

Criminal and civil penalties for corporate and financial misconduct to strengthen

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Get ready for greater penalties for corporate and financial misconduct. The Government has announced that it is strengthening criminal and civil penalties for corporate misconduct under the *Corporations Act 2001* (Cth) (**Corporations Act**) and boosting the powers of the Australian Securities and Investments Commission (**ASIC**) to protect Australian consumers from corporate and financial misconduct.

Why are the proposed reforms being made?

The proposed reforms have followed recommendations made in a report by the ASIC Enforcement Review Taskforce (**the Taskforce**). Both the Taskforce Report and the full Government response is [available here](#).

The Taskforce has made 50 recommendations, all of which the Government has agreed to, or agreed to in principle. The Government will prioritise the implementation of 30 of the recommendations, with the remaining 20 (which relate to self-reporting of breaches, industry codes and ASIC's directions powers) to be considered alongside the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (currently due in February 2019).

That's great, but what are the proposed changes?

The new reforms will increase the penalties for many criminal offences in ASIC-administered legislation (*Corporations Act* and the *National Consumer Credit Protection Act 2009* (Cth)). The maximum penalties for the most serious criminal offences will be harmonised and increased to:

- for an individual, 10 years' imprisonment and/or the larger of 4,500 penalty units (\$945,000) or three times the benefit gained or loss avoided as a result of the offence; and
- for a corporation, the larger of 45,000 penalty units (\$9.45 million) or three times the benefit gained or loss avoided or 10% of annual turnover.

Specific mention was made to section 184 of the *Corporations Act* being subject to this new maximum penalty. This section imposes criminal liability where;

- a director or officer acts recklessly or with intentional dishonesty and fails to fulfil his or her duties to the corporation; or
- a director, officer or employee uses their position or information dishonestly (or recklessly) with the intention to gain an advantage for themselves or someone else or to cause a detriment to the corporation.

The range of sections of the *Corporations Act* for which infringement notices can be issued is to be increased, and any new infringement notice provisions will be set at 12 penalty units (\$2,520) for individuals and 60 penalty units (\$12,600) for corporations.

The range of contraventions of the *Corporations Act* that are subject to civil penalties will also be increased, including;

- providing defective disclosure documents for takeovers, compulsory acquisitions and buy-outs; or
- offering securities without appropriate disclosure.

A full list of the sections to become subject to civil penalties can be found in Table C of the Taskforce's report.

The maximum civil penalty amounts that can be imposed for contraventions of ASIC-administered legislation are also being increased. Under the current civil penalty regime, the current maximum civil penalty for a contravention is \$200,000 for an individual and \$1 million for a corporation. Under the new regime this will be increased to the greater of:

- for an individual, 5,000 penalty units (currently \$1.05 million) or three times the benefit gained or loss avoided; and
- for a corporation, the higher of 50,000 penalty units (currently \$10.5 million) or three times the benefit gained or loss avoided or 10% of annual turnover.

ASIC will be empowered to strip wrongdoers of profits illegally obtained, or losses avoided from contraventions resulting in civil penalty proceedings, and will have increased powers including:

- an expanded ability to ban individuals from performing any role in a financial services company where the individual are found to be unfit, improper, or incompetent;
- a strengthened power to refuse, revoke or cancel financial services and credit licences where the licensee is not fit or proper; and
- additional tools to investigate and prosecute serious offences by harmonising their search warrant powers to provide them with greater flexibility to use seized materials, and granting ASIC access to telecommunications intercept material.

The amendments above represent a large increase in the penalty for corporate and financial misconduct, and an increase in ASIC's powers to both uncover and penalise such misconduct. As yet, no timeframe has been given for their introduction, though the Government has stated it will develop legislative amendments to implement the prioritised recommendations.

For more information or discussion, please contact our [Corporate Advisory and Governance](#) team.

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