



Australian Government

Australian Government response to the ASIC Enforcement Review Taskforce Report

April 2018

Rec no.	Recommendation	Government Action
Chapter 1: Self-reporting of contraventions by financial services and credit licensees		
1	The 'significance test' in section 912D of the <i>Corporations Act 2001</i> should be retained but clarified to ensure that the significance of breaches is determined objectively	The Government agrees in principle to this recommendation. The Government notes that the Royal Commission into misconduct in the banking, superannuation and financial services industry (Royal Commission) will consider internal systems of financial entities to identify misconduct. The Government will defer implementation of this recommendation to enable it to take account any findings arising out of the Royal Commission.
2	Introduce a self-reporting regime for credit licensees equivalent to the regime for AFS licensees under section 912D of the <i>Corporations Act 2001</i>	As for recommendation 1.
3	The obligation for licensees to report should expressly apply to misconduct by an employee or representative	As for recommendation 1.
4	Significant breaches (and suspected breach investigations that are ongoing) must be reported within 30 days	As for recommendation 1.
5	The required content of breach reports should be prescribed by ASIC and be lodged electronically	As for recommendation 1.
6	Criminal penalties should be increased for failure to report as and when required	As for recommendation 1.
7	A civil penalty should be introduced in addition to the criminal offence for failure to report as and when required	As for recommendation 1.

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8	Encourage a cooperative approach where licensees report breaches, suspected or potential breaches or employee or representative misconduct at the earliest opportunity	As for recommendation 1.
9	Streamline the reporting requirements for responsible entities of managed investment schemes by replacing the requirements in section 601FC(1)(l) of the Corporations Act with an expanded requirement in section 912D.	As for recommendation 1.
10	Require annual publication of breach report data for licensees by ASIC	As for recommendation 1.
Chapter 2: Harmonisation and enhancement of search warrant powers		
11	ASIC-specific search warrant powers in various acts should be consolidated into the ASIC Act	The Government agrees that ASIC-specific search warrant powers should be centralised in the <i>Australian Securities and Investments Commission Act 2001</i> (ASIC Act). This will result in consistent search warrant powers across the legislation in respect of which ASIC has specific enforcement responsibility. The Government will develop legislative amendments to implement this recommendation.
12	ASIC Act search warrants should provide for search and seizure of 'evidential material'	The Government agrees that ASIC Act search warrant powers should be consistent to those in the Commonwealth <i>Crimes Act 1914</i> (Crimes Act) and <i>Competition and Consumer Act 2010</i> . The Government will develop legislative amendments to implement this recommendation.
13	ASIC Act search warrant powers should include ancillary powers that mirror the Crimes Act provisions	The Government agrees that ancillary powers that mirror the Crimes Act provisions should be included the ASIC Act to modernise its search warrant powers. The Government will develop legislative amendments to implement this recommendation.

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14	ASIC Act search warrants should only be issued when there is a reasonable suspicion of a contravention of an indictable offence	<p>The Government agrees that the ASIC Act search warrants should only be issued when there is a reasonable suspicion of a contravention of an indictable offence. Imposing this threshold would ensure that search warrants are only issued in investigations for relatively serious offences. It also appropriately balances the regulator’s need to access effective investigative tools and the rights of individuals subject to investigation.</p> <p>The Government will develop legislative amendments to implement this recommendation.</p>
15	Material seized under ASIC Act search warrants should be available for use in criminal, civil and administrative proceedings for as long as is reasonable and practicable	<p>The Government agrees that material seized under ASIC Act search warrants should be available for use in criminal, civil and administrative proceedings for as long as is reasonable and practicable.</p> <p>ASIC’s current ability to hold and use seized material “for as long as necessary” should be modified to enable ASIC to hold the material for as long as is reasonable and practicable in the circumstances. This timeframe better reflects the complexity of investigations and prosecutions undertaken by ASIC.</p> <p>We will develop legislative amendments to implement this recommendation.</p>
16	Use of material seized under search warrants by private litigants should be subject to appropriate limits	<p>The Government agrees that private litigants should only have access to material seized by ASIC under search warrants where the private litigant has obtained an order from a court.</p> <p>We will develop legislative amendments to implement this recommendation.</p>

