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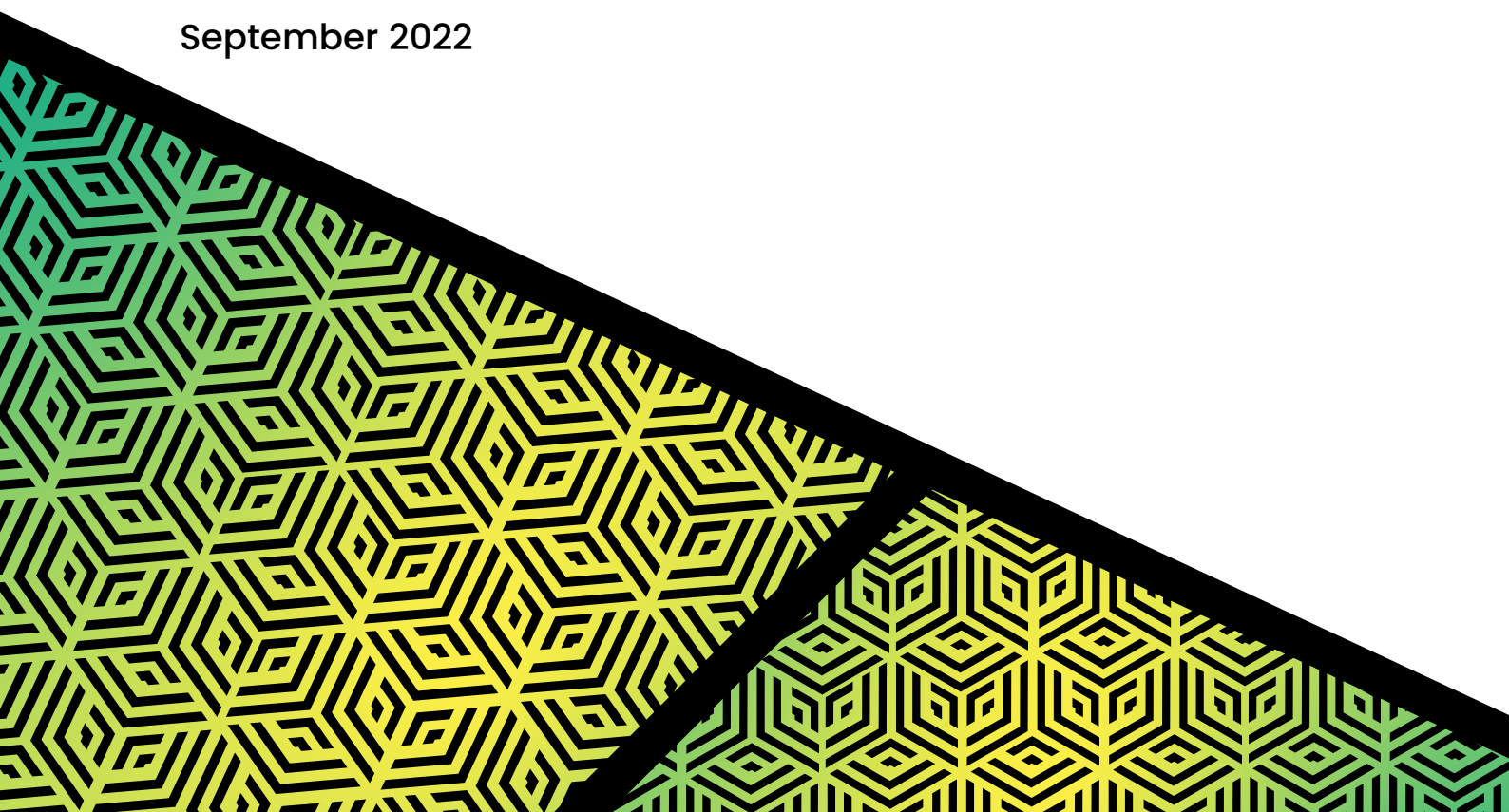
Australian Law Reform Commission

INTERIM REPORT B – ADDITIONAL RESOURCES

LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

Corporations Act Offence and Penalty Architecture

September 2022



Interim Report B is the second of three Interim Reports to be published as part of the Australian Law Reform Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation. This document is one of several additional resources, published on the ALRC's website, which provide further detail relevant to particular aspects of Interim Report B.

