

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Corporations Act 2001
National Consumer Credit Protection Act 2009
Insurance Contracts Act 1984

Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Regulations 2019

Section 1364 of the *Corporations Act 2001* (the Corporations Act), section 329 of the *National Consumer Credit Protection Act 2009* (the Credit Act) and section 78 of the *Insurance Contracts Act 1984* (the Insurance Contracts Act) provide that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Regulations 2019* (the Regulations) is to:

- prescribe the list of offence, civil penalty and key requirement provisions that are subject to an infringement notice regime;
- ensure penalties and offences are consistent with the strengthened penalty framework inserted by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (the Amending Act);
- update a number of cross-references; and
- provide for contingent amendments to allow certain regulations to transition into the strengthened penalty framework provided by the Amending Act.

The Regulations amend the *Corporations Regulations 2001*, the *National Consumer Credit Protection Regulations 2010* and the *Insurance Contracts Regulations 2017*.

The Amending Act made amendments to the Corporations Act, the *Australian Securities and Investments Commission Act 2001*, the Credit Act and the Insurance Contracts Act to strengthen penalties to combat corporate and financial sector misconduct, and to modernise and harmonise a number of penalty and enforcement frameworks.

The amendments made by the Amending Act were a result of recommendations from the Financial System Inquiry and the Australian Securities and Investments Commission Enforcement Review Taskforce (the Taskforce). The Taskforce recommended a number of policy options to strengthen the Australian Securities and Investments Commission's (ASIC) powers and regulatory tools, including a strengthened penalty framework for corporate and financial sector misconduct.

One regulatory tool, the use of infringement notices, was expanded by the Amending Act to apply to certain criminal offences, civil penalties and key requirement provisions in the Corporations Act, the Schedule to the Credit Act and the Insurance Contracts Act. The framework was designed so that regulations can list provisions that would be subject to infringement notices. This ensured flexibility and efficiency in keeping the infringement notice regime fit for purpose.

The Regulations prescribe provisions that are subject to infringement notices, and update penalty amounts and the scope of some offences to ensure offences and penalties align with the strengthened penalty framework inserted by the Amending Act.

A number of cross-references have been updated as a result of the amendments made by the Amending Act. Contingent amendments also help to transition proposed amendments to the *National Consumer Credit Protection Regulations 2010* into the strengthened penalty framework.

Details of the Regulations are set out in [Attachment B](#).

The Authorising Acts specify no conditions that need to be met before the power to make the Regulations may be exercised.

The Treasury conducted stakeholder roundtable discussions on 10 October 2018 on an exposure draft of the Amending Act and accompanying explanatory material. The accompanying explanatory material included the list of provisions that are now subject to an infringement notice regime under the Corporations, Credit and Insurance Contracts Regulations, and details on the penalties that have increased. Feedback received was considered in developing the Amending Act.

The Regulations were not consulted on, as the changes they make were considered consequential in nature and arose from the primary law, such as the prescribing of provisions that are subject to infringement notices, ensuring penalty amounts are consistent and updating cross-references. The primary reforms were discussed with key stakeholders during the development of the Amending Act.

The Regulations commenced the day after it was registered.

The Office of Best Practice Regulation (OBPR) considered the reforms from the Taskforce have no more than minor impacts on business, community organisations or individuals. The reforms do not change regulatory costs and the OBPR has certified that the Regulations do not require a Regulation Impact Statement (OBPR ID 23315).

A Statement of Compatibility with Human Rights is at [Attachment A](#)

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Regulations 2019

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the Regulations is to:

- prescribe the list of offence, civil penalty and key requirement provisions that are subject to an infringement notice regime;
- ensure penalties and offences are consistent with the strengthened penalty framework inserted by the Amending Act;
- update a number of cross-references; and
- provide for contingent amendments to allow certain regulations to transition into the strengthened penalty framework inserted by the Amending Act.