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<i>Chapter 3: ASIC's access to telecommunications intercept material</i>		
17	ASIC should be able to receive telecommunications intercept material to investigate and prosecute serious offences.	The Government agrees that ASIC's ability to investigate and prosecute serious offences successfully would be enhanced by enabling it to receive telecommunications intercept material. We will develop legislative amendments to implement this recommendation.
<i>Chapter 4: Industry codes in the financial sector</i>		
18	ASIC approval should be required for the content of and governance arrangements for relevant codes	The Government agrees in principle with this recommendation. The Government notes that the Royal Commission will consider the adequacy of forms of industry self-regulation, including industry codes of conduct. The Government will defer implementation of Chapter 4 recommendations to enable it to take account any findings arising out of the Royal Commission.
19	Entities should be required to subscribe to the approved codes relevant to the activities in which they are engaged.	As for recommendation 18.
20	Approved codes should be binding on and enforceable against subscribers by contractual arrangements with a code monitoring body	As for recommendation 18.
21	An individual customer should be able to seek appropriate redress through the subscriber's internal and external dispute resolution arrangements for non-compliance with an applicable approved code	As for recommendation 18.

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22	The code monitoring body, comprising of a mix of industry, consumer and expert members, should be required to monitor the adequacy of the code and industry compliance with it over time, and periodically report to ASIC on these matters.	As for recommendation 18.
Chapter 5: Strengthening ASIC's licencing powers		
23	ASIC should be able to refuse a licence application (or, for existing licensees, take licensing action) if it is not satisfied controllers are fit and proper	<p>The Government agrees that ASIC should be able to refuse a licence application if it is not satisfied that the controllers of the applicant are fit and proper and to take licensing action if it is no longer satisfied of this, including on a change of control.</p> <p>We will develop legislative amendments to implement this recommendation.</p>
24	Empower ASIC with the ability to cancel a licence if the licensee fails to commence business within six months	<p>The Government agrees that ASIC should be able to immediately cancel an Australian Financial Services (AFS) licence and credit licence if the licensee has not commenced to engage in a financial services or credit business within six months of being granted a licence to do so. ASIC will also be able to cancel a licence if the licensee has ceased to carry on a financial services or credit business.</p> <p>This will address both the issue of 'warehousing' AFS licences and provide certainty for AFS and credit licensees as to when ASIC's power to cancel a licence for failure to commence engaging in business will arise.</p> <p>We will develop legislative amendments to implement this recommendation.</p>
25	ASIC should be able to refuse a licence application if it is false or misleading in a material particular.	<p>The Government agrees that ASIC should be able to refuse an AFS or credit licence application if it is false or misleading in a material particular. This would cover false or misleading statements or omissions.</p> <p>As noted by the Taskforce, at present there is no express power to refuse a licence application in these circumstances. Licensee applicants would have an opportunity to be heard prior to ASIC's decision to refuse to grant the licence.</p> <p>We will develop legislative amendments to implement this recommendation.</p>

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26	Introduce an express obligation requiring applicants to confirm that there have been no material changes to information given in the application before the licence is granted	<p>ASIC's decision to grant a licence or licence variation should be based on up to date information about the circumstances of the applicant.</p> <p>The Government agrees that applicants seeking an AFS or credit licence, or to vary an existing licence, should have an express obligation to confirm that there have been no material changes in the applicant's circumstances that would render statements or information in the application to be false or materially misleading.</p> <p>We will develop legislative amendments to implement this recommendation.</p>
27	Align the assessment requirements for AFS licence applications with the enhanced credit licence assessment requirements	<p>The Government agrees that AFS and credit licence applications and assessment requirements should be as similar as possible.</p> <p>Harmonisation of licence application requirements ensures applicants are subject to the same assessment criteria and provides greater certainty for AFS and credit licence applicants.</p> <p>We will develop legislative amendments to implement this recommendation.</p>
28	A statutory obligation should be introduced to notify change of control within 30 days of control passing, with penalties for failure to notify	<p>A change of licensee control can have a large impact on a business.</p> <p>The Government agrees that a licensee be required to notify ASIC of changes of control within 30 business days of the change of control taking effect and that penalties should apply for failure to notify ASIC.</p> <p>We will develop legislative amendments to implement this recommendation.</p>

