

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Treasurer**

*Corporations Act 2001*  
*National Consumer Credit Protection Act 2009*  
*Corporations (Fees) Act 2001*  
*National Consumer Credit Protection (Fees) Act 2009*

*Financial Sector Reform (Hayne Royal Commission Response—Breach Reporting and Remediation) Regulations 2021*

The *Corporations Act 2001* (Corporations Act) provides for the regulation of corporations and financial services. The *National Consumer Credit Protection Act 2009* (Credit Act) establishes a national consumer credit regime that provides for the regulation of credit activities. The *Corporations (Fees) Act 2001* (Corporations Fees Act) and the *National Consumer Credit Protection (Fees) Act 2009* (Credit Fees Act) impose fees for matters under the Corporations Act and the Credit Act respectively.

Section 1364 of the Corporations Act, section 329 of the Credit Act, section 8 of the Corporations Fees Act and section 10 of the Credit Fees Act provide that the Governor-General may make regulations prescribing matters required or permitted by the respective Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the respective Act.

The purpose of the *Financial Sector Reform (Hayne Royal Commission Response—Breach Reporting and Remediation) Regulations 2021* (the Regulations) is to support the amendments in Schedule 11 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (the Act).

Schedule 11 to the Act implements the Government's response to recommendations 1.6, 2.8 and 7.2 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry by:

- clarifying and strengthening the breach reporting regime for financial services licensees in the Corporations Act;
- introducing a comparable breach reporting regime for credit licensees in the Credit Act; and
- requiring financial services licensees and credit licensees to report serious compliance concerns about financial advisers and mortgage brokers respectively.

To support these amendments, the Regulations amend the *Corporations Regulations 2001*, the *National Consumer Credit Protection Regulations 2010*, the *Corporations (Fees) Regulations 2001* and the *National Consumer Credit Protection (Fees) Regulations 2010* to:

- prescribe civil penalty provisions and key requirements that are *not* taken to be significant (and therefore may not be reportable) under the relevant breach reporting regime if those provisions are contravened;
- ensure certain breach reporting offences and civil penalty provisions are subject to an infringement notice; and
- make minor and technical amendments, including updating references to the Corporations Act.

Public consultation on the draft Regulations and explanatory materials was held between 10 March 2021 and 9 April 2021. Nineteen submissions were received in response to the public consultation from the banking, insurance, superannuation, funds management, financial advisers, mortgage brokers and legal sectors.

As a result of the consultation, additional civil penalty provisions and key requirements (that are not automatically taken to be significant if contravened) were prescribed. Prescribing these additional provisions ensure that minor and technical breaches of the provisions are not within the scope of the relevant breach reporting regime, thereby reducing the reporting burden on industry.

The respective Acts do not specify any conditions that need to be met before the power to make the Regulations may be exercised.

Details of the Regulations are set out in Attachment A.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the later of the day after registration and immediately after the commencement of Schedule 11 to the Act, which is 1 October 2021.

A Statement of Compatibility with Human Rights is at Attachment B.

The Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has been certified as being informed by a process and analysis equivalent to a Regulation Impact Statement for the purposes of the Government decision to implement this reform. The Final Report can be accessed at this link:

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2Fbc83795c-b7fa-4b42-a93b-fa012cffffc2%22>.

**Details of the *Financial Sector Reform (Hayne Royal Commission Response—Breach Reporting and Remediation) Regulations 2021***

Section 1 – Name

The name of the instrument is the *Financial Sector Reform (Hayne Royal Commission Response—Breach Reporting and Remediation) Regulations 2021* (the Regulations).

Section 2 – Commencement

The Regulations commence on the later of the day after registration and immediately after the commencement of Schedule 11 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*.

Section 3 – Authority

The Regulations are made under the *Corporations Act 2001* (Corporations Act), the *National Consumer Credit Protection Act 2009* (Credit Act), the *Corporations (Fees) Act 2001* (Corporations Fees Act) and the *National Consumer Credit Protection (Fees) Act 2009* (Credit Fees Act).