Human rights implications

Consideration has been specifically given to the guidance in the Parliamentary Joint Committee on Human Rights' *Guidance Note 2: Offence provisions, civil penalties and human rights* (the Guidance Note) and to the Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition (the Guide).

The impact of the Regulations on the following human rights has been considered:

- the right to fair trial under article 14 of the International Covenant on Civil and Political Rights (ICCPR); and
- the increases to maximum penalties, under the Guide.

Increase to maximum fine for criminal offences

The Regulations make amendments to increase the financial penalty for certain criminal offences. The maximum financial penalty for criminal offences is calculated through a new formula that was inserted by the Amending Act, where, if the term of imprisonment is less than 10 years, the individual fine formula is the imprisonment term in months multiplied by 10.

Penalties have been increased to ensure consistency with the amendments made by the Amending Act. The increases are appropriate, given that the relevant offences are

of a corporate nature. The increase in penalties reflects the seriousness of misconduct and aligns with community standards and expectations.

The financial penalty amounts are the maximum that a court can impose.

Those involved in committing offences of a corporate nature could receive large financial benefits from their misconduct, especially in the larger corporate and financial business sectors. To deter such behaviour, and to ensure paying a financial penalty does not become a cost of doing business, calculating the financial penalty for individuals by multiplying the imprisonment term in months by 10 is appropriate.

The increases neutralise any financial benefits or gains obtained from illegal behaviour.

To the extent the Regulations increase the maximum penalty for criminal offences, they do not amend any of the criminal process or procedural rights that exist and are upheld in accordance with article 14 of the ICCPR. The increased penalties apply to offences that have been committed, or that began to be committed, after the Regulations commenced. The increases apply prospectively, upholding article 15 of the ICCPR.

To the extent the increase in financial penalties apply to bodies corporate, they do not engage any human rights.

Increase to penalties for strict liability offences

The Regulations also increase financial penalties for strict liability offences.

Financial penalties for strict liability offences have increased to reflect the seriousness of the offence. The Guide suggests an appropriate penalty for a strict liability offence is 60 penalty units for an individual and 300 penalty units for a body corporate. The body corporate fine formulae in some instances have increased strict liability penalties to be higher than 300 penalty units for body corporates. While the amendments depart from the Guide in these instances, the increase in penalty reflects the seriousness of the offence and is appropriate as it makes the amounts more proportionate to the other penalty increases and acts as a sufficient deterrent.

Strict liability offences essentially remove the requirement to prove fault. The application of strict liability offences are appropriate to ensure the integrity of the financial sector, as consumers put their trust in certain classes of people (such as company directors, financial advisors and superannuation trustees), and a failure to comply with the obligations bestowed on these people can result in detriment to the consumer. Strict liability offences reduce non-compliance and act as an appropriate deterrent.

Furthermore, strict liability offences preserve the defence of honest and reasonable mistake of fact. This is to be proved by the accused on the balance of probabilities. The defence maintains adequate checks and balances for the person who may be accused of such offence.

While the Regulations increase the maximum penalty for strict liability offences, they do not amend any of the process rights that currently exist. The increased penalties will apply to offences that have been, or began to be, committed after the Regulations commenced and therefore apply prospectively, upholding article 15 of the ICCPR.

Increase to the maximum civil penalty

The Regulations increase civil penalties, ensuring consistency with the increases in the Amending Act. If an individual contravenes a civil penalty provision, ASIC may apply to the court and the court can order individual defendants to pay a penalty the greater of:

- 5,000 penalty units; or
- the benefit derived or detriment avoided because of the contravention, multiplied by three.

The Guidance Note observes that civil penalty provisions may engage criminal process rights under articles 14 and 15 of the ICCPR, regardless of the distinction between criminal and civil penalties in domestic law. This is because the word ‘criminal’ has an autonomous meaning in international human rights law. When a provision imposes a civil penalty, an assessment is therefore required as to whether it amounts to a ‘criminal’ penalty for the purposes of articles 14 and 15 of the ICCPR.