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29	Align consequences for making false or misleading statements in documents provided to ASIC in AFS and credit contexts.	<p>The Government agrees that the consequences for making false or misleading statements in documents provided to ASIC in the AFS and credit contexts should be aligned. This should apply with respect to statements made in licence applications, licence variation applications and other documents lodged with ASIC.</p> <p>Penalties for misleading ASIC in AFS licence applications should be consistent with other penalties that apply for misleading ASIC and are aligned with those that currently apply with respect to false or misleading statements in the Credit Act.</p> <p>We will develop legislative amendments to implement this recommendation.</p>
<i>Chapter 6: ASIC's power to ban individuals in the financial sector</i>		
30	Once an administrative banning power is triggered, ASIC should be able to ban a person from performing a specific function, or any function, in a financial services or credit business.	<p>The Government agrees that ASIC should have the power to ban a person from performing any function in a financial services or credit business.</p> <p>This will help bring ASIC's powers in line with a number of international jurisdictions and will ensure that, where appropriate, banned individuals cannot hold a specific position or any position in a financial services or credit business.</p> <p>We will develop legislative amendments to implement this recommendation.</p>
31	The grounds for exercising ASIC's power to ban individuals from performing roles in financial services and credit businesses should be expanded.	<p>The Government agrees that ASIC's banning power should be expanded where ASIC has reason to believe that a person is fit and proper, or is not adequately trained to provide financial services or to perform their specific role in a financial services business.</p> <p>We will develop legislative amendments to implement this recommendation.</p>

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Chapter 7: Strengthening penalties for corporate and financial sector misconduct		
32	The maximum imprisonment penalties for criminal offences in ASIC-administered legislation should be increased as outlined in Table A of the Taskforce Report	<p>The Government agrees that penalties for certain criminal offences should be increased as recommended by the Taskforce.</p> <p>The scope of the Taskforce’s review allowed it to consider criminal penalties across ASIC-administered legislation in a holistic manner.</p> <p>The Government will develop legislative amendments to implement increases to criminal penalties as recommended by the Taskforce.</p>
33	The maximum pecuniary penalties for criminal offences in the Corporations Act should generally be calculated by reference to the following formula: maximum term of imprisonment in months multiplied by 10 = penalty units for individuals, multiplied by a further 10 for corporations	<p>The Government agrees that greater clarity and consistency of criminal penalties will be achieved by standardising the method of setting a maximum pecuniary penalty.</p> <p>As noted by the Taskforce, the Crimes Act sets a standard multiple of five times the number of months of imprisonment for pecuniary penalties for individuals. The Attorney-General’s Department’s <i>A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</i> (AGD guide), however, contemplates a higher multiple for corporate offences.</p> <p>The Government agrees that a multiple of ten is appropriate given the potentially large profits from corporate crime as well as the potential harm to consumers and the public. The Government also considers a further multiple of ten is appropriate to calculate the equivalent penalty for corporations for the same offence, where applicable.</p> <p>We will develop legislative amendments to implement this recommendation.</p>
34	The maximum penalty for a breach of section 184 should be increased to reflect the seriousness of the offence, to 10 years’ imprisonment and/or a fine: for individuals the greater of 4,500 penalty units of three times the benefit gained (or loss avoided); and for corporations the greater of 45,000 penalty units, or three times the benefit gained (or loss avoided) or 10% annual turnover.	<p>The Government agrees to increase the maximum penalty for a breach of section 184 of the Corporations Act and to include the recommended multiple of benefit gained (or loss avoided) and 10% annual turnover for corporations as alternative methods of calculating the appropriate maximum penalty.</p> <p>We will develop legislative amendments to implement this recommendation.</p>