Section 4 – Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

***Amendments to the Corporations Regulations 2001***

*Civil penalty provisions that are not taken to be significant if contravened*

Item 8 prescribes the following civil penalty provisions for the purposes of paragraph 912D(4)(b) of the Corporations Act:

<b>Provision</b>	<b>Description</b>
<b><i>Corporations Act 2001</i></b>	
<b>798H(1)</b>	Failure to comply with the market integrity rules
<b>901E(1)</b>	Failure to comply with the derivative transaction rules
<b>922M(5)</b>	Failure to notify Australian Securities Investment Commission (ASIC) in relation to relevant providers
<b>941A(3)</b>	Failure by licensee to give a person a Financial Services Guide (FSG) if the licensee provides a financial service to the person as a retail client

<b>Provision</b>	<b>Description</b>
<b>941B(4)</b>	Failure by authorised representative to give a person a FSG if the authorised representative provides a financial service to the person as a retail client or the FSG is provided when it has not been authorised by the licensee
<b>962G(4)</b>	Failure by fee recipient to give client a fee disclosure statement in relation to an ongoing fee arrangement
<b>962S(5)</b>	Failure by fee recipient to get written consent from an account holder and provide a copy to the account provider before arranging to deduct ongoing fees from the account
<b>962S(8)</b>	Failure by fee recipient to refuse payment from a client's account of fees if the consent has been varied or withdrawn
<b>962U(3)</b>	Failure by fee recipient to give written confirmation to the account holder that their consent withdrawal or variation notice was received or provide a copy of the consent withdrawal or variation to the account provider
<b>962V(3)</b>	Failure by fee recipient to give notice of cessation of consent by the account holder to account provider
<b>981B(3)</b>	Failure to ensure money is paid into an account that satisfies specified requirements
<b>981C(2)</b>	Failure to comply with regulations dealing with matters relating to accounts that are maintained for the purposes of paying clients' money into the account and paying money out of that account
<b>1012A(5)</b>	Failure to give a Product Disclosure Statement (PDS) when giving personal advice recommending a particular financial product
<b>1012B(6)</b>	Failure to give a PDS in situations relating to the offer and issue of financial products
<b>1012C(11)</b>	Failure to give a PDS in situations relating to the sale of financial products
<b>1017BA(4B)</b>	Failure by trustee of a regulated superannuation fund to make product dashboard information publicly available on the fund's website
<b>1017BB(5AA)</b>	Failure by trustee of a regulated superannuation fund to have information relating to investment assets publicly available on the fund's website
<b>1021E(8)</b>	Giving a defective disclosure document or statement (including a defective PDS or supplementary PDS)
<b>1021G(3)</b>	Failure by licensee to take reasonable steps to ensure its authorised representative gives or communicates disclosure documents or statements as and when required
<b>1101AC</b>	Failure to comply with enforcement code provisions of an approved code of conduct if the person holds out that they comply with the approved code of conduct

Provision	Description
<b><i>Other legislation</i></b>	
<p>All civil penalty provisions that cover conduct relating to the provision of financial services in the:</p> <ul style="list-style-type: none"> <li>• <i>Australian National Registry of Emissions Units Act 2011</i></li> <li>• <i>Banking Act 1959</i></li> <li>• <i>Carbon Credits (Carbon Farming Initiative) Act 2011</i></li> <li>• <i>Financial Sector (Collection of Data) Act 2001</i></li> <li>• <i>Financial Sector (Shareholdings) Act 1998</i></li> <li>• <i>Financial Sector (Transfer and Restructure) Act 1999</i></li> <li>• <i>Insurance Acquisitions and Takeovers Act 1991</i></li> <li>• <i>Insurance Act 1973</i></li> <li>• <i>Insurance Contracts Act 1984</i></li> <li>• <i>Life Insurance Act 1995</i></li> <li>• <i>Retirement Savings Accounts Act 1997</i></li> <li>• <i>Superannuation Industry (Supervision) Act 1993</i></li> <li>• <i>Superannuation (Resolution of Complaints) Act 1993</i></li> </ul>	

This means that a breach of any of these civil penalty provisions is *not* taken to be significant for the purposes of paragraph 912D(4)(b) of the Corporations Act.

