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Corporations Act 2001
National Consumer Credit Protection Act 2009
Corporations (Fees) Act 2001
National Consumer Credit Protection (Fees) Act 2009

Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Regulations 2021: breach reporting

The *Corporations Act 2001* (Corporations Act) provides for the regulation of corporations and financial services. The *National Consumer Credit Protection Act 2009* (Credit Act) establishes a national consumer credit regime that provides for the regulation of credit activities. The *Corporations (Fees) Act 2001* (Corporations Fees Act) and the *National Consumer Credit Protection (Fees) Act 2009* (Credit Fees Act) impose fees for matters under the Corporations Act and the Credit Act respectively.

Section 1364 of the Corporations Act, section 329 of the Credit Act, section 8 of the Corporations Fees Act and section 10 of the Credit Fees Act provide that the Governor-General may make regulations prescribing matters required or permitted by the respective Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the respective Act.

The purpose of the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Regulations 2021: breach reporting* (the Regulations) is to support the amendments in Schedule 11 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (the Act).

Schedule 11 to the Act implements the Government's response to recommendations 1.6, 2.8 and 7.2 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry by:

- clarifying and strengthening the breach reporting regime for financial services licensees in the Corporations Act;
- introducing a comparable breach reporting regime for credit licensees in the Credit Act; and
- requiring financial services licensees and credit licensees to report serious compliance concerns about financial advisers and mortgage brokers respectively.

To support these amendments, the Regulations amend the *Corporations Regulations 2001*, the *National Consumer Credit Protection Regulations 2010*, the *Corporations (Fees) Regulations 2001* and the *National Consumer Credit Protection (Fees) Regulations 2010* to:

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- prescribe civil penalty provisions that are *not* taken to be significant (and therefore may not be reportable) under the relevant breach reporting regime if those provisions are contravened;
- ensure certain breach reporting offences and civil penalty provisions are subject to an infringement notice; and
- make minor and technical amendments, including updating references to the Corporations Act.

The respective Acts do not specify any conditions that need to be met before the power to make the Regulations may be exercised.

Details of the Regulations are set out in the Attachment.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on 1 October 2021, in line with the commencement of Schedule 11 to the Act.

Details of the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Regulations 2021: breach reporting***Section 1 – Name**

The name of the instrument is the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Regulations 2021: breach reporting* (the Regulations).

Section 2 – Commencement

The Regulations commence on 1 October 2021.

Section 3 – Authority

The Regulations are made under the *Corporations Act 2001* (Corporations Act), the *National Consumer Credit Protection Act 2009* (Credit Act), the *Corporations (Fees) Act 2001* (Corporations Fees Act) and the *National Consumer Credit Protection (Fees) Act 2009* (Credit Fees Act).

Section 4 – Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments***Amendments to the Corporations Regulations 2001******Civil penalty provisions that are not taken to be significant if contravened***

Item 8 prescribes the following civil penalty provisions in the Corporations Act for the purposes of paragraph 912D(4)(b) of the Corporations Act:

Provision	Description
Subsection 941A(3)	Failure by a licensee to give a Financial Services Guide (FSG) when providing a financial service to a person as a retail client
Subsection 941B(4)	Failure by an authorised representative to give a FSG when providing a financial service to a person as a retail client
Subsection 1012A(5)	Failure to give a Product Disclosure Statement (PDS) when giving personal advice recommending a particular financial product
Subsection 1012B(6)	Failure to give a PDS in situations relating to the offer and issue of financial products
Subsection 1012C(11)	Failure to give a PDS in situations relating to the sale of financial products
Subsection 1021E(8)	Giving a defective disclosure document or statement (including a defective PDS or supplementary PDS)

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This means that a breach of any of these civil penalty provisions is *not* taken to be significant for the purposes of paragraph 912D(4)(b) of the Corporations Act.

However, such a breach may still be significant and reportable under the breach reporting regime if one of the other circumstances in the deemed significance test in subsection 912D(4) apply, or if the breach is otherwise significant under the test in subsection 912D(5) of the Corporations Act.

For example, if a financial services licensee contravenes subsection 941A(3) of the Corporations Act by failing to give a Financial Services Guide to a person as required, that contravention is not taken to be significant for the purposes of paragraph 912D(4)(b) of the Corporations Act. However, if that breach results in or is likely to result in material loss or damage to the person (to whom the licensee provides the financial service), the breach would be taken to be significant under paragraph 912D(4)(d) of the Corporations Act. Therefore, the financial services licensee would need to report the breach to ASIC within the required timeframe.

The rationale for prescribing these civil penalty provisions is:

- a breach of these provisions may be minor, technical or inadvertent in nature;
- given the frequency with which these documents must be provided, it is possible minor, technical or inadvertent breaches (that would not otherwise be significant) would result in a large regulatory burden if they were deemed automatically significant; and
- more material breaches of these provisions would be captured by the other limbs of the deemed significant test in subsection 912D(4) or by the test in subsection 912D(5) of the Corporations Act.