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35	The Peters test should apply to all dishonesty offences under the Corporations Act	<p>The Government agrees to amend legislation so that the Peters test will apply to all offences with an element of dishonesty in the Corporations Act.</p> <p>The Peters test for dishonesty applies an objective definition of dishonesty and is the test preferred by the High Court of Australia at common law. Establishing a single objective test for dishonesty will provide certainty when prosecuting relevant offences in the Corporations Act.</p>
36	Imprisonment should be removed as a possible sanction for strict and absolute liability offences	<p>The Government agrees that imprisonment penalties should be removed as a possible sanction for all strict and absolute liability offences in the Corporations Act.</p> <p>Removing imprisonment as a possible penalty for offences without a mental element would be consistent with the AGD guide.</p> <p>We will amend the Corporations Act to implement this recommendation.</p>
37	An ordinary offence should be introduced to complement a number of strict and absolute liability offences as outlined in Table B of the Taskforce report	<p>The Government agrees that ordinary offences should be introduced in relation to certain strict and absolute liability offences, as identified by the Taskforce.</p> <p>An ordinary criminal offence should apply for the conduct where there has been an element of fault, such as dishonesty or intention. Graduated penalties should be available in the prosecution of misconduct to ensure penalties are applied proportionately based on the level of culpability, for example.</p> <p>The Government will amend the Corporations Act to incorporate ordinary criminal offences, as outlined by the Taskforce.</p>
38	Maximum pecuniary penalties for strict and absolute liability offences currently set at 5, 10 or 15 penalty units should be increased to 20 penalty units for individuals, corresponding penalties for corporations should be increased to 200 penalty units	<p>The Government agrees to increase pecuniary penalties for strict and absolute liability offences as recommended by the Taskforce.</p> <p>Pecuniary penalties should be set at an adequate level to deter would-be offenders. The Government also agrees to the Taskforce's recommendation to extend penalty notices to these offences, which will have a lower pecuniary penalty attached. This will ensure an appropriate enforcement pathway is available for lower level breaches of these offences.</p> <p>We will develop legislative amendments to implement this recommendation.</p>

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39	All strict and absolute liability offences should be subject to the penalty notice regime.	The Government agrees that strict and absolute liability offences should be enforceable through a penalty notice regime (or a similar regime). The Corporations Act will be amended to give effect to this recommendation. A penalty notice regime is an appropriate enforcement pathway for lower level breaches and allows for regulatory action to be taken without requiring admission of guilt or liability. Inclusion of penalty notices would not prevent ASIC from prosecuting the underlying offence with the associated higher penalty.
40	<p>Maximum civil penalty amounts in ASIC-administered legislation should be increased as follows:</p> <ul style="list-style-type: none"> – For individuals: 2,500 penalty units (currently \$525,000); – For corporations: the greater of 50,000 penalty units (currently \$10.5 million) or three times the value of benefits obtained or losses avoided or 10% of annual turnover in the 12 months preceding the contravening conduct (but not more than 1 million penalty units (\$210 million)). 	<p>The Government agrees-in-principle to this recommendation. The Government accepts the Taskforce’s recommended civil penalty for corporations, and also accepts that the penalties for individuals should be increased. However, the Government accepts ASIC’s submission to the Taskforce that the maximum penalties for individuals should be set at the greater of 5,000 penalty units (currently \$1.05 million) or three times the value of benefits obtained or losses avoided for individuals.</p> <p>In addition to being recommended by ASIC in its submission to the Taskforce, this position it also achieves an increase in existing penalties that is more consistent with the magnitude of the Taskforce’s recommended increase in penalties for corporations (from \$1 million to \$10.5 million). Including the ‘three times value of benefits or losses’ is also more consistent with the structure of the proposed Corporations penalty amount.</p> <p>Further, the Government notes this recommendation overlaps with recommendations 4 and 5 of the Senate Economic References Committee report <i>‘Lifting the fear and suppressing the greed’: Penalties for white-collar crime and corporate and financial misconduct in Australia</i> (White Collar Crime report), which recommended increasing the quantum of civil penalties and establishing a maximum penalty by reference to a multiple of benefit gained or loss avoided (including for penalties for individuals).</p> <p>We will develop legislative amendments to implement this recommendation.</p>

