criminal offences that are also now civil penalty provisions, the physical elements of each offence are generally contained within the offence provision. This is not exhaustive, and the matters to be proven as part of the physical elements can also subsist in other parts of the Acts, such as within definitions.

1.54 For example, while subsection 205G(1) of the Corporations Act contains the general conduct rule, the matters to be proven as part of the physical elements of the offence may also be present in subsection 205G(2) and section 9 of the Corporations Act (for example, the definition of ‘director’). It can be necessary to consider the whole of offence provision, or other relevant provisions, in determining the physical elements of the offence.

## **Modernising and expanding the civil penalty regime**

1.55 The Bill makes amendments to increase the maximum financial penalty for a contravention of a civil penalty provision and harmonise civil penalty frameworks across ASIC administered Acts. The Bill also expands the civil penalty regime by making a wider range of provisions civil penalty provisions.

### ***Modernising the civil penalty regime***

1.56 Amendments have been made to the civil penalty amounts to address the eroded deterrent effect of civil penalties due to the effects of inflation. Amendments have also been made to civil penalty regimes to

harmonise the underpinning framework across the Corporations, ASIC, Credit and Insurance Contracts Acts.

1.57 For civil penalties in the Corporations Act, a Court may order a person to pay a pecuniary penalty to the Commonwealth in relation to a contravention of a civil penalty provision if the Court has made a declaration of contravention of a civil penalty provision. *[Schedule 1, item 103, paragraph 1317G(1)(a) of the Corporations Act]*

1.58 In making an order to pay a civil penalty, the Court may consider if the contravention is serious or materially prejudices relevant interests, parties or abilities in respect of whether the contravention is of:

- a corporation/scheme civil penalty provision;
- a financial services civil penalty provision that is not a Part 7.7A provision; or
- a contravention of subsection 1211B(1) or 1211B(2).

*[Schedule 1, item 103, paragraphs 1317G(1)(b), 1317G(1)(c), and 1317G(1)(d) of the Corporations Act]*

1.59 For civil penalties in the ASIC Act, the Court can order a person pay a pecuniary penalty it determines to be appropriate if it is satisfied the person has contravened a civil penalty provision. Such an order is a ‘pecuniary penalty order’. *[Schedule 2, item 10, subsections 12GBA(1) and 12GBA(4) of the ASIC Act]*

1.60 Civil penalty provisions are Subdivision C, Subdivision D (except section 12DA), and Subdivision GC in Division 2 of Part 2 of the ASIC Act. *[Schedule 2, item 10 and 12, subsection 12GBA(1A) of the ASIC Act]*

1.61 For civil penalties in the Insurance Contracts Act, the court must make a declaration that a person has contravened a civil penalty provision. ASIC may make an application for such a declaration, and must do so within 6 years of the alleged contravention. *[Schedule 4, item 4, subsections 75A(1), 75A(2) and 75A(3) of the Insurance Contracts Act]*

1.62 The declaration must specify, and is conclusive evidence of, the following:

- the court that made the declaration;
- the provision that was contravened;
- the person who contravened the provision; and
- the conducted that constituted the contravention.

*[Schedule 4, item 4, subsections 75A(4) and 75A(5) of the Insurance Contracts Act]*

1.63 ASIC can apply to the court for an order that the person who has contravened a civil penalty provision pay the Commonwealth a pecuniary penalty. ASIC must make this application within six years of the

contravention. If the court has made a declaration that a civil penalty provision has been contravened, the court can order the person who contravened the civil penalty provision to pay a pecuniary penalty to the Commonwealth. Such an order is a ‘pecuniary penalty order’. *[Schedule 4, item 4, subsections 75B(1), 75B(2), 75B(3) and 75B(4) of the Insurance Contracts Act]*

1.64 In determining the pecuniary penalty that should be payable by the person who contravened the civil penalty provision, the court must take into account all relevant matters, including:

- the nature of the contravention;
- the nature and extent of losses or damages as a result of the contravention;
- the circumstances in which the contravention took place; and
- whether a court has found the person has engaged in similar conduct in the past.

*[Schedule 4, item 4, subsection 75B(5) of the Insurance Contracts Act]*

1.65 The amendments provide that the pecuniary penalty the relevant court may order must not exceed the ‘pecuniary penalty applicable’ to the contravention of the civil penalty provision. Such an order is known as a ‘pecuniary penalty order’. *[Schedule 1, item 103, subsections 1317G(2) of the Corporations Act; Schedule 2, item 11 subsection 12GBA(3) of the ASIC Act; Schedule 3, item 7, subsection 167A(1) of the Credit Act; Schedule 4, item 4, subsection 75C(1) of the Insurance Contracts Act]*

1.66 A different pecuniary penalty is applicable to individuals and bodies corporate. For individuals, the penalty applicable for a contravention of a civil penalty provision is the greater of:

- 5,000 penalty units (for the Corporations and ASIC Acts, and civil penalties under the Credit Code civil penalty framework), or the penalty set out in the civil penalty provision (for the Insurance Contracts Act and civil penalties under the Credit Act civil penalty framework); or
- the benefit derived or detriment avoided because of the contravention, multiplied by three.

*[Schedule 1, item 103, subsection 1317G(3) of the Corporations Act; Schedule 2, item 11, subsection 12GBA(3A) of the ASIC Act; Schedule 3, item 7, subsection 167A(2) of the Credit Act; Schedule 3, items 23 and 24, section 116 of the Credit Code; Schedule 4, item 4, subsection 75C(2) of the Insurance Contracts Act]*

1.67 For a body corporate, the penalty applicable for a contravention of a civil penalty provision is the greater of the following:

- 50,000 penalty units (for the Corporations and ASIC Acts, and civil penalties in the Credit Code civil penalty framework), or the penalty set out in the civil penalty

provision (for the Insurance Contracts Act and civil penalties in the Credit Act civil penalty framework) multiplied by 10;

- the benefit derived or detriment avoided by the body corporate because of the contravention, multiplied by three; or
- 10 per cent of the annual turnover of the body corporate, but only to a maximum monetary value of 1 million penalty units.

*[Schedule 1, item 103, subsection 1317G(4) of the Corporations Act; Schedule 2, item 11, subsection 12GBA(3B) of the ASIC Act; Schedule 3, item 7, subsection 167A(3) of the Credit Act; Schedule 3, item 25, section 116 of the Credit Code; Schedule 4, item 4, subsection 75C(3) of the Insurance Contracts Act]*

1.68 Amendments have been made to the Credit Act to increase the penalty that attaches to all civil penalty provisions. The penalty is increased from 2,000 penalty units to 5,000 penalty units. This ensures the civil penalties in the Credit Act are consistent with the increased penalties in the Corporations and ASIC Acts. *[Schedule 3, item 42]*

1.69 The pecuniary penalty applicable applies in relation to a contravention of a civil penalty provision unless there is a contrary intention in relation to the pecuniary penalty applicable to the contravention. *[Schedule 1, item 103, subsection 1317G(8) of the Corporations Act; Schedule 2, item 10, subsection 12GBA(3D) of the ASIC Act; Schedule 3, item 7, subsection 167A(5) of the Credit Act]*

1.70 Annual turnover has the same meaning as it has in Chapter 7 of the Corporations Act, and is calculated for the 12 month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision.