However, such a breach may still be significant and reportable under the breach reporting regime if one of the other circumstances in the deemed significance test in subsection 912D(4) apply, or if the breach is otherwise significant under the test in subsection 912D(5) of the Corporations Act.

For example, if a financial services licensee contravenes subsection 941A(3) of the Corporations Act by failing to give a FSG to a person as required, that contravention is not taken to be significant for the purposes of paragraph 912D(4)(b) of the Corporations Act. However, if that breach results in or is likely to result in material loss or damage to the person (to whom the licensee provides the financial service), the breach would be taken to be significant under paragraph 912D(4)(d) of the Corporations Act. Therefore, the financial services licensee would need to report the breach to ASIC within the required timeframe.

A breach of a prescribed civil penalty provision is not intended to be reportable under the breach reporting regime merely because it may also amount to a breach of the broad civil penalty provision in subsection 912A(5A) (relating to the general obligations). This would otherwise undermine the rationale for prescribing these civil penalty provisions, which is set out below.

The rationale for prescribing these civil penalty provisions is:

- a breach of these provisions may be minor, technical, or inadvertent in nature;
- given the frequency with which these documents must be provided (where relevant), it is possible minor, technical, or inadvertent breaches (that would not otherwise be significant) would result in a large regulatory burden if they were deemed automatically significant; and
- more material breaches of these provisions would be captured by the other limbs of the deemed significant test in subsection 912D(4) or by the test in subsection 912D(5) of the Corporations Act.

*Breach reporting offences and civil penalty provisions that are subject to an infringement notice*

Item 9 prescribes the offences in subsections 912DAA(1) and 912DAC(1) of the Corporations Act as being subject to an infringement notice. The offence in subsection 912DAA(1) relates to a failure by a financial services licensee to report a reportable situation to ASIC within the required timeframe and in the prescribed form where there are reasonable grounds to believe the reportable situation has arisen in relation to the licensee. The offence in subsection 912DAC(1) relates to a failure by a financial services licensee to notify ASIC as soon as practicable that the licensee has become a participant in a licensed market or a licensed clearing and settlement (CS) facility, or ceases to be such a participant.

Item 10 prescribes the civil penalty provision in subsection 912DAB(8) of the Corporations Act as being subject to an infringement notice. This civil penalty provision applies if a financial services licensee fails to either lodge a breach report about a financial adviser that is engaged by *another* licensee to ASIC, or provide a copy of that report to the other licensee, as required.

The Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* sets out considerations and recommendations in relation to the use of infringement notices. These include when an infringement notice is appropriate, the number of penalty units that generally should not be exceeded in a notice, and who should be authorised to issue infringement notices.

*Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* recommends that generally the limit on the penalty amount issued via an infringement notice should be no more than 20 percent of the maximum financial penalty applicable to the primary offence and should not exceed 12 penalty units for an individual and 60 penalty units for a body corporate.

Infringement notices issued in relation to the offences pertaining to item 9 (being the offences under subsections 912DAA(1) and 912DAC(1) of the Corporations Act) have penalty amounts which exceed the recommended amount in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The penalty amounts (being 120 for individuals and 1,200 for corporates in relation to subsection 912DAA(1); and 60 for individuals and 600 for corporates in relation to subsection 912DAC(1)) are 50 percent of the maximum financial penalty attaching to

the primary offences. The primary offences carry high penalties to reflect the seriousness of the offences and to deter offending. The ratio of 50 percent for the infringement notices was chosen because 20 percent does not act as sufficient deterrent for offences of a corporate and financial nature. An infringement notice penalty amount of 50 percent strikes an appropriate balance between providing an adequate deterrent from misconduct and an efficient mechanism to avoid a breach going to court and ensuring payments of penalties under infringement notices do not simply become a cost of doing business.

Infringement notices issued in relation to item 10 (which pertains to subsection 912DAB(8) of the Corporations Act) do not have penalty units in excess of the recommended amount, being exactly 12 for individuals and 60 for corporates.

*The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* also states that “[o]ffences to which an infringement scheme applies should not require proof of fault. Proof of fault often involves a complex assessment of the available evidence to establish the state of mind of the person at the time of committing the offence.”

Strict and absolute liability offences do not require proof of fault. Civil penalty provisions without fault elements also do not require proof of fault, because they are not criminal offences and therefore do not need a fault element attributed to them.

Subsection 912DAA(1) of the Corporations Act, which is related to item 9, is a strict liability offence.

Subsection 912DAC(1) of the Corporations Act, being the other provision related to item 9, is not a strict liability offence. Though there is no fault element specified in the provision, in accordance with the *Criminal Code Act 1995*, as subsection 912DAC(1) relates to a circumstance or result, recklessness is the fault element that applies.

Subsection 912DAC(1) requires a licensee to lodge a notice with ASIC when they become a participant in a licensed market or licensed CS facility or cease to be such a participant. Whether the licensee is such a participant is something which is within the knowledge of the licensee, if not within their complete control. Therefore, the question of whether a licensee is reckless of becoming or ceasing to be such a participant is unlikely to require a complex assessment of evidence. On this basis, it is appropriate for an infringement notice to be available in respect of this offence.

Subsection 912DAB(8) of the Corporations Act, being the provision related to item 10, is not an offence. It is a civil penalty provision and does not have a fault element. Its inclusion in the infringement notice scheme is therefore appropriate.

Infringement notices in relation to items 9 and 10 are issued under Part 9.4AB of the Corporations Act. Items 9 and 10 prescribe provisions that are brought into the operation of the Part by virtue of section 1317DAN of the Corporations Act.

Subsection 1317DAM(1) of the Corporations Act states “[i]f ASIC believes on reasonable grounds that a person has contravened a provision subject to an infringement notice under this Part, ASIC may give the person an infringement notice for the alleged contravention.”

Accordingly, ASIC is authorised to issue the infringement notices in relation to items 9 and 10. ASIC may delegate this power in accordance with section 102 of the *Australian Securities and Investments Commission Act 2001*.

Prescribing these offences and the civil penalty provision as being subject to an infringement notice is appropriate as there may be a high volume of contraventions (ranging in severity) of these provisions. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* highlights failing to comply with reporting obligations as an example of a case where issuing infringement notices may be appropriate.

Minor contraventions of these provisions may be caused by poor internal processes. Where this is the case, the use of an infringement notice may lead to a faster rectification of processes, as licensees are put on notice by ASIC sooner.

The ability to give an infringement notice (along with the other existing enforcement options) gives ASIC sufficient flexibility to pursue the most appropriate action in each case, which will depend on its assessment of various considerations. This approach is also consistent with the consequences that applied in relation to the former breach reporting regime (being the regime that is replaced with the amendments in Schedule 11 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (the Act)).

#### *Minor and technical amendments*

Item 3 repeals paragraph 1.0.05A(2)(b) of the *Corporations Regulations 2001* (Corporations Regulations). This paragraph provides that a breach report *may* be lodged with ASIC in the prescribed form. However, under the new breach reporting regime, breach reports *must* be lodged with ASIC in the prescribed form. Paragraph 1.0.05A(2)(b) of the Corporations Regulations is therefore repealed as it has been superseded by the new requirements in the Corporations Act.