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41	Disgorgement remedies should be available in civil penalty proceedings brought by ASIC under the Corporations, Credit and ASIC Acts.	<p>The Government agrees that disgorgement remedies should be made available in civil penalty proceedings brought by ASIC.</p> <p>The ability to deprive contraveners of their ill-gotten gains is an important tool for ASIC and implementation of this recommendation would allow ASIC to pursue the remedy in respect of civil penalty contraventions, supplementing the existing power to seek disgorgement after criminal convictions under the <i>Proceeds of Crime Act 2002</i>.</p> <p>We will develop legislative amendments to implement this recommendation. The Government notes this recommendation is supported by recommendation 6 of the White Collar Crime report, which recommends introducing disgorgement powers for ASIC for ‘non-criminal matters’.</p>
42	The Corporations Act should require courts to give priority to compensation	<p>The Government agrees to the recommendation to align the Corporations Act with the ASIC Act and the Credit Act by requiring courts to give priority to compensating victims over paying a pecuniary penalty order.</p> <p>We will develop legislative amendments to implement this recommendation.</p>
43	The civil penalty regime should be expanded to the provisions outlined in Table C of the Taskforce report	<p>The Government agrees to expand the civil penalty regime as outlined by the Taskforce.</p> <p>The Government recognises the important regulatory role that civil penalties play in ASIC’s enforcement approach.</p> <p>We will develop legislative amendments to implement this recommendation.</p>

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44	The provisions outlined in Table D of the Taskforce report should be made infringement notice provisions.	The Government agrees to this recommendation. Similar to penalty notices under recommendation 39, infringement notices are an effective enforcement pathway for lower level breaches. Infringement notices will provide an additional enforcement pathway that will not prevent ASIC from prosecuting the underlying civil penalty provision in respect of more serious offences or where an infringement notice is not complied with. We will develop legislative amendments to implement this recommendation. The Government notes this recommendation is supported by recommendation 3 of the White Collar Crime report, which recommends expanding infringement notices for breaches of financial services laws.
45	Infringement notices should be set at 12 penalty units for individuals and 60 penalty units for corporations for any new infringement notice provisions	The Government agrees that the infringement notice amounts should generally be 12 penalty units for individuals and 60 for corporations. These amounts are in line with the AGD guide and represent appropriate penalties for relatively minor offences. We will develop legislative amendments to implement this recommendation.
Chapter 8: ASIC's directions powers		
46	ASIC should have the power to direct financial services or credit licensees in the conduct of their business where necessary to address or prevent risk to consumers.	The Government agrees in principle to this recommendation. The Government notes that the Royal Commission will consider the adequacy of existing laws and policies. The Government will consider recommendations under Chapter 8 of the Taskforce report in conjunction with any findings arising out of the Royal Commission.
47	The directions power should be triggered where ASIC has reason to suspect that a licensee has, is or will contravene AFS or credit licensing requirements (including relevant laws).	As for recommendation 46.
48	ASIC should be able to make an interim direction without a hearing, for a period of time, if the direction is to cease a type of activity and a delay in making a direction would be prejudicial to the public interest.	As for recommendation 46.

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49	A licensee should have an opportunity to be heard before the direction is made, and the ability to review a direction at the Administrative Appeals Tribunal.	As for recommendation 46.
50	The requirement to comply with a direction should be an obligation of licensees, and there should be a civil penalty provision for non-compliance.	As for recommendation 46.

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