1.71 Benefit derived or detriment avoided is the sum of:

- the total value of all benefits that the person obtained that are reasonably attributable to the contravention; and
- the total value of all detriments that the person avoided that are reasonably attributable to the contravention.

*[Schedule 1, item 103, subsection 1317G(5) of the Corporations Act; Schedule 2, item 11, subsection 12GBA(3C) of the ASIC Act; Schedule 3, item 7, subsection 167A(4) of the Credit Act; Schedule 4, item 4, subsection 75C(4) of the Insurance Contracts Act]*

1.72 Where relevant, existing provisions that provide for penalty calculations have been repealed. *[Schedule 1, item 103, section 1317G of the Corporations Act; Schedule 3, item 6, subsection 167(3) of the Credit Act]*

1.73 The method for calculating the pecuniary penalty applicable provides flexibility and ensures the penalty reflects the seriousness of the contravention and community expectations. It is intended that the pecuniary penalty applicable to provisions across the Corporations Act,

ASIC Act, Credit Act and Insurance Contracts Act are interpreted and operate consistently.

1.74 The increase in civil penalties for individuals ensures it proportionately aligns with the increase in civil penalties for bodies corporate and acts as a sufficient deterrent for misconduct.

1.75 Those who attempt to contravene, or are involved in a contravention, of a civil penalty provision are also taken to have contravened that provision. Where required, the concept of ‘contravention’ has been amended so that it includes attempts to contravene. [*Schedule 1, item 101, section 1317DB of the Corporations Act; Schedule 2, item 10, paragraph 12GBA(1B) of the ASIC Act; Schedule 3, item 8, section 169 of the Credit Act; Schedule 4, item 4, section 75N of the Insurance Contracts Act*]

1.76 For the purposes of the Corporations Act, the ASIC Act, the Insurance Contracts Act and the Credit Act, section 79 of the Corporations Act and the definition of ‘involved in’ in subsection 5(1) of the Credit Act, provide for when a person is involved in contraventions. A person is involved in a contravention if the person:

- aids, abets, counsels or procures a person to contravene the provision;
- induces, or attempts to induce, whether by threats or promises or otherwise, to contravene the provision;
- being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of the provision; and
- conspires with others to contravene the provision.

1.77 The Court continues to be prohibited from making a pecuniary penalty order under the ASIC Act if the person has been convicted of an offence constituted by substantially the same conduct as the civil penalty. [*Schedule 2, item 13, subsection 12GBB(1) of the ASIC Act*]

1.78 The Court, under the ASIC Act, can also continue to relieve a person other than a body corporate from being liable to pay a pecuniary penalty if the person acted honestly, reasonably, and ought fairly to be excused. [*Schedule 2, item 18, subsection 12GI(5) of the ASIC Act*]

1.79 Contravening a civil penalty provision does not relieve the person of their obligations under the provision. If an act or thing is required to be done, the obligations continue until the act or thing is done. This means that if the act or thing is not done, the civil penalty provision is initially contravened and a separate contravention is then committed each day until the act or thing is done. [*Schedule 1, item 103, section 1317GAA of the Corporations Act; Schedule 2, item 14, section 12GBCA of the ASIC Act; Schedule 3, item 9, section 175A of the Credit Act; Schedule 4, item 4, section 75P of the Insurance Contracts Act*]

1.80 It is not necessary to prove a person's intention, knowledge, recklessness, negligence or any other state of mind for the relevant court to make a pecuniary penalty order against a person. However, it is necessary to prove those elements, or any other relevant state of mind element, to the extent the civil penalty proceedings relate to attempting to contravene, or being involved in a contravention of, a civil penalty provision. *[Schedule 1, item 103, section 1317GAB of the Corporations Act; Schedule 2, item 14, section 12GBCB of the ASIC Act; Schedule 3, item 9, section 175B of the Credit Act; Schedule 4, item 4, section 75Q of the Insurance Contracts Act]*

1.81 A person is not liable to have a pecuniary penalty order made against them if the contravention was a result of a mistake of fact. For the person to rely on this defence, the person has to establish that:

- relevant facts existed or did not exist;
- the person was under a mistaken but reasonable belief about those facts; and
- if those facts did or did not exist, the person would not have contravened the civil penalty provision.

*[Schedule 1, item 103, subsection 1317GAC of the Corporations Act; Schedule 2, item 14, subsection 12GBCC of the ASIC Act; Schedule 3, item 9, section 175C of the Credit Act; Schedule 4, item 4, section 75R of the Insurance Contracts Act]*

1.82 A person seeking to rely on the mistake of fact defence bears the evidential burden in relation to those matters. *[Schedule 1, item 103, subsection 1317GAC(3) of the Corporations Act; Schedule 2, item 14, subsection 12GBCC(3) of the ASIC Act; Schedule 3, item 9, subsection 175C(3) of the Credit Act; Schedule 4, item 4, subsection 75R(3) of the Insurance Contracts Act]*

1.83 More generally, a person who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating the civil penalty provision, then that person also bears the evidential burden; that is, the burden to adduce or point to evidence to establish a matter, in relation to those matters. *[Schedule 1, item 103, section 1317GAD of the Corporations Act; Schedule 2, item 14, section 12GBCD of the ASIC Act; Schedule 3, item 9, section 175D of the Credit Act; Schedule 4, item 4, section 75S of the Insurance Contracts Act]*

1.84 Any element of a civil penalty provision done by an employee or agent of a body corporate acting within scope of their employment or authority, must also be attributable to the body corporate. *[Schedule 1, item 103, section 1317GAE of the Corporations Act; Schedule 2, item 14, section 12GBCE of the ASIC Act; Schedule 3, item 9, section 175E of the Credit Act; Schedule 4, item 4, section 75T of the Insurance Contracts Act]*

1.85 After a court has ordered a payment of a pecuniary penalty, the amount is a debt payable to ASIC on behalf of the Commonwealth (or in the case of civil penalties in the Insurance Contracts Act, debt payable to the Commonwealth). ASIC or the Commonwealth may enforce such an order as if it were an order made in civil proceedings for the recovery of a

debt due by the person, also known as a judgement debt. This ensures that enforcement options are available to ASIC or the Commonwealth to pursue payment of a pecuniary penalty. *[Schedule 1, item 103, subsections 1317G(6) and 1317G(7) of the Corporations Act; Schedule 4, item 4, section 75D of the Insurance Contracts Act]*

*Amendments that are specific to the Insurance Contracts Act*

1.86 Further amendments have been made specifically to the Insurance Contracts Act to insert a framework that underpins the introduction of civil penalties into that Act.