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CORPORATIONS ACT OFFENCE AND PENALTY ARCHITECTURE

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Introduction

1. This note supplements Chapter 5 of Interim Report B by setting out key features of the existing legislative architecture for penalties and offences in the *Corporations Act 2001* (Cth) (*'Corporations Act'*).¹

Types of consequences available for breach of the law

2. The *Corporations Act* includes offences, civil penalties, and at least one 'true' administrative penalty.² As the relevant regulator, the Australian Securities and Investments Commission ('ASIC') also has power to take a wide range of administrative action following certain contraventions or alleged contraventions of the law. This includes powers to issue an infringement notice;³ accept an enforceable undertaking;⁴ issue a stop order;⁵ disqualify a person from acting as a director;⁶ impose licensing conditions or revoke a licence;⁷ or refer to disciplinary action.⁸

Structure of offence and penalty provisions

3. **Offences** are created and identified in the *Corporations Act* in a number of ways. These do not always operate consistently.⁹

1 Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022).
2 As to the latter, see *Corporations Act 2001* (Cth) s 206B. As to the distinctions between the different categories, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [5.9]–[5.10].
3 See, eg, *Corporations Act 2001* (Cth) s 1317DAC.
4 See eg, *Australian Securities and Investments Commission Act 2001* (Cth) ss 93A, 93B.
5 See, eg, *Corporations Act 2001* (Cth) ss 1020E, 1200N, 1215.
6 See, eg, *ibid* s 206F.
7 See, eg, *ibid* s 914A.
8 See, eg, *ibid* sch 2, ss 40–40 to 40–65.
9 See Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [8.16]–[8.20].

4. Most generally, s 1311(1) provides that (unless otherwise stated) breach of *any* requirement or prohibition in the *Corporations Act* is an offence under that section. However, s 1311(1A) carves out a large part of the *Corporations Act* from the general operation of s 1311(1). It provides that, for specified parts of the *Corporations Act*, including Chapter 7, an offence is created under s 1311(1) only if a penalty for the provision is listed in Sch 3. Schedule 3 also lists penalties for some of the offences created by the general operation of s 1311(1) but not others.¹⁰ Throughout the *Corporations Act*, some sections have notations to indicate that contravention of the section is made an offence by the operation of s 1311(1), but this is not adopted universally.¹¹

5. Some parts of the *Corporations Act* (including Chapter 7) create offences in specific sections.¹² The penalties for some, but not all, of these offences are listed in Sch 3.¹³

6. While Sch 3 lists a large number of the offence provisions under the *Corporations Act*, it is not comprehensive. By the operation of s 1311F, an offence may also be created without a penalty being specified.¹⁴ It is, therefore, very difficult to identify comprehensively the offence provisions within the *Corporations Act* (as to which see further below, 'Number of provisions').

7. In contrast to offences, **civil penalty provisions** under the *Corporations Act* are easier to identify. An obligation or prohibition attracts civil penalty liability if it is listed in s 1317E(3). Each relevant provision has a notation directly underneath the section alerting readers to the fact that it is a civil penalty provision under s 1317E.

Range of maximum penalties – offences

8. As at 1 January 2022, offences under the *Corporations Act* attracted terms of imprisonment ranging from three months to 15 years and, in the absence of provision for imprisonment, maximum fines (for an individual) ranging from 10 penalty units (currently \$2,220) to 3,000 penalty units (\$666,000). Table 1 below shows a breakdown of the number of offences by maximum penalty available.¹⁵

10 For example, Part 2M.4 of the *Corporations Act* falls under the general provision of s 1311(1), but penalties for offences under that part are listed in Sch 3. See, eg, s 324BA and 37 additional provisions in Part 2.4M that are listed in Sch 3.

11 Compare, for example, offences under Chapter 7.9, such as ss 1013I(4), 1013IA(5) and 1013K(2) which note the application of s 1311(1) with ss 1021K(1) and 1021P(1), which do not.

12 See, eg, *Corporations Act 2001* (Cth) pt 7.9 div 7 subdiv A.

13 For example, the penalties for offences created under s 1020AI(3), (5), and (7) of the *Corporations Act* are included in Sch 3, while the penalties for ss 198G, 422C(5), 422D(2), and 453F(2), are not listed in Sch 3.