While the civil penalty provisions are not classified as criminal under Australian law, consideration must be had to the nature, purpose and severity of the penalties.

While the purpose of the increase to the maximum civil penalty is to act as a sufficient deterrent for misconduct, the penalties are restricted to people who should be aware of their obligations. The increased penalty ensures civil penalties for individuals proportionately align with the increased civil penalties for bodies corporate, and act as a sufficient deterrent for misconduct.

In practice, it is intended that courts would determine which method provides the greatest penalty, and then use discretion to impose an appropriate penalty up to that amount. The specified penalty is the maximum penalty that a court can impose, taking into account the facts and circumstances of each case.

The method for calculating the pecuniary penalty applicable provides flexibility and ensures the penalty reflects the seriousness of the contravention and community expectations. It will further ensure that incurring a civil penalty is not considered a cost of doing business, and provides an appropriate penalty amount to deter and punish misconduct.

The new maximum penalty is justified where consequences of not complying can cause consumer detriment. Not complying with obligations under the Credit Act can harm consumers and create distrust in the financial services sector. The maximum penalty is considered appropriate to adequately deter misconduct.

While the civil penalty amounts are intended to deter misconduct, none of the civil penalty provisions carry a penalty of imprisonment. The civil penalty provisions should not be considered ‘criminal’ for the purpose of human rights law due to their application in a financial services regulatory context. Therefore, the civil penalty provisions do not create criminal offences for the purposes of articles 14 and 15 of the ICCPR.

Furthermore, the increased penalty for civil penalty provisions will apply to offences that have been, or began to be, committed after the Regulations commenced, and therefore applies prospectively, upholding article 15 of the ICCPR.

Conclusion

To the extent that the Regulations engage the rights under articles 14 and 15 of the ICCPR, they are compatible with human rights as the limitations:

- achieve the legitimate objective of protecting the general public from corporate misconduct;
- are rationally connected to the objective by improving the likelihood of compliance with the regulatory regimes; and
- impose proportionate penalties to deter future misconduct.

Therefore the Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Explanation of provisions

Clauses 1, 2, 3 and 4 – Machinery provisions

Clauses 1 to 4 of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Regulations 2019* (the Regulations) are machinery provisions setting out:

- the name of the Regulations;
- the day the Regulations commenced, and the day the amendments made by the Regulations commenced;
- the authority for making the Regulations; and
- that items in the schedule to the Regulations amend or repeal each instrument that is specified in the schedule, and have effect according to their terms.

Schedule 1 – Amendments

Amendments relating to penalty amounts

Items 1 to 10, 16, 32, 33, 37, 43, 45, 47, 49, 51 and 53

The regulations ensure specified penalties in the *Corporations Regulations 2001* (Corporations Regulations) and the *National Consumer Credit Protection Regulations 2010* (Credit Regulations) are consistent with the amendments made by the Amending Act.

The Regulations make the following amendments:

- if an offence had a combination of a financial penalty and a term of imprisonment, the specification of the financial penalty has been removed so that the fine formula framework can operate to provide the financial penalty from the imprisonment component;
- if the penalty was a fine and did not specify it was the penalty for a body corporate, a separate body corporate penalty has been specified to provide certainty that the body corporate penalty is 10 times the individual penalty;
- if a penalty for an offence did not have a term of imprisonment and the financial penalty was higher than 30 penalty units, it did not change; however the multiplier of 10 applies to body corporates;
- where necessary, civil penalties have been increased to ensure the penalty is consistent with the increases made by the amendments in the Amending Act; and
- the scope of some offences in Part 5D.2 of the Corporations Regulations have been extended to capture those involved in a contravention of the offence. This is consistent with the extensions made in the Amending Act to capture those involved in contraventions.