1.87 If a person's conduct constitutes the contravention of two or more civil penalty provisions, proceedings may be commenced in relation to any one or more of those provisions. However, the person is not liable to more than one pecuniary penalty in relation to the same conduct. *[Schedule 4, item 4, section 75E of the Insurance Contracts Act]*

1.88 The court is able to make a single civil penalty order against a person for multiple contraventions of a civil penalty provision if proceedings are founded on the same facts or the contraventions form a series of contraventions of the same or similar character. However, the maximum pecuniary penalty the court can order must not exceed the sum of the maximum penalties that could be ordered if a separate penalty were ordered for each of the contraventions. *[Schedule 4, item 4, section 75F of the Insurance Contracts Act]*

1.89 The court may direct that two or more proceedings for civil penalty orders are to be heard together. The court must also apply the rules of evidence and procedure for civil matters when hearing proceedings for a pecuniary penalty order. *[Schedule 4, item 4, sections 75G and 75H of the Insurance Contracts Act]*

1.90 A pecuniary penalty order cannot be made against a person for a contravention of a civil penalty provision if the person has been convicted of an offence constituted by substantially the same conduct. Similarly, civil penalty proceedings against a person are stayed if criminal proceedings are on foot in relation to a criminal offence constituted by substantially the same conduct as the civil penalty provision. Civil penalty proceedings can only resume if the person is not convicted of the offence, otherwise the civil penalty proceedings are dismissed and there must be no award as to cost. *[Schedule 4, item 4, sections 75J and 75K of the Insurance Contracts Act]*

1.91 Criminal proceedings can be commenced regardless of whether a pecuniary penalty order has been made against the person. Evidence of information given or documents produced by an individual is not admissible in criminal proceedings if the individual previously gave that information or documents in civil penalty proceedings and conduct that constituted the criminal offence is substantially the same as the civil

penalty provision. However this does not apply in relation to the falsity of evidence. [Schedule 4, item 4, sections 75L and 75M of the Insurance Contracts Act]

**Expanding the civil penalty regime**

1.92 The Bill introduces a number of provisions in the Corporations Act, Credit Act, Credit Code and Insurance Contracts Act into the civil penalty regime.

1.93 The following existing provisions have been introduced into the relevant civil penalty regime.

**Table 1.5 – Existing provisions that have been introduced into the civil penalty regime**

<i>Provision</i>	<i>Brief description</i>
<b>Corporations Act</b>	
601ED(5)	Managed investment scheme must be registered.
670A	Documents relating to takeovers, compulsory acquisitions and buy-outs cannot be misleading or deceptive, or contain omissions, and are required to contain information that should have been included if a new situation has emerged.
727	A disclosure document is required for offers of securities.
728	A disclosure document cannot be misleading or deceptive, or contain omissions, and is required to contain information that should have been included if a new situation has emerged in relation to offers of securities.
791A	A person who operates a financial market is required to hold a market licence or have an exemption.
792A	General obligations for a market licensee.
792B	A person who holds a market license must notify ASIC of certain matters.
820A	A person who operates a clearing and settlement facility must be licensed.
821A	General obligations for a clearing and settlement facility licensee.
821B	A person who holds a clearing and settlement facility licence must notify ASIC of certain matters.
853F(2)	A person who is disqualified must not be involved in a market licensee, clearing and settlement facility licensee, derivative trade repository licensee or a benchmark administrator licensee and must take reasonable steps to cease.

904A	General obligations for a derivative trade repository licensee.
904C(1)	A person who holds a derivative trade repository licence must notify ASIC of certain matters.
905A	The regulations may identify a class of derivative trade repositories as being required to be licensed, and if so the requirements need to be met.
911A	A person who carries on a financial services business must hold an AFSL or have an exemption.
911B	A person can provide financial services on behalf of another person only if certain conditions are met.
912A	General obligations for a financial services licensee.
912D	A financial services licensee must notify ASIC of certain matters.
920C(2)	A person must not breach a banning order.
922M	A person commits an offence if they fail to comply with their obligation to notify ASIC.
941A	A person who holds an AFSL must give a financial services guide if they provide a financial service to a retail client.
941B	An authorised representative of an AFSL holder that holds an Australian financial services licence must give a financial services guide if they provide financial services to a retail client.
946A	A person is required to give their clients a statement of advice if personal financial advice is provided to a retail client.
952E	A person must not give a defective disclosure document or statement.
952H	A financial services licensee must ensure disclosure documents or statements be issued by the authorised representative as required.
981B	A person is obligated to pay client money into a particular account.
981C	A person is required to comply with regulations dealing with various matters relating to accounts for the purposes of section 981B.
993D(3)	A person is required to pay loan money into an account.
1012A	A person is required to provide a product disclosure document when providing financial advice for a particular financial product.

1012B	A person is required to provide a product disclosure document under certain situations.
1012C	A person is required to provide a product disclosure document under certain situations.
1017BA	A trustee of a superannuation fund is obligated to make a product dashboard publicly available.
1017BB(1)	A trustee of a superannuation fund is obligated to make information relating to investment of assets publicly available.
1020A(1)	Prohibition against offers relating to managed investment schemes that need to be registered.
1021E	A person must not prepare and give out a defective disclosure statement or document.
1021G	An Australian financial services licensee must ensure their representatives give out a product disclosure document or statement.
1309(2)	A person must not give out false information relating to a corporation.
<b>Credit Act</b>	
47	General obligations for a credit licensee.
<b>Credit Code</b>	
24	A credit provider must not enter into a credit contract on terms imposing a prohibited monetary liability.
39B(1)	If there is a default under a small amount credit contract, the amount that can be recovered must not exceed an amount that is twice the adjusted credit amount.
154	A person must not make false or misleading representation.
155	A person must not harass a person to get them to apply for credit or enter into a credit contract.
156(1)	A person must not visit another person's home for the purposes of inducing that person to apply for a credit contract.
174(3)	Consumer leases must contain certain disclosures.
179U	A person must not make false or misleading representation in relation to consumer leases.
179V	A person must not harass a person to get them to apply for a consumer lease.
<b>Insurance Contracts Act</b>	

13(1)	An insurer must comply with the duty of utmost good faith.
33C(1)	Insurers must ensure the Key fact sheet contains certain information.

*[Schedule 1 items 26, 28, 32, 33, 34, 35, 36, 37, 40, 41, 42, 43, 44, 49, 50, 51, 52, 59 to 63, 67 to 75, 79 to 87, 92, and 93, sections 601ED, 670A, 727, 728, 791A, 792A, 792B, 820A, 821A, 821B, 853F, 904A, 904C, 905A, 911A, 911B, 912A, 912D, 920C, 922M, 941A, 941B, 946A, 952E, 952H, 981B, 981C, 993D, 1012A, 1012B, 1012C, 1017BA, 1017BB, 1020A, 1021E, 1021G, 1309 of the Corporations Act; Schedule 3, item 4, section 47 of the Credit Act; Schedule 3, items 18, 19, 22, 26 to 29, 31 to 41, sections 24, 39B, 154, 155, 156, 174, 179U, 179V of the Credit Code; Schedule 4, items 2 and 3, sections 13 and 33C of the Insurance Contracts Act]*

1.94 These provisions have been introduced into the civil penalty regime to address a regulatory gap. They are provisions which, if contravened, are serious enough to warrant financial penalties as a sanction, but are not characterised as a criminal offence.

1.95 If the Court makes a declaration of a contravention of the civil penalty provisions in subsections 670A(4), 727(6), 728(4) or 1309(12), the Court must also specify the corporation, registered scheme, or notified foreign passport fund to which the conduct related. *[Schedule 1, item 102A, paragraph 1317E(2)(f) of the Corporations Act]*

## Harmonising and expanding the infringement notice regime

1.96 Infringement notices are an administrative tool ASIC can use to deter and punish financial sector misconduct. Infringement notices may be used as an alternative to criminal or civil proceedings. If an infringement notice is complied with, including payment of the penalty, no further action will be taken against the person and the payment is not considered an admission of guilt. However, if the infringement notice is not complied with, ASIC may pursue criminal or civil penalties.