14 In practice this only applies to provisions not carved out of s 1311(1) by s 1311(1A).

15 This data does not include five offences where the penalty varies according to the particular contravention or the maximum sentence of imprisonment depends on whether the breach is a first or second offence.

Table 1: Number of offences in the Corporations Act by maximum penalty

Maximum penalty	Number of offences
Imprisonment	
< 1 year	66
1 – 4 years	219
5 – 9 years	111
10 – 14 years	2
15 years	32
Fine (for an individual)	
<50 penalty units	281
50 – 99 penalty units	210
100 – 999 penalty units	34
≥1000 penalty units	5

Calculation of pecuniary penalties for civil penalty provisions

9. With one exception, maximum pecuniary penalties for all civil penalty provisions under the *Corporations Act* are calculated under the formula set out in s 1317G. This provides that, for an individual, the maximum pecuniary penalty payable is the higher of: (i) 5,000 penalty units (currently \$1.1 million); and (ii) three times the amount of the benefit derived and detriment avoided because of the contravention.

10. For a corporation, the maximum pecuniary penalty payable is the higher of: (i) 50,000 penalty units (currently \$11.1 million); and (ii) three times the amount of the benefit derived and detriment avoided because of the contravention; and (iii) either 10% of the annual turnover of the body corporate for the 12 month period prior to the contravention or (if that amount is greater than 2.5 million penalty units), 2.5 million penalty units (currently \$555 million).

11. The one exception is s 1101AC (breach of an enforceable code provision of an approved code of conduct), which provides for a maximum pecuniary penalty of 300 penalty units (currently \$66,600).

12. The *Corporations Act* builds in ‘material prejudice’ and seriousness thresholds for the making of a pecuniary penalty order under many civil penalty provisions.¹⁶ The Act also directs the Court to consider all relevant matters when determining the amount of pecuniary penalty, including the nature and extent of the contravention, nature and extent of loss or damage suffered, and circumstances in which it took place.¹⁷

¹⁶ *Corporations Act 2001* (Cth) ss 1317G(1)(b)–(d).

¹⁷ *Ibid* s 1317G(6).

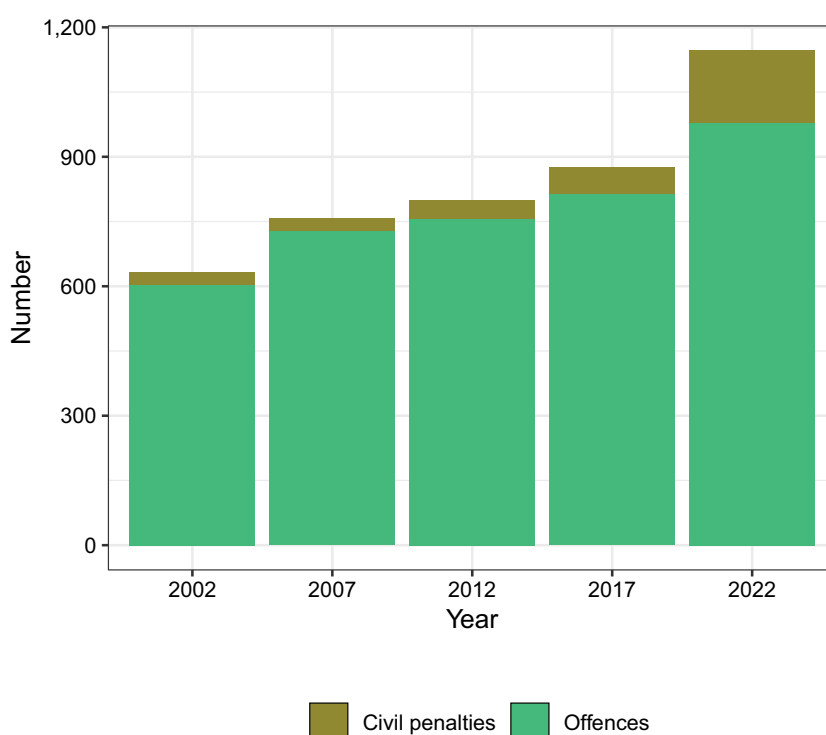
13. Alongside these statutory factors, the courts have identified factors that inform an assessment of whether a pecuniary penalty has an ‘appropriate deterrent value’.¹⁸ These relate to both the ‘character of the contravening conduct’ (such as whether it was deliberate, and/or carried out by senior management), and the ‘character of the contravenor’ (such as the contravenor’s size, market share, and culture of compliance).¹⁹