As the Amending Act introduced a new fine formula framework to determine the penalty amount, the Regulations ensure the uplift of 10 applies to bodies corporate. For amendments to the penalties for offences in the Corporations Regulations, this has been done by specifying the penalty for a body corporate. For amendments to the penalties in the Credit Regulations, only the individual penalty has been specified, with the fine formula framework in the Credit Act operating to calculate the financial penalty for an individual (where applicable) and the body corporate penalty.

The Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition (the Guide) was considered during the development of the fine formula frameworks. The Guide suggests an appropriate fine to imprisonment ratio is five, or 5 penalty units for every one month of imprisonment.

A departure from the ratio of five is warranted because relevant offences are of a corporate nature. Those involved in committing such offences could receive large financial benefits from their misconduct, especially in the larger corporate and financial business sectors. To deter such behaviour, and to ensure paying a financial penalty does not become a cost of doing business, a ratio of 10 for individuals is appropriate. This neutralises any financial benefits or gains obtained from illegal behaviour.

The further uplift of 10 that applies only to bodies corporate also ensures that a body corporate does not obtain financial benefits from illegal behaviour. Bodies corporate can be well resourced and often can, in the corporate and financial sector, have significant financial value and resources. To ensure financial penalties act as an adequate deterrent, punish illegal behaviour, and are commensurate to the size and capacity of bodies corporate, a further ratio of 10 is appropriate.

The further uplift of 10 is consistent with the Guide as they provide an adequate penalty that will deter and punish illegal behaviour. They provide an adequate outcome for the worst possible case of corporate and financial misconduct.

The Guide also suggests an appropriate penalty for a strict liability offence is 60 penalty units for an individual and 300 penalty units for a body corporate. The body corporate penalty for some strict liability offences have been increased to more than 300 penalty units. While these amendments depart from the Guide, the increase in penalty reflects the seriousness of the offence and is appropriate as it makes the amounts more proportionate to the other penalty increases and acts as a sufficient deterrent.

The increase in civil penalties ensures that incurring a civil penalty is not considered a cost of doing business and the amount is appropriate to deter and punish misconduct. The increases ensure community confidence in the corporate and financial sectors and act as a sufficient deterrent for misconduct.

Amendments relating to strict liability offences

Items 17, 18, 30, 44, 46, 48, 50 and 52

The Regulations ensure the penalties in the Corporations Regulations and Credit Regulations are consistent with the Amending Act. If a strict liability offence is

below 20 penalty units with no imprisonment, it has increased to 20 penalty units. The multiplier of 10 applies to body corporates making the penalty 200 penalty units.

The penalty amount of 20 penalty units strikes an appropriate balance between ensuring the integrity and effectiveness of the regulatory framework and deterring and punishing misconduct for lower level breaches, and provides efficiency and effectiveness in prosecuting such offences. This recognises that the regulated population should not only refrain from consciously doing wrong, but should take active steps to fulfil certain statutory obligations.

Increasing the penalty amount to 20 penalty units also avoids penalties for lower level breaches being seen as a cost of doing business. If penalties are too low and can easily be paid with no real deterring effect, there is no negative stigma associated with committing the underlying offence.

The penalty amount of 20 penalty units recognises that fault elements do not need to be established for these offences and that a lower maximum penalty is appropriate compared to ordinary and more serious offences. These amendments implement a balanced and fair penalty framework for minor and lower level breaches.

Amendments relating to updating cross references

Items 11 to 15 and 22 to 29

A number of cross-references have been updated and clarified as a result of the amendments made by the Amending Act.

Items 19 and 20

References to provisions in the Corporations Act that have been amended as a result of the Amending Act have been updated to ensure they refer to the correct provision.

Items 21 and 31

Notes that make reference to table items in the table in Schedule 3 to the Corporations Act have been removed as the table in Schedule 3 has been restructured.