1.97 The existing penalty notice regime has been replaced with a new infringement notice regime in the Corporations Act. An infringement notice may be issued for all strict and absolute liability offences in the Corporations Act, other prescribed offences in the Corporations Act and prescribed civil penalty provisions in the Corporations Act. *[Schedule 1, items 97 and 99, sections 1313 and 1317DAN of the Corporations Act]*

1.98 The existing infringement notice regimes in the ASIC Act and Credit Act continue to apply with some additional machinery changes to ensure the regimes are harmonised and operate as intended.

1.99 In the ASIC Act, subdivisions C and D of Division 2, Part 2, sections 12GYB and 12GYC continue to be subject to the infringement notice regime. In the Credit Act, strict liability offences and prescribed civil penalty provisions continue to be subject to the infringement notice regime. Table 1.6 also outlines new provisions in the Credit Act that are

subject to an infringement notice regime. *[Schedule 2, item 20, section 12GXA of the ASIC Act; Schedule 3, item 13, section 288L of the Credit Act]*

1.100 A new infringement notice regime is added to the Insurance Contracts Act to give effect to the Taskforce's recommendation that section 33C of the Insurance Contracts Act be subject to an infringement notice.

1.101 An infringement notice may be issued if ASIC reasonably believes a person has contravened a provision subject to an infringement notice. The infringement notice must be issued within the 12 months after the alleged contravention took place and a single infringement notice is to be issued for a single contravention unless the contravention is related to a person failing to do something required within a specified period of time, in which case the infringement notice can include a contravention for each day. If the contravention relates to both a civil penalty provision and an offence provision, the infringement notice must relate to the offence provision. *[Schedule 1, item 99, section 1317DAM of the Corporations Act; Schedule 2, item 20, section 12GX of the ASIC Act; Schedule 3, item 13, section 288K of the Credit Act; Schedule 4, item 4, section 75U of the Insurance Contracts Act]*

1.102 The penalty amounts for all strict and absolute liability offences subject to an infringement notice regime is 50 per cent of the maximum pecuniary penalty for the offences in the Corporations Act. For example, if the maximum penalty for an individual for a strict liability offence is 20 penalty units, the infringement notice penalty for an individual for that offence is 10 penalty units. If the maximum penalty for a body corporate for a strict liability offence is 200 penalty units, the infringement notice penalty for a body corporate for that offence is 100 penalty units. *[Schedule 1, item 99, section 1317DAO(2) of the Corporations Act]*

1.103 Some civil penalty provisions in the Corporations Act are also subject to an infringement notice regime. The infringement notice penalty amount is 12 penalty units for individuals and 60 penalty units for body corporates. *[Schedule 1, item 99, paragraph 1317DAO(2)(c) and paragraph 1317DAO(2)(d) of the Corporations Act]*

1.104 The civil penalty provisions that are subject to an infringement notice regime will be prescribed in the regulations. Prescribing the list in the regulations allows for flexibility, as when additional contraventions are added in, that may be subject to a civil penalty, it may also be appropriate that the provision penalty be made subject to the infringement notice regime. By having the prescribed list in the regulations, this ensures greater flexibility to allow the penalty framework to stay fit for purpose, while also ensuring ASIC has an appropriately flexible set of regulatory tools to deter and punish financial misconduct.

**Table 1.6 – Provisions that are subject to infringement notices**

<i>Provision</i>	<i>Brief description</i>
<b>Corporations Act</b>	
188(1) and (2)	Responsibilities of a secretary and how they cannot contravene certain provisions.
792B	A person who holds a market license must notify ASIC of certain matters
821B	A person who holds a clearing and settlement facility licence must notify ASIC of certain matters
962P	Fees cannot continue be charged after an arrangement has been cancelled.
912D	A financial services licensee must notify ASIC of certain matters
941A	A person who holds an Australian financial services licence must give a financial services guide if they provide a financial service to a retail client
941B	An authorised representative that holds an Australian financial services licence must give a financial services guide if they provide financial services to a retail client
946A	A person is required to give their clients a statement of advice if financial advice is provided to a retail client
962S(1)	Fee recipient must give fee disclosure statement
963E(1) and (2)	Financial services licensee responsible for breach of ban on conflicted remuneration
963G(1)	Authorised representative must not accept conflicted remuneration
963J	Employer must not pay employees conflicted remuneration
963K	Financial product issuer or seller must not give conflicted remuneration to financial services licensee or representative
964A(1)	Platform operator must not accept volume-based shelf-space fees
964D(1) and (2)	Financial services licensee responsible for breach of asset-based fees on borrowed amounts
964E(1)	Authorised representative must not charge asset-based fees on borrowed amounts
985E(1)	Issuing or increasing limit of margin lending facility without having made assessment etc.

985J(1)	Failure to give assessment to retail client if requested before issue of facility or increase in limit
985J(2)	Failure to give assessment to retail client if requested after issue of facility or increase in limit
985J(4)	Demanding payment to give assessment to retail client
985L	Making issue of margin lending facility conditional on retail client agreeing to receive communications through agent
1012A	A person is required to provide a product disclosure document when providing financial advice for a particular financial product
1012B	A person is required to provide a product disclosure document under certain situations
1012C	A person is required to provide a product disclosure document under certain situations
1017BA	A trustee of a superannuation fund is obligated to make a product dashboard publicly available
<b>Credit Act</b>	
31(1)	Prohibition on conducting business with unlicensed persons
70(1)	Obligation to vary or revoke authorisation that ceases to have effect
124A(1)	Prohibition on providing credit assistance in relation to short-term credit contracts
124B(1)	Licensee who makes representations about credit assistance in relation to small amount credit contracts must display information etc.
133AC(2)	Credit provider's website to provide capacity to generate Key Facts Sheet
133AD(2)	Credit provider to provide Key Facts Sheet in other Situations
133AE(2)	What if more information is needed from the consumer?
133BC(1)	Application form for credit card contract to include up-to-date Key Facts Sheet
133BD(1)	Credit provider not to enter into credit card contract unless Key Facts Sheet has been provided etc.
133BG(1)	Records of consents and withdrawals to be kept
133BH(3)	Credit provider to notify consumer of use of credit card in excess of credit limit
133BJ(1)	Records of consents and withdrawals to be kept

133CA(1)	Prohibition on entering, or increasing the credit limit of, short-term credit contracts
133CB(1)	Licensee who makes representations about small amount credit contracts must display information etc.
133CC(1)	Licensee must not enter into a small amount credit contract if the repayments do not meet the prescribed requirements.
133DB(1)	Giving projections of equity before providing credit assistance or entering credit contract.
133DC(2)	Making reverse mortgage information statement available on website of credit provider or credit assistance provider
133DD(2)	Making reverse mortgage information statement available in other situations
133DE(1) and (2)	Representations that use the term “reverse mortgage” etc
160B(1)	“Independent”, “impartial” or “unbiased” etc.
160C(1)	“Financial counsellor” etc.
160E(2) and (3)	Requirements for giving authorisation to employer
<b>Credit Code</b>	
17(3), (4), (5), (6), (8), (9), (11), (15), (15A)	Matters that must be in contract document
23(1)	Prohibited monetary obligations—general
24	A credit provider must not enter into a credit contract on terms imposing a monetary liability
32A	Prohibitions relating to credit contracts if the annual cost rate exceeds 48%
39B	Limit on amount that may be recovered if there is a default under a small amount credit contract
32AA(2)	Prohibitions relating to credit contracts if the annual cost rate exceeds 48%
34(6)	Information to be contained in statements of account
35(1)	Opening balance must not exceed closing balance of previous Statement
72(4)	Changes on grounds of hardship
177B(4)	Changes on grounds of hardship
<b>Insurance Contracts Act</b>	
33C	Insurer’s must ensure the Key fact sheets contains certain information