14. Under the *Corporations Act*, civil penalty provisions are also subject to a safe harbour which provides relief where a person has ‘acted honestly’ and ‘ought fairly to be excused’.²⁰

Number of offence and civil penalty provisions

15. The number of offence and civil penalty provisions in the *Corporations Act* has increased significantly over time, as represented in Figure 1.²¹

Figure 1: Corporations Act Offence and Civil Penalty Provisions 2002–22



18 *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599, [18] (Kiefel CJ, Gageler, Keane, Gordon, Steward, and Gleeson JJ).

19 Ibid [18]–[19] (Kiefel CJ, Gageler, Keane, Gordon, Steward, and Gleeson JJ), citing with approval *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076, 52,152–52,153 (French J). These factors are commonly referred to as the ‘French factors’. Note that *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599 concerned s 546 of the *Fair Work Act 2009* (Cth), which provides simply that the court may order a person to pay a pecuniary penalty that the court considers is ‘appropriate’; cf *Corporations Act 2001* (Cth) s 1317G(6).

20 *Corporations Act 2001* (Cth) s 1317S.

21 This includes all offence provisions for which a penalty is specified in the *Corporations Act*, and all civil penalty provisions. There may be additional offences created under s 1311(1) for which a penalty is not specified. For an explanation of the methodology used see Australian Law Reform Commission, ‘Data Methodologies’ <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Data-methodologies.pdf>.

16. Figure 1 shows that on 11 March 2002, there were 603 offences for which penalties were specified, and 28 civil penalty provisions. By 1 January 2022 there were 978 offence provisions and 168 civil penalty provisions, a 62% and 500% increase respectively over approximately 20 years.

Delegation of the content of offences and civil penalty provisions

17. The *Corporations Act* has a number of examples of provisions creating offences and civil penalties where the content is set out in delegated legislation or other documents. Examples include:

- s 738Q (failure of a crowd sourced funding ('CSF') intermediary to conduct checks prescribed by regulations to a reasonable standard before publishing a CSF offer document is a strict liability offence subject to a fine of 50 penalty units);
- s 903D (obligation to comply with derivative trade depository rules is a civil penalty provision subject to calculation under s 1317G);
- breach of the Financial Planners and Advisers Code of Ethics (made by legislative instrument) attracts a 'restricted' civil penalty (ss 921E and 921Q);²²
- s 949B(2) (failure to comply with regulations made under the section as to additional disclosure requirements for particular types of financial services is an offence subject to one year imprisonment);
- s 1017DA(3) (failure to provide information in accordance with regulations made under the section is an offence subject to a fine of 50 penalty units); and
- s 1101AC (breach of an enforceable code provision by a person holding themselves out as complying with an approved code of conduct attracts civil penalty liability subject to a maximum pecuniary penalty of 300 penalty units).

18. Civil penalty liability also attaches to a failure to comply with a number of other sets of ASIC-made rules. These include the market integrity rules (s 798H(1)), derivative transaction rules (s 901E(1)), client money reporting rules (s 981M(1)), and financial benchmark rules and compelled financial benchmark rules (s 908CF(1)). When initially introduced, these were subject to differentiated penalties specified in the relevant rules.²³ However, recent amendments have removed these differentiated penalties and all contraventions of the relevant rules are now subject to the maximum pecuniary penalty payable under s 1317G of the *Corporations Act*.²⁴ Notations to the relevant provisions in the Act also refer to relief from liability to a civil penalty available under s 1317S (where the person acted honestly and ought fairly to be excused for the contravention).

22 It can also lead to disciplinary action by the new Financial Services and Credit Panel: *Corporations Act 2001* (Cth) s 921K.