Amendments relating to the infringement notice regime

Items 34, 35, 39 to 42 and 55

The penalty notice regime, including the prescribed form, has been repealed by the Amending Act and replaced with a new infringement notice regime.

Section 1317DAN of the Corporations Act and subsection 288K(1) of the Credit Act allow regulations to prescribe offence, civil penalty and key requirement provisions that can be subject to an infringement notice. The Regulations prescribe the civil penalty, criminal offence and key requirement provisions that are subject to infringement notices.

The Regulations prescribe certain ordinary criminal offences as being subject to infringement notices. These provisions are also civil penalty provisions. It is appropriate to prescribe the offence provision as being subject to infringement notices

due to the general notion that criminal offences are the ultimate sanction for misconduct. It would be inconsistent with the existing framework of sanctions and indemnities if infringement notices for these provisions attach to the civil conduct rather than the criminal conduct. This position is supported by the standard infringement notice framework in the *Regulatory Powers (Standard Provisions) Act 2014*, which to the extent possible has been adopted by in the Amending Act, and provides that if a provision can constitute a civil penalty provision and criminal offence provision, the infringement notice must relate to the offence provision.

Amendments made by the Amending Act ensure that penalty notices that have been issued before the commencement of these Regulations operate as if the penalty notice regime had not been repealed. This ensures the preservation of the penalty notice framework to existing penalty notices so these notices can continue to operate as intended.

Item 36

An amendment has been made to retain the prescribed penalty for the offence that is subject to a penalty notice in subregulation 9.4.03(2) of the Corporations Regulations of failing to pay a review fee in accordance with subsection 1351(3) of the Corporations Act.

The Amending Act repealed the penalty notice framework, inserting a modern infringement notice framework in its place. Subsection 1313(8) of the Corporations Act allowed the offence of failing to pay a review fee in accordance with subsection 1351(3) of the Corporations Act to be prescribed as an offence subject to a penalty notice. Subsection 1364(2)(n) of the Corporations Act allows a penalty to be prescribed for that offence.

To ensure the offence still remains subject to a penalty notice like regime, it has been prescribed under paragraph 1317DAN(c) so that it is subject to an infringement notice. The penalty for the offence has been relocated as Part 9.4 of the Corporations Regulations has been repealed.

These amendments ensure that the offence is subject to an infringement notice and the penalty remains the same.

Application of the amendments

Items 38 and 54

The amendments in the Regulations relating to penalty amounts for offences apply to offences if the conduct of the offence occurs wholly on or after the commencement of the Regulations.

The amendments relating to penalty amounts for civil penalty provisions apply to civil penalty provisions if the conduct of the provision occurs wholly on or after the commencement of the Regulations.

Infringement notices that have been issued under the repealed infringement notice framework, and that were issued before the commencement day of the Amending Act, continue to apply as if that framework had not been repealed.

Other consequential amendments

Items 56 and 57

Amendments have been made to update references in the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* to certain offences in Schedule 3 to the Corporations Act.

An amendment has also been made to update the definition of ***designated offence*** in the *Fair Work (Registered Organisations) Regulations 2009* as the penalty notice regime has been repealed. The new definition captures offences that are subject to an infringement notice under section 1317DAN of the Corporations Act.

Schedule 2 – Contingent amendments

Item 1

In transitioning to the strengthened penalty framework, contingent amendments are necessary to ensure proposed amendments to laws can operate effectively and as intended. The Regulations contain contingent amendments to address the transition of amendments made in the National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018 that introduce new offences that will be subject to infringement notices.

The Regulations achieve this by making the commencement of certain offence provisions being subject to infringement notices contingent on the commencement of *National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Regulations 2019*. This will ensure that once the framework for those new offences commence, they can be prescribed and be subject to infringement notices.

The contingent amendments commence the later of the commencement of the Regulations or the commencement of the *National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Regulations 2019*. However, the amendments do not commence if the *National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Regulations 2019* never commence.