



# Technical Accounting Alert

## TA 2020-04

### ASIC infringement regime now law

#### Introduction

The purpose of this Alert is to highlight recent amendments to the *Corporations Act* have given ASIC the power to issue infringement notices for strict liability offences in the Act without taking the matter to Court. These strict liability offences include late lodgement of directors' details, failing to lodge annual reports on time, and failing to co-operate with administrators and liquidators. Fines of between \$12,500 and \$252,000 may apply.

*Corporations Act* and other Acts that have come into place, this Alert deals with the strict liability offences and ASIC's powers to issue infringement notices for those offences.

#### Overview

Following the ASIC Enforcement Review Taskforce's [report](#) in late 2017, and the Government [responding](#) in April 2018 with agreement, or in-principle agreement, to all recommendations, the [Treasury Laws Amendment \(Strengthening Corporate and Financial Sector Penalties\) Act 2019](#) received Royal Assent in March 2019. The Amendment Act introduces a stronger penalty framework for corporate and financial sector misconduct.

In particular, ASIC now has the power to issue infringement notices for what are known in the *Corporations Act 2001* (Cth) (the Act) as *strict liability offences* (those where proof of fault is not required). Previously, these strict liability offences were subject to a fine and/or imprisonment – the Government has now determined that individuals should not be subject to imprisonment for inadvertent breaches of the law or offences where there is no fault element. Instead, the previous prison terms have been converted to monetary penalties of up to \$252,000.

We note that the legislation does not compel ASIC to issue an infringement notice for an alleged contravention; it is one of a range of regulatory tools that ASIC may decide to use.

Overleaf is an explanation of the impact of the regime on a set of strict liability offences and payment terms allowed in the Act.

#### Impact of new infringement regime

Strict and absolute liability offences, of which there are around 700 in the Act, are now subject to the new infringement regime<sup>1</sup>.

<sup>1</sup> Part 9.4AB (ss 1317DAM-1317DAV) of the *Corporations Act 2001* (Cth) deals with this new regime



As an example, each of the offences listed below incur a maximum fine of 120 penalty units for individuals and 1,200 penalty units for a body corporate. At the current rate of \$210 per penalty unit, the fines are \$25,200 and \$252,000 respectively. However, ASIC infringement notices are limited to 50 per cent of these amounts<sup>2</sup>.

| <b>Corporations Act<br/>2001 Reference</b> | <b>Brief description of provision</b>                                                     |
|--------------------------------------------|-------------------------------------------------------------------------------------------|
| 205B                                       | Failure to lodge notice of name and address of directors and secretaries to ASIC on time. |
| 319(1)                                     | Failure to lodge annual report to ASIC on time.                                           |
| 320                                        | Failure to lodge half-year report to ASIC on time.                                        |
| 438B(4)                                    | Director not helping administrator.                                                       |
| 438C(5)                                    | Failure to give administrator's rights to company's books.                                |
| 530A(6)                                    | Failure of officers to help liquidator.                                                   |
| 530B(6)                                    | Failure to give liquidator's rights to company's books.                                   |
| 592(1)                                     | Incurring of debt under certain circumstances and fraudulent conduct.                     |

Penalty amounts for these and other offences are included in [Schedule 3](#) of the Act.

## The infringement

If ASIC decides to issue an infringement notice, it must be issued within the 12 months after the alleged contravention having taken place.

The legislation provides that payment of infringement notices is to be made within 28 days. There is provision for requesting an extension to the payment deadline; a payment plan; or for withdrawal of the infringement notice. ASIC has 14 days to respond to requests of this kind – if no response is received, this is considered a refusal on ASIC's part. ASIC may also do these things unilaterally, without receiving an application<sup>3</sup>.

## ASIC not obliged to issue infringements, can take to Court instead

The Act does not compel ASIC to issue an infringement notice for an alleged contravention. It is one of a range of regulatory tools that ASIC may decide to use.

Irrespective of this new power, ASIC may still commence legal proceedings against a person for a contravention if the infringement notice is given and then subsequently withdrawn, or if the infringement notice is not given. Two or more infringement notices can be given under the infringement notice regime.

## AAT review not available for infringement notices

Review by the Administrative Appeals Tribunal (AAT) is not available for decisions by ASIC to give, extend, refuse to extend, make or refuse arrangements, withdraw or not withdraw infringement notices.

<sup>2</sup> Schedule 3 of the *Corporations Act 2001* (Cth)

<sup>3</sup> Revised Explanatory Memorandum 1.157



## ASIC Guide on infringements currently under revision

At the time of writing, ASIC Information Sheet 139 ([INFO 139](#)), which deals with infringement notices, is currently being revised.

### Further information



If you wish to discuss any of the information included in this Technical Accounting Alert, please get in touch with your Grant Thornton Relationship Partner or a member of the National Assurance Quality Team at [national.assurance.quality@au.gt.com](mailto:national.assurance.quality@au.gt.com).