

CORPORATE CRIME AND INVESTIGATIONS: NEW LAWS TO INCREASE SANCTIONS FOR WHITE-COLLAR OFFENCES

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Legal Briefings - By **Grant Marjoribanks, Tania Gray, Jacqueline Wootton and Christine Wong**

In an update at the end of late last year, we foreshadowed a number of expected reforms to the regulation and enforcement of corporate crime in Australia in 2019 (see [here](#)).

One of those reforms, the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Bill)*, passed both Houses on 18 February 2019. The Bill introduces heavier civil penalties and criminal sanctions under the Corporations Act and other legislation.

The Bill and the Explanatory Memorandum can be found [here](#) and [here](#), respectively.

WHAT ARE THE IMPLICATIONS?

As noted in our Briefing Paper on the implications of the Final Report of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report)* (see [here](#)), the reforms are part of a broader enforcement revolution.

The reforms will enable ASIC to pursue heavier civil penalties and criminal sanctions against banks and other companies, their executives and others who have breached corporate and financial services laws. We expect that the availability of greater sanctions, combined with ASIC's more aggressive enforcement stance, will lead to increased litigation against companies, senior executives and officers.

This is consistent with ASIC's updated response to the Final Report released on 19 February 2019 in which ASIC confirmed:

- heightened investigatory and enforcement activity. In particular, since 1 February 2018, there has been a 15% increase in the number of ASIC enforcement investigations on foot and a 50% increase in the number of ASIC enforcement investigations of misconduct by large financial institutions (or their employees or subsidiary companies).
- its decision to establish a separate Office of Enforcement within ASIC with responsibility for investigating and enforcing contraventions. The principles underlying the enforcement approach of that office include:
 - asking the question ‘why not litigate’ if a contravention is more likely than not;
 - only pursuing a negotiated outcome where an objective assessment weighs in its favour; and
 - focusing on corporate and individual accountability.

The legislation does not operate retrospectively. Past breaches will be subject to the penalties in place at the time the offence was committed.

WHAT ARE SOME OF THE KEY CHANGES THAT WILL BE BROUGHT ABOUT BY THE REFORMS?

1. SIGNIFICANT INCREASES IN MAXIMUM PENALTIES FOR CRIMINAL OFFENCES

The prison terms for the most serious offences in the Corporations Act are increasing from 5 years to 15 years. These include:

- engaging, whether directly or indirectly, in market manipulation (s 1041A) and insider trading (s 1043A(1));
- intentionally, recklessly or dishonestly contravening duties as officers or directors (s 184);

- dishonestly failing to comply with financial and audit obligations (s 344(2));
- intentionally or recklessly breaching duties as officers or employees of the responsible entity of a registered scheme (ss 601FD, 601FE); and
- knowingly or recklessly providing defective disclosure documents or statements (ss 952D, 952F, 1021D).

Financial penalties will also be increased:

- Where a criminal offence is committed, for which a fine is the only penalty specified, the specified fine will be multiplied by 10 penalty units for a company.
- For criminal offences that only provide for a term of imprisonment of 15 years or more, the financial penalty is increasing to the greater of:

- for companies:

- 45,000 penalty units (\$9.45 million);

- three times the benefit gained or loss avoided; or
- for individuals:
 - up to 10 per cent of annual turnover; and

- 4,500 penalty units (\$945,000); or
- three times the benefit gained or loss avoided.

- For criminal offences that only provide for a term of imprisonment of less than 15 years, the financial penalty is calculated by multiplying the prison term (in months) by:

- 100 penalty units for a corporation. For instance, a prison term of 14 years (168 months) will attract 168,000 penalty units (\$3.528 million); and
- 10 penalty units for an individual.

2. SIGNIFICANT INCREASES IN MAXIMUM PENALTIES FOR CIVIL CONTRAVENTIONS

The maximum financial penalty for contraventions of a relevant civil penalty provision is currently \$200,000 for an individual or \$1 million for a body corporate.

The maximum financial penalty for civil penalty contraventions is increasing as follows:

- For companies, the greater of:
 - 50,000 penalty units (\$10.5 million);
 - three times the benefit gained or loss avoided; or
 - 10% of the annual turnover of the corporation (but capped at 2.5 million penalty units, or \$525 million).

- For individuals, the greater of:
 - 5,000 penalty units (\$1.05 million); or
 - three times the benefit gained or loss avoided.

Strikingly, the maximum penalty unit figures are higher than those that apply for criminal offences (although are capped for companies, whereas those for criminal offences are notionally open ended). Parliament has not explained the rationale for this.

3. EXTENSION OF THE CIVIL PENALTY REGIME

The civil penalty regime is being extended including to apply to:

- a failure to report a breach within the prescribed 10 day timeframe. A breach of this obligation is currently only a criminal offence.
- a breach of general obligations under section 912A which require a financial services licensee to “*do all things necessary to ensure that the financial services covered by the license are provided efficiently, honestly and fairly*”.

4. NEW DEFINITION OF DISHONESTY

The term ‘dishonesty’ will be explicitly defined in the Corporations Act as “*dishonest according to the standards of ordinary people*”.

This definition will be engaged in provisions such as section 1041G, which provides that it is an offence to engage in dishonest conduct in relation to a financial product or service whilst carrying on a financial services business. This provision received significant attention from the Royal Commission in its Final Report.

5. INTRODUCTION OF NEW CRIMINAL OFFENCES

Additional criminal offences are being introduced to sit alongside existing strict and absolute liability offences.

The introduction of these new criminal offences, which will involve an element of criminal intention, will mean that higher penalties are available where that fault element can be established.

For example, the obligation for companies to keep financial records is currently a strict liability offence, meaning prosecutors do not have to prove any wrongful intention. The reforms will introduce a new criminal offence with a fault element, in addition to that existing offence.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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