Breach reporting offences and civil penalty provisions that are subject to an infringement notice

Item 9 prescribes the offences in subsections 912DAA(1) and 912DAC(1) of the Corporations Act as being subject to an infringement notice. The offence in subsection 912DAA(1) relates to a failure by a financial services licensee to report a reportable situation to ASIC within the required timeframe and in the prescribed form where there are reasonable grounds to believe the reportable situation has arisen in relation to the licensee. The offence in subsection 912DAC(1) relates to a failure by a financial services licensee to notify ASIC as soon as practicable that the licensee has become a participant in a licensed market or a licensed CS facility, or ceases to be such a participant.

Item 10 prescribes the civil penalty provision in subsection 912DAB(8) of the Corporations Act as being subject to an infringement notice. This civil penalty provision applies if a financial services licensee fails to either lodge a breach report about a financial adviser that is engaged by *another* licensee to ASIC, or provide a copy of that report to the other licensee, as required.

Prescribing these offences and the civil penalty provision as being subject to an infringement notice is appropriate as there may be a high volume of contraventions (ranging in severity) of these provisions. The Attorney-General's Department's A

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Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers highlights failing to comply with reporting obligations as an example of a case where issuing infringement notices may be appropriate.

Minor contraventions of these provisions may be caused by poor internal processes. Where this is the case, the use of an infringement notice may lead to a faster rectification of processes, as licensees are put on notice by ASIC sooner.

The ability to give an infringement notice (along with the other existing enforcement options) gives ASIC sufficient flexibility to pursue the most appropriate action in each case, which will depend on its assessment of various considerations. This approach is also consistent with the consequences that applied in relation to the former breach reporting regime (being the regime that is replaced with the amendments in Schedule 11 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (the Act)).

Minor and technical amendments

Item 3 repeals paragraph 1.0.05A(2)(b) of the *Corporations Regulations 2001* (Corporations Regulations). This paragraph provides that a breach report *may* be lodged with ASIC in the prescribed form. However, under the new breach reporting regime, breach reports *must* be lodged with ASIC in the prescribed form. Paragraph 1.0.05A(2)(b) of the Corporations Regulations is therefore repealed as it has been superseded by the new requirements in the Corporations Act.

Item 3 also repeals paragraph 1.0.05A(2)(c) of the Corporations Regulations and substitutes it with a new paragraph to update the reference to the Corporations Act. This reflects that Schedule 11 to the Act repealed section 912D of Corporations Act and replaced it with new provisions, so former subsection 912D(2) was replaced with subsection 912DAC(1). These provisions require financial services licensees to notify ASIC when the licensee becomes a participant in a licensed market or a licensed CS facility (or ceases to be such a participant). New paragraph 1.0.05A(2)(b) of the Corporations Regulations provides that such a notice may be lodged with ASIC in the prescribed form. There are no substantive changes to the operation of this provision as a result of this change.

Similarly, item 5 amends regulation 7.6.02A of the Corporations Regulations by updating the reference to subparagraph 912D(1)(a)(iii) to paragraph 912D(3)(c). This regulation specifies Commonwealth legislation for the purposes of the breach reporting regime. The provisions of the specified Commonwealth legislation are considered to be core obligations under the breach reporting regime, in so far as they cover conduct relating to the provision of financial services. Significant breaches or likely breaches of core obligations (or investigations into whether such a matter has or will occur) are required to be reported under the new breach reporting regime. There are no substantive changes to the operation of this provision as a result of this change.

Item 6 repeals paragraph 7.6.02A(ac) of the Corporations Regulations, which specifies the *Clean Energy Act 2011* as such a Commonwealth legislation. This reflects that the *Clean Energy Act 2011* was repealed in 2014.

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Item 7 amends paragraph 7.6.02A(d) to update the reference to the *Financial Sector (Transfer and Restructure) Act 1999*, as the short title of that Act was amended by the *Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Act 2018*.

Item 4 is a consequential amendment that takes into account new subregulation 7.6.02A(2) of the Corporations Regulations, which prescribes the civil penalty provisions that are not taken to be significant for the purposes of paragraph 912D(4)(b) of the Corporations Act.

Application

The former breach reporting regime will continue to have some application on and after 1 October 2021. In particular, the application provisions in Schedule 11 to the Act provides that the former breach reporting regime continues to apply in relation to breaches and likely breaches that occurred before 1 October 2021, if, before 1 October 2021, the licensee knew the breach or likely breach occurred.

Item 11 ensures the provisions that are repealed by the Regulations continue to apply in relation to the former breach reporting regime in these circumstances. This mirrors the application provisions relating to the Corporations Act amendments in Schedule 11 to the Act.