23 See, eg, *Corporations Amendment (Financial Market Supervision) Act 2010* (Cth), sch 1, item 28.

24 See *ASIC Market Integrity Rules (Securities Markets and other ASIC-Made Rules) Amendment Instrument 2022/117* (Cth).

Dual-track regulation

19. The *Corporations Act* also exhibits dual-track, and sometimes tri-track, regulation by which the same conduct amounts to an ordinary offence, civil penalty provision, and/or strict liability offence.²⁵ As part of its Corporate Criminal Responsibility Inquiry, the ALRC analysed the *Corporations Act* in 2018 and found that approximately 7% of relevant offence provisions in the Act were subject to dual-track regulation.²⁶ The ALRC also identified strict liability offences with equivalent civil penalty provisions in the *Corporations Act*.²⁷ The ALRC noted that the

*increasing preference for dual-track regulation is evidenced by the recent changes to the Corporations Act following the ASIC Enforcement Review between October 2016 and December 2017. That review introduced 37 civil penalty provisions, 23 of which were also criminal offences. For these dual-track provisions in the Corporations Act, the content of the prohibition is the same for both the civil penalty and the criminal offence. The criminal offence requires proof of fault in accordance with the Criminal Code.*²⁸

In addition, the ALRC noted that, following the ASIC Enforcement Review, there had been an increase in ‘ordinary criminal offences’ that sit alongside strict and absolute liability offences’ in the *Corporations Act* but which require proof of a fault element.²⁹ These ‘provide for a higher maximum penalty than the accompanying strict or absolute liability offence’.³⁰

Availability of infringement notices

20. The *Corporations Act* allows for the giving of infringement notices as an administrative alternative to pursuing both criminal prosecutions and civil penalty proceedings in some cases. They may be given by ASIC or, in relation to certain ‘restricted civil penalty provisions’, by a Financial Services and Credit Panel, where ASIC or the Panel believes on reasonable grounds that a person has contravened an infringement notice provision.³¹ Infringement notices may be given for all strict and absolute liability offences, other prescribed offences and civil penalty provisions, and civil penalty provisions of approved and mandatory codes of conduct.³² Part 9.4AA of the Act also provides a specific regime in relation to infringement notices for alleged contraventions of continuous disclosure provisions.

21. The amount payable under an infringement notice is, for an offence, half the maximum penalty that the court could impose on the person for the contravention, and for a civil penalty provision, 12 penalty units for an individual (currently \$2,664) and 60 penalty units for a corporation (currently \$13,320).³³ For a restricted civil penalty provision the amount payable is 12 penalty units (currently \$2,664).³⁴

25 See Australian Law Reform Commission, *Corporate Criminal Responsibility* (ALRC Report No 136, 2020) [5.24]–[5.26].

26 Ibid [3.50] n 88.

27 Ibid [3.52] n 93.

28 Ibid [3.51] (citations omitted, emphasis in original).

29 Ibid [5.26]. See Revised Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) [1.71]–[1.81]. The relevant ordinary offences are contained in the *Corporations Act 2001* (Cth) ss 286, 307A, 606, 671B, 989CA. For further information about the ASIC Enforcement Review see Australian Law Reform Commission, ‘Recent Developments — Penalties and Enforcement’ <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Penalties-and-enforcement-developments.pdf> and Australian Government, *ASIC Enforcement Review Taskforce Report* (2017).

30 Australian Law Reform Commission (n 25) [5.26].

31 *Corporations Act 2001* (Cth) s 1317DAM.

32 Ibid s 1317DAN.

33 Ibid s 1317DAP(2)(a)–(d). Where there are multiple contraventions the amount is multiplied by the number of contraventions.

34 Ibid s 1317DAP(2)(e).

Use of notional amendments

22. ALRC analysis has identified numerous examples of regulations and ASIC legislative instruments that notionally amend existing offence or civil penalty provisions in the *Corporations Act*, some of which are subject to penalties of imprisonment.³⁵

23. Some offence provisions of the *Corporations Act* are amended by notional amendments enacted through the *Corporations Regulations 2001* (Cth) or ASIC instruments. While not all of these notional amendments change the obligations contained in the primary provision, or their scope, many of them do. For example, the *ASIC Corporations (Design and Distribution Obligations — Exchange Traded Products) Instrument 2020/1090* (Cth) extends design and distribution obligations under s 994C(2) of the *Corporations Act* to exchange traded products, attracting imprisonment of up to one year.³⁶