1.105 The existing provisions in the ASIC Act subject to an infringement notice, namely a provision of Subdivision C and D of Division 2, Part 2 of the ASIC Act, and sections 12GYB and 12GYC, continue to be subject to an infringement notice of the same penalty amount. The penalty amounts for the infringement notice are set out in the table below. *[Schedule 2, item 20, subsection 12GXB(2) of the ASIC Act]*

**Table 1.7 – Provisions subject to infringement notices**

<i>Section (references are to the ASIC Act)</i>	<i>Individual penalty (penalty units)</i>	<i>Body corporate penalty (penalty units)</i>
Subdivision C and D	12	60
12GYB	6	30
12GYC	10	50

1.106 Schedule 3 to the Bill provides that strict liability offences and prescribed civil penalty provisions in the Credit Act are subject to an infringement notice. *[Schedule 3, item 13, section 288L of the Credit Act]*

1.107 The infringement notice penalty amount in the Credit Act for a single contravention of an offence provision is one fifth of the maximum penalty that the court can impose. This ensures that the penalty amount for infringement notices for offences are proportionated to the maximum offence penalty. *[Schedule 3, item 13, paragraph 288M(2) of the Credit Act]*

1.108 The infringement notice penalty amount in the Credit Act for a single contravention of a civil penalty provision is 50 penalty units for individuals and 250 penalty units for bodies corporate. These reflect the current maximum penalty amounts provided for by section 331 of the Credit Act which is being repealed. *[Schedule 3, items 13 and 15, paragraph 288M(2) and section 331 of the Credit Act]*

1.109 Schedule 4 to the Bill provides that certain offence and civil penalty provisions in the Insurance Contracts Act can be subject to an infringement notice. The penalty amount for an infringement notice issued under an offence provision is 50 per cent of the maximum penalty for the prescribed offence. The penalty amount for an infringement notice issued under a civil penalty provision is 12 penalty units for individuals and 60 penalty units for body corporates. *[Schedule 4, item 4, section 75V and subsection 75W(2) Insurance Contracts Act]*

1.110 Certain matters are required to be prescribed in the infringement notice including a unique identifier, information about the alleged contravention, the penalty amount, the payment period, how to pay, and information about how the person may apply to ASIC seeking an extension, withdrawal or instalment plan. The infringement notice also

needs to stipulate the consequences of not paying the infringement notice. *[Schedule 1, item 99, subsection 1317DAO(1) of the Corporations Act; Schedule 2, item 20, subsection 12GXB(1) of the ASIC Act; Schedule 3, item 13, subsection 288M(1) of the Credit Act; Schedule 4, item 4, subsection 75W(1)]*

1.111 A person has 28 days to pay the infringement notice once the notice is given unless the person requests via application to ASIC either to extend the payment period, request an instalment plan or request that the infringement notice be withdrawn. ASIC may also, of its own accord, extend the payment period, make arrangements for an instalment plan or withdraw an infringement notice and can do so before or after the end of the payment period. ASIC can extend the payment period, make arrangements for an instalment plan or withdraw an infringement notice without receiving an application. *[Schedule 1, item 99, sections 1317DAP, 1317DAQ, 1317DAR and 1317DAS of the Corporations Act; Schedule 2, item 20, sections 12GXC, 12GXD, 12GXE, and 12GXF of the ASIC Act; Schedule 3, item 13, sections 288N, 288P, 288Q, 288R of the Credit Act; Schedule 4, item 4, sections 75X, 75Y, 75Z and 75ZA of the Insurance Contracts Act]*

1.112 In making the decision to withdraw an infringement notice, ASIC should take into account whether a penalty has been previously imposed by the court, the circumstances of the alleged contravention, whether the person has had any previous infringement notices and whether that amount has been paid and any other matters ASIC considers relevant. *[Schedule 1, item 99, subsection 1317DAS(4) of the Corporations Act; Schedule 2, item 20, subsection 12GXF(4) of the ASIC Act; Schedule 3, item 13, subsection 288R(4) of the Credit Act; Schedule 4, item 4, subsection 75ZA(4) of the Insurance Contracts Act]*

1.113 If a person applies to ASIC within 28 days to either extend the payment period or request an instalment plan or request a withdrawal of their infringement notice, ASIC then has 14 days to respond. If ASIC does not respond within 14 days, this is taken to mean ASIC has not approved the request and the refusal is taken to have occurred on the last day of the 14 day period. If ASIC refuses the extension, instalment or withdrawal application, the payment period ends the later of either the 28 days or the day after 7 days after the person gets the notice from ASIC that their application has been refused or the day after 7 days after the application has taken to be refused. *[Schedule 1, item 99, sections 1317DAP, 1317DAQ, 1317DAR and 1317DAS of the Corporations Act; Schedule 2, item 20 sections 12GXC, 12GXD, 12GXE, 12GXF of the ASIC Act; Schedule 3, item 13, sections 288N, 288P, 288Q, 288R of the Credit Act; Schedule 4, item 4, sections 75X, 75Y, 75Z and 75ZA of the Insurance Contracts Act]*

1.114 If ASIC responds to the extension request, then the payment period is extended. If ASIC responds to the instalment plan request, then the payment period is the last day on which an instalment is to be paid under the arrangement. However, if the person fails to pay the instalment in accordance with the arrangement, then the payment period ends on the last day of the missed instalment. If ASIC grants the infringement notice to be paid in instalments, ASIC will need to specify when the payments

are required by and the amounts of each instalment. ASIC may also extend the payment period or vary an instalment plan more than once. *[Schedule 1, item 99, sections 1317DAQ, 1317DAR of the Corporations Act; Schedule 2, item 20, sections 12GXD, 12GXE of the ASIC Act; Schedule 3, item 13, subsection 288P and 288Q of the Credit Act; Schedule 4, item 4, 75Y and 75Z of the Insurance Contracts Act]*

1.115 If ASIC decides to withdraw the infringement notice, ASIC is required to issue a notice to the person outlining the consequences – that is the person may be prosecuted in the court for an offence provision or that a civil penalty order may be brought upon the person for a civil penalty provision or both may happen if the misconduct relates to both contravening an offence provision and a civil penalty provision. *[Schedule 1, item 99, subsection 1317DAS(6) of the Corporations Act; Schedule 2, item 20, subsection 12GXF(6) of the ASIC Act; Schedule 3, item 13, subsection 288R(6) of the Credit Act]*

1.116 If ASIC withdraws an infringement notice and the person has either paid the full amount or has partially paid the infringement notice via instalments, then ASIC is required to refund the monies that have been paid back to the person. Similarly, if a person fails to pay all their instalments as specified by ASIC and later on ASIC decides to prosecute or seek proceedings for the alleged contravention, ASIC must refund to the person the amount that has been paid. *[Schedule 1, item 99, subsection 1317DAR(6) and 1317DAS(7) of the Corporations Act; Schedule 2, item 20, subsection 12GXE(6) and 12GXF(7) of the ASIC Act; Schedule 3, item 13, subsection 288Q(6) and 288R(7) of the Credit Act; Schedule 4, item 4, subsection 75Z(6) and 75ZA(7) of the Insurance Contracts Act]*

1.117 If a person complies with the infringement notice and pays the set amount then the person is to be discharged of any liability and is not to be prosecuted in the court for the alleged contravention for either an offence provision or a civil penalty provision. If a person has paid an infringement notice issued in relation to an alleged contravention of a civil penalty provision, proceedings seeking a civil penalty order cannot be brought against them. If a person has paid an infringement notice for an offence provision, the person has not considered to have admitted guilt or liability. However if a person refuses to pay an infringement notice, then this does not apply. *[Schedule 1, item 99, section 1317DAT of the Corporations Act; Schedule 2, item 20, section 12GXG of the ASIC Act; Schedule 3, item 13, section 288S of the Credit Act; Schedule 4, item 4, section 75ZB of the Insurance Contracts Act]*

1.118 The infringement notice regime does not mean an infringement notice needs to be issued for an alleged contravention. It is one of a range of regulatory tools that ASIC may decide to use. ASIC may still commence proceedings against a person for a contravention if the infringement notice is given and then subsequently withdrawn or if the infringement notice is not given. Two or more infringement notices can be given under the infringement notice regime. Making a provision subject to the infringement notice regime does not limit the court's discretion to

determine an appropriate penalty for a person who is found to have contravened the provision. [*Schedule 1, item 99, section 1317DAU of the Corporations Act; Schedule 2, item 20, section 12GXH of the ASIC Act; Schedule 3, item 13, section 288T of the Credit Act; Schedule 4, item 4, section 75ZC of the Insurance Contracts Act*]

1.119 Review by the Administrative Appeals Tribunal is not available for decisions by ASIC to give, extend, refuse to extend, make or refuse arrangements, withdraw or not withdraw infringement notices. [*Schedule 1, item 98, paragraph 1317C(gf) of the Corporations Act*]

1.120 The exclusion of these decisions is consistent with the Guide. Parts 6.7 and 6.8 of the Guide explicitly state that decisions to issue or withdraw infringement notices should not be subject to merits review. This is because infringement notices are not final or operative determinations of substantive rights and a person may elect to challenge the infringement notice in court. Furthermore this is consistent with the Credit and ASIC Acts, where there is currently no merits review for infringement notices.

## Defining dishonesty

1.121 There is no consistent definition of dishonesty in the Corporations Act. Dishonesty takes its ordinary meaning for the purposes of many provisions in the Corporations Act, while it has been defined as a two limbed test for the purposes of sections 1041F and 1041G.

1.122 More recent jurisprudence has suggested that a single limbed test is the preferred test for dishonesty in Australia. The High Court of Australia in *Peters v R* (1998) 192 CLR 493 (*Peters*) preferred an objective only test where whether an act was ‘dishonest’ should be decided by the standards of ordinary, decent people.

1.123 The amendments in this Bill address the lack of a consistent definition of ‘dishonest’ in the Corporations Act by introducing a specific definition that applies across the Act.

1.124 The amendments insert a definition of ‘dishonest’ into section 9 of the Corporations Act. ‘Dishonest’ means “dishonest according to the standards of ordinary people”. This definition adopts, and is consistent with, the single limb test from *Peters*. [*Schedule 1, item 4, section 9 of the Corporations Act*]

1.125 As the definition is an objective only test, it is not necessary to prove that a defendant knew that the relevant conduct was dishonest. Instead, to establish dishonesty, it is only necessary to prove that the conduct is dishonest according to the standards of ordinary people.

1.126 A consequential amendment is required to paragraph 184(1)(b) of the Corporations Act to ensure the new definition of dishonesty can apply consistently across the Corporations Act. Currently, the offence in

subsection 184(1)(b) of the Corporations Act requires an officer of a corporation to have been “intentionally dishonest” and have failed to exercise their powers and discharge their duties in good faith or for a proper purpose. As the concept of ‘intention’ is subjective, the offence would not operate consistently with the new definition of dishonesty. To ensure the new definition operates as intended, ‘intention’ has been omitted from this offence. [*Schedule 1, item 10, paragraph 184(1)(b) of the Corporations Act*]

1.127 Amendments have also been made to subsections 1041F(2) and 1041G(2) to repeal the existing definition of ‘dishonest’ so that the new definition applies uniformly across the Corporations Act. Minor consequential amendments have also been made to provisions that refer to the subsections that are being repealed. [*Schedule 1, items 88 to 90, subsections 1041F(2), 1041G(1) and 1041G(2) of the Corporations Act; Schedule 1, item 117, Schedule 3 to the Corporations Act*]

## Relinquishment as a remedy

1.128 The Bill makes amendments to the Corporations Act, ASIC Act and Credit Act to enable the relevant court to make a relinquishment order if there has been a contravention of a civil penalty provision.

1.129 A relinquishment order is a mechanism to prevent the unjust enrichment of those who contravene the act by removing any financial benefits that arise. Also known as disgorgement, the mechanism prevents wrongdoers from treating civil penalties as a cost associated with gaining unjust financial benefits.

1.130 A relinquishment aims to neutralise any financial benefit that might have been gained from misconduct. On some occasions, it can be difficult to identify those who have suffered losses or damages at the hands of wrongdoers. In those situations, and unless those who have suffered losses or damages commence compensation proceedings, the financial benefit gained from misconduct could still remain with the wrongdoer as they would only be subject to a financial penalty.

1.131 The concept of relinquishment exists in the *Proceeds of Crimes Act 2002*, where property can be forfeited to the Commonwealth to deprive persons of any financial benefits or profits from committing criminal offences.

1.132 There are currently no mechanisms that allow ASIC to seek the relinquishment of unjust financial benefits. The amendments made by this Bill address this by introducing a framework to allow a court to make relinquishment orders to neutralise the financial benefits and stop the unjust enrichment resulting from misconduct.

1.133 The relevant court can make an order (a ‘relinquishment order’) that a person is to pay to the Commonwealth the amount of benefit

derived or detriment avoided because of a contravention of a civil penalty provision if:

- in relation to a contravention of a civil penalty provision in the Corporations Act:
  - a declaration of a contravention of a civil penalty provision has been made; and
- in relation to the contravention of a civil penalty provision in the ASIC Act:
  - the person has contravened a civil penalty provision in that Act; or
- in relation to the contravention of a civil penalty in the Credit Act:
  - a declaration of a contravention of a civil penalty provision has been made.

*[Schedule 1, item 103, subsection 1317GAF(1) of the Corporations Act; Schedule 2, item 17, subsection 12GCA(1) of the ASIC Act; Schedule 3, item 10, subsection 180B(1) of the Credit Act]*

1.134 The relevant court can make a relinquishment order on its own initiative during proceedings before the court, or on application from ASIC. *[Schedule 1, item 103, subsection 1317GAF(2) of the Corporations Act; Schedule 2, item 17, subsection 12GCA(2) of the ASIC Act; Schedule 3, item 10, subsection 180B(2) of the Credit Act]*

1.135 The relevant court can make a relinquishment order even if a pecuniary penalty order has been made in relation to a civil penalty contravention, or a penalty has been imposed for an offence, if the conduct constituting the civil penalty provision would also constitute the commission of the offence. *[Schedule 1, item 103, subsection 1317GAF(3) of the Corporations Act; Schedule 2, item 17, subsection 12GCA(3) of the ASIC Act; Schedule 3, item 10, subsection 180B(3) of the Credit Act]*

1.136 For example, if a person contravenes a civil penalty provision that is also an ordinary criminal offence, a penalty for the offence can be imposed and the relevant court can also make a relinquishment order. If a person contravenes a civil penalty provision only, a person may be liable to pay a pecuniary penalty and the relevant court can also make a relinquishment order.

1.137 The amount owing under a relinquishment order will be a debt payable to ASIC on behalf of the Commonwealth, and ASIC or the Commonwealth can enforce the order as if it were a judgement debt. *[Schedule 1, item 103, subsections 1317GAF(4) and 1317GAF(5) of the Corporations Act; Schedule 2, item 17, subsections 12GCA(4) and 12GCA(5) of the ASIC Act; Schedule 3, item 10, subsections 180B(4) and 180B(5) of the Credit Act]*

## Priority given to compensate victims

1.138 The Bill makes amendments to clarify that preference must be given to compensating victims who suffer damage as a result of a contravention of a civil penalty provision in the Corporations Act.

1.139 Currently, only the ASIC Act and Credit Act provide that compensating victims who suffer damage as a result of contraventions of civil penalty provisions is preferred where a defendant does not have sufficient financial resources to pay both a financial penalty and compensation.

1.140 Clarifying that the court is to give preference to compensation ensures that victims of corporate and financial sector misconduct are compensated as a priority, as these victims are the ones that have ultimately suffered as a result of the misconduct.

1.141 The requirement to give preference to compensation arises if the relevant court considers it appropriate to:

- make a pecuniary penalty order in relation to a contravention of a civil penalty provision;
- make a relinquishment order in relation to a civil penalty provision; or
- impose a fine in relation to a commission of an offence constituted by the same conduct as the conduct constituting the contravention of the civil penalty order.

*[Schedule 1, item 103, subsection 1317GAG(1) of the Corporations Act; Schedule 2, item 17, subsection 12GCB(1) of the ASIC Act; Schedule 3, item 11, subsection 181(1) of the Credit Act]*

1.142 In making a pecuniary penalty order, relinquishment order or imposing a fine, the relevant court:

- must consider the effect that making the pecuniary penalty, relinquishment order or imposing the fine would have on the amount of compensation that might be reasonably payable; and
- give preference to making an appropriate amount available for compensation under those provisions.

*[Schedule 1, item 103, subsection 1317GAG(2) of the Corporations Act; Schedule 2, item 17, subsection 12GCB(2) of the ASIC Act; Schedule 3, item 11, subsection 181(2) of the Credit Act]*

1.143 The relevant court can make any orders it sees fit to ensure the amount remains available for compensation. *[Schedule 1, item 103, subsection 1317GAG(3) of the Corporations Act; Schedule 2, item 17, subsection 12GCB(3) of the ASIC Act; Schedule 3, item 11, subsection 181(3) of the Credit Act]*

1.144 Compensation proceedings do not need to have been commenced for the court to consider the amount of compensation that might reasonably be likely to be payable, and to make an appropriate amount for compensation available.

1.145 It is intended that the provisions are interpreted and operate consistently across the Corporations Act, ASIC Act and Credit Act.

### **Clarifying the operation of section 184 of the Corporations Act**

1.146 The Bill makes amendments to clarify the operation and scope of section 184 of the Corporations Act.

1.147 Currently a person who is or has been an officer or employee of a corporation, commits an offence against subsections 184(2) and 184(3) of the Corporations Act if they dishonestly or recklessly use their position, or information known to them, with the intention of gaining an advantage for themselves or someone else, or causing detriment to the corporation. There is ambiguity in the current operation of those offences around whether conduct that benefits the corporation would amount to an offence.

1.148 Section 184 of the Corporations Act has been amended to clarify that it is not a defence to an offence against subsections 184(2) or 184(3) that the person uses their position or information with the result of, or with the intention of, gaining an advantage for the corporation. The amendment ensures that those who use their position or information dishonestly or recklessly, but gain an advantage for the corporation, still commit the offence. *[Schedule 1, items 11 and 12, subsections 184(2A) and 184(4) of the Corporations Act]*

### **Specific amendments for certain rules made under the Corporations Act**

1.149 ASIC has the ability to make a number of rules relating to:

- market integrity rules under section 798G of the Corporations Act;
- derivative transaction rules under section 901A of the Corporations Act;
- derivative trade repository rules under section 903A of the Corporations Act;
- client money rules under section 981J of the Corporations Act; and
- financial benchmark rules under section 908CF of the Corporations Act.

1.150 Currently these provisions state ASIC may make rules in relation to those matters and the penalty amount cannot exceed the

prescribed limit. These rules fall under the civil penalty provisions and therefore are subject to the new maximum pecuniary penalty formula. Consequential amendments are made to remove the existing penalty amounts. ASIC is still able to make rules but the maximum penalty amounts are now set in the legislation. *[Schedule 1, items 38, 45, 47, 57 and 76, subsections 798G(2), 901A(4), 903A(4), section 908CO and subsection 981K(3) of the Corporations Act]*

1.151 The Bill makes amendments to leave the infringement notice penalty amounts related to these rules relatively unchanged for individuals, but makes the penalty for bodies corporate more proportionate to the increased civil penalty maximum by multiplying the individual infringement notice penalty amount by 5. Subsections 798K(2), 901F(2), 903E(2), 908CG(2) and 981N(2) are repealed. These subsections calculated the maximum infringement notice penalty amounts based on three-fifths of the maximum civil penalty for the market integrity rules and client money reporting rules and one-fifth of the maximum penalty for the derivative transaction rules, derivative trade repository rules and financial benchmark rules. While the new pecuniary penalty formula for civil penalties is increasing, infringement notice penalty amounts remain unchanged for these rules for individuals. Infringement notice penalty amounts for bodies corporate are made more proportionate to the new civil penalty increases for bodies corporate on the basis outlined below. These infringement notice amounts are the maximum penalty that ASIC can specify in an infringement notice for an alleged contravention of a rule. ASIC may, in its discretion, specify the penalty (if any) payable up to the maximum for each alleged contravention. *[Schedule 1, items 39, 46, 48, 56, and 77 subsections 798K(2), 901F(2), 903E(2), 908CG(2) and 981N(2) of the Corporations Act]*

**Table 1.8 – infringement penalty amounts for rules and benchmarks**

<i>Rule</i>	<i>Individual penalty (penalty units)</i>	<i>Body corporate penalty (penalty units)</i>
Market integrity rules	3,000	15,000
Derivative transaction rules	200	1,000
Derivative trade repository rules	200	1,000
Financial benchmarks rules	1,110	5,550
Client money reporting rules	3,000	15,000

## Amendments to definitions

1.152 The Bill makes a number of amendments to the definition provisions in the Corporations Act, the ASIC Act, the Credit Act and the Insurance Contracts Act to define new concepts.

1.153 Definitions have been inserted into section 9 of the Corporations Act to:

- define ‘annual turnover’;
- add relinquishment order into the definition of ‘civil penalty order’;
- repeal the definition of ‘compliance period’;
- define ‘contravene’, in relation to a civil penalty provision;
- define ‘dishonest’;
- repeal the definition of ‘infringement notice’;
- add a further element to the definition of ‘offence based on’;
- define ‘Part 7.7A civil penalty provision’;
- define ‘payment period’, in relation to infringement notices;
- define ‘relinquishment order’; and
- Define ‘subject to an infringement notice’.

*[Schedule 1, items 1 to 8, definitions in section 9 of the Corporations Act]*

1.154 Definitions have been inserted into subsections 5(1) and 12BA(1) of the ASIC Act to:

- define ‘contravention’
- define ‘civil penalty provision’;
- make a consequential amendment to the definition of ‘infringement notice’
- repeal the definitions of ‘infringement notice compliance period’ and ‘infringement notice provision’; and
- define ‘payment period’, ‘pecuniary penalty order’, ‘relinquishment order’, and ‘subject to an infringement notice’.

*[Schedule 2, items 1 to 9, subsections 5(1) and 12BA(1) of the ASIC Act]*

1.155 Definitions have been inserted into subsection 5(1) of the Credit Act to:

- define ‘annual turnover’;
- amend the definition of ‘contravention’; and

- define ‘individual fine formula’, ‘infringement notice’, ‘payment period’, ‘relinquishment order’, and ‘subject to an infringement notice’.

*[Schedule 3, items 1 to 3, subsection 5(1) of the Credit Act]*

1.156 Definitions have been inserted into the Insurance Contracts Act to define:

- ‘annual turnover’;
- ‘civil penalty provision’;
- ‘contravention’;
- ‘infringement notice’;
- ‘involved’;
- ‘payment period’;
- ‘pecuniary penalty order’; and
- ‘subject to an infringement notice’.

*[Schedule 4, item 1, subsection 11(1) of the Insurance Contracts Act]*

## Miscellaneous technical and consequential amendments

1.157 The Bill makes a number of technical and consequential amendments to support the structural changes to penalty frameworks contained in this Bill.

### *Technical amendments*

1.158 Amendments have been made to some existing provisions to modernise language and enhance readability. *[Schedule 1, item 14, subsection 205G(1) of the Corporations Act; Schedule 3, items 22 and 30, subsections 39B(1) and 154(3) of the Credit Code]*

1.159 Amendments have been made to certain strict and absolute liability offences in the Corporations Act to clarify that an offence is based on the particular subsections that have been referenced. Previously, these provisions stated ‘an offence based on this section is an offence of strict liability’. The amendments clarify which subsections are offences of strict liability. *[Schedule 1, items 21, 22, 23, subsections 347A(3), 347B(3), 428(3) of the Corporations Act]*

1.160 Where existing criminal offences are also now a civil penalty provision, consequential amendments have been made to clarify multiple consequences attach to the conduct. *[Schedule 1, items 24 and 25, subsections 601ED(5) and 601ED(7) of the Corporations Act]*

1.161 Amendments have been made to clarify that infringement notices issued under section 1317DAC of the Corporations Act in relation

to disclosures, do not apply to subsection 1317P(1) of the Corporations Act. *[Schedule 1, item 104, paragraph 1317P(2)(a) of the Corporations Act]*

1.162 To aid readability and modernise its structure, amendments have been made to the table that lists civil penalty provisions in section 1317E of the Corporations Act to clearly list and categorise each of the civil penalty provisions. The categorisation makes it easier to determine whether additional criteria are to be considered by the Court in making a declaration that a civil penalty provision has been contravened. *[Schedule 1, items 100 and 102, section 1317DA and subsection 1317E(1) of the Corporations Act]*

#### *Consequential amendments*

1.163 A number of cross-references have been updated as a result of the amendments made by the Bill. *[Schedule 1, items 55, 102 and 106 subsection 908CF(1), Note 3 in subsection 1317E(1), and the note in subsection 1364(2) of the Corporations Act; Schedule 2, item 12, subsection 12GBA(4) of the ASIC Act; Schedule 3, item 5, subsections 167(2) of the Credit Act]*

1.164 Amendments have been made to certain civil penalty provisions in the Credit Code to ensure consistency in the uplift between penalties for individuals and penalties for bodies corporate. *[Schedule 3, items 17 and 21, subsections 18C(4) and 30B(4) of the Credit Code]*

1.165 Amendments have been made to certain penalty provisions in the Corporations Act, ASIC Act and Credit Act to ensure consistency in the uplift between penalties for individuals and penalties for bodies Corporate. *[Schedule 1, items 105, 116 and 119, paragraph 1364(2)(w), subsection 105-1(3) of Schedule 2, subclause 29(7) of Schedule 4 of the Corporations Act; Schedule 2, items 15 and 19, subsection 12GBD(1) and subsection 12GN(5) of the ASIC Act; Schedule 3, items 16 and 20, subsections 18C(3) and 30B(3) of the Credit Code]*

1.166 Amendments have been made to certain penalty provisions in the Corporations Act where the penalty amounts are stated in the provisions. These penalties have been updated to reflect the new structure of stating penalties using a term of imprisonment or penalty amount or a formula to work out the financial penalty. *[Schedule 1, items 9, 53, 54, 58, 115, 118 and 120, paragraph 5.3 of the small business guide in Part 5.1, subsection 908BA(1), section 908BB, section 908DC, subsection 70-85(2) of Schedule 2, subclause 25(5) of Schedule 4, subclause 33(1) of Schedule 4 of the Corporations Act]*

1.167 Amendments have been made to ensure the *Corporations Amendment (Asia Region Funds Passport) Act 2018* works as intended, including ensuring the penalty amounts reflect the new up-lift. *[Schedule 1, items 29 and 91, subsections 671B(1) and 1211B(3) of the Corporations Act]*

1.168 Consequential amendments have been made to update a number of cross-references as a result of repealing the penalty notices regime (section 1313 of the Corporations Act). *[Schedule 1, items 107, 108 and 109, paragraph 1369(1)(a), subsections 1369(2) and 1369(3) of the Corporations Act]*

1.169 Consequential amendments have been made to update certain headings. *[Schedule 3, item 14, part 6-6 of the Credit Act]*

1.170 Subsections 1311(2) to (6) of the Corporations Act have been repealed and moved into other provisions inserted by this Bill. *[Schedule 1, items 94 and 95, subsections 1311(2) to (6), and sections 1311E, 1311D and 1311E of the Corporations Act]*

1.171 A consequential amendment repeals section 1312 of the Corporations Act as a new formula calculates the financial penalty for a body corporate. *[Schedule 1, item 96, section 1312 of the Corporations Act]*

## **Commencement of the amendments made by this Bill**

1.172 The amendments made by Schedules 1 to 4 to this Bill commence on the day after the day this Bill receives Royal Assent. *[Clause 2]*