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Amendments to the National Consumer Credit Protection Regulations 2010

Civil penalty provisions that are not taken to be significant if contravened

Item 13 prescribes the following civil penalty provisions in the Credit Act for the purposes of paragraph 50A(4)(b) of the Credit Act:

Provision	Description
Subsection 52(2)	Failure to cite the licensee's Australian credit licence number in a document of a kind prescribed by the regulations
Subsection 113(1)	Failure to give a consumer the licensee's credit guide before providing credit assistance to the consumer in relation to a credit contract
Subsection 126(1)	Failure to give a consumer the licensee's credit guide before entering a credit contract with the consumer
Subsection 127(1)	Failure to give a debtor the licensee's credit guide after the licensee is assigned any rights or obligations of a credit provider under the credit contract
Subsection 136(1)	Failure to give a consumer the licensee's credit guide before providing credit assistance to the consumer in relation to a consumer lease
Subsection 149(1)	Failure to give a consumer the licensee's credit guide before entering a consumer lease with the consumer
Subsection 150(1)	Failure to give a lessee the licensee's credit guide after the licensee is assigned any rights or obligations of a lessor under the consumer lease
Subsection 158(1)	Failure to give the credit representative's credit guide
Subsection 160(1)	Failure to give a debtor the licensee's or credit representative's credit guide after the licensee or credit representative becomes authorised to collect repayments by the debtor on behalf of the credit provider
Subsection 160(2)	Failure to give a lessee the licensee's or credit representative's credit guide after the licensee or credit representative becomes authorised to collect payments by the lessee on behalf of the lessor

This means that a breach of any of these civil penalty provisions is *not* taken to be significant for the purposes of paragraph 50A(4)(b) of the Credit Act.

However, such a breach may still be significant and reportable under the breach reporting regime if one of the other circumstances in the deemed significance test in subsection 50A(4) apply, or if the breach is significant under the test in subsection 50A(5) of the Credit Act.

For example, if a credit licensee fails to give a consumer the licensee's credit guide before providing credit assistance to the consumer in relation to a credit contract (as required under subsection 113(1)), that breach is not taken to be significant for the purposes of paragraph 50A(4)(b) of the Credit Act. However, if that breach results in or is likely to result in material loss or damage to a credit activity client of the licensee, then the breach would be taken to be significant under paragraph 50A(4)(e). Therefore, the breach would need to be reported to ASIC within the required timeframe.

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The rationale for prescribing these civil penalty provisions is:

- a breach of these provisions may be minor, technical or inadvertent in nature;
- given the frequency with which these documents must be provided, it is possible minor, technical or inadvertent breaches (that would not otherwise be significant) would result in a large regulatory burden if they were deemed automatically significant; and
- more material breaches of these provisions would be captured by the other limbs of the deemed significant test in subsection 50A(4) or by the test in subsection 50A(5) of the Credit Act.

Breach reporting offences and civil penalty provisions that are subject to an infringement notice

Item 14 prescribes the offence in subsection 50B(2) of the Credit Act as being subject to an infringement notice. This offence relates to a failure by a credit licensee to report a reportable situation to ASIC within the required timeframe where there are reasonable grounds to believe the reportable situation has arisen in relation to the licensee.

Item 15 prescribes the civil penalty provisions in subsections 50C(1) and (5) of the Credit Act as being subject to an infringement notice. These civil penalty provisions apply if a licensee fails to either lodge a breach report with ASIC about a mortgage broker that is engaged by *another* licensee, or provide a copy of that report to the other licensee, as required.

Prescribing this offence and these civil penalty provisions as being subject to an infringement notice is appropriate as there may be a high volume of contraventions (ranging in severity) of these provisions. The Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* highlights failing to comply with reporting obligations as an example of a case where issuing infringement notices may be appropriate.

Minor contraventions may be caused by poor internal processes. Where this is the case, the use of infringement notices may lead to a faster rectification of processes, as licensees are put on notice by ASIC sooner.

The ability to give an infringement notice (along with the other existing enforcement options) provides ASIC sufficient flexibility to pursue the most appropriate action in each case, which will depend on its assessment of various considerations. These options are consistent with the options that apply in relation to the breach reporting regime in the Corporations Act.

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Other amendments

Item 2 updates the reference in the table in clause 1 of Schedule 1 to the *Corporations (Fees) Regulations 2001* to confirm that financial services licensees are not required to pay a fee on lodging a breach report.

As the former breach reporting regime in the Corporations Act will continue to have some application on and after 1 October 2021, item 1 ensures the repeal of the existing reference in clause 1 of Schedule 1 to the *Corporations (Fees) Regulations 2001* continues to apply in relation to the former breach reporting regime, to the extent that regime applies.

Item 12 inserts a new item in the table in clause 1 of Schedule 1 to the *National Consumer Credit Protection (Fees) Regulations 2010* to specify that credit licensees are not required to pay a fee on lodging a breach report.

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