Offences created in delegated legislation

24. Delegated legislation made under the *Corporations Act* also creates offences, including one enacted in the *Corporations Regulations 2001* (Cth) that is subject to two years imprisonment.³⁷

25. ALRC analysis also identified at least one case in which an ASIC instrument may have unsuccessfully attempted to create an offence. The *ASIC Corporations (Short Selling) Instrument 2018/745* (Cth) notionally amends the *Corporations Act* by inserting ss 1020B(7B) and (7H), and includes a note to the effect that a failure to comply is an offence. However, without an additional amendment to include these provisions in Sch 3 of the *Corporations Act*, these may not be valid offences.³⁸

Interaction with exemptions, licensing, and breach reporting

26. Offence and penalty provisions also have important interactions with conditions on exemptions, the licensing regime, and breach reporting requirements.

27. In some circumstances, breach of a condition placed on an exemption from the legislation may be an offence or give rise to civil penalty liability. For example, s 111AU of the *Corporations Act* makes it an offence to intentionally or recklessly contravene conditions attached to exemptions from disclosing entity obligations, with a maximum penalty of five years imprisonment.³⁹

28. In relation to licensing, Australian Financial Services ('AFS') licensees are subject to a number of general obligations under s 912A of the *Corporations Act*, including that they comply with financial services laws and take reasonable steps to ensure that their representatives comply with financial services laws.⁴⁰ The term 'financial services laws' is defined in s 761A and includes specific provisions

35 See further Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [5.76]–[5.77].

36 See also, for example, *Corporations Regulations 2001* (Cth) reg 7.7.10AE, which notionally replaces s 946B of the *Corporations Act*. It includes s 946B(3A), which is an offence in Sch 3. Regulation 7.7.10AC similarly replaces s 942B(8) of the *Corporations Act*, which is listed in Sch 3, with another offence. In relation to ASIC instruments see, for example, *ASIC Corporations (Minimum Subscription and Quotation Conditions) Instrument 2016/70* (Cth) (modifies s 724); *ASIC Corporations (ASIC Close Down Period) Instrument 2018/1034* (Cth) (notionally amends the offence in s 1016B, which appears in Sch 3 and is subject to 2 years imprisonment).

37 *Corporations Regulations 2001* (Cth) reg 7.6.02AGA (notionally amending s 911A of the *Corporations Act*, including by inserting a new offence subject to two years imprisonment, and new civil penalty provision with a penalty of 2,000 penalty units). See further Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) [5.79]–[5.81].

38 See *Corporations Act 2001* (Cth) s 1311(1A). This provides that an obligation or prohibition set out in Chapter 7 of the *Corporations Act* (and other specified parts of the Act) only gives rise to an offence by virtue of s 1311(1) 'if a penalty, pecuniary or otherwise, is set out in Schedule 3 for that provision ...'.

39 See *Corporations Act 2001* (Cth) Sch 3.

40 *Corporations Act 2001* (Cth) ss 912A(1)(c)–(ca).

of the *Corporations Act*, including each provision of Chapter 7, as well as each provision of Part 2 Div 2 of the *Australian Securities and Investments Commission Act 2001* (Cth).⁴¹ Where an AFS licensee has breached its obligation to comply with those laws (or where ASIC has reason to believe that the licensee is likely to breach the obligation), ASIC has the power to suspend or cancel the licence (after a hearing).⁴² Breach by an AFS licensee of the obligation to take reasonable steps to ensure that representatives comply with financial services laws also in itself gives rise to civil penalty liability.⁴³

29. In addition, AFS licensees are under an obligation to report significant breaches of core obligations to ASIC.⁴⁴ Again, the definitions of ‘core obligation’ and ‘significant breach’ have important interactions with offence and civil penalty provisions. For example, breaches of a civil penalty provision are deemed to be significant breaches (with certain exceptions), as are offences punishable by 12 months imprisonment (or three months imprisonment where the offence involves dishonesty).⁴⁵

41 See the definition of ‘financial services law’ in s 761A, which also includes ‘any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial services...’.

42 *Corporations Act 2001* (Cth) ss 915C(1)(a)–(aa).

43 *Ibid* s 912A(5A).

44 *Ibid* ss 912D, 912DAA.

45 *Ibid* ss 912D(4)(a)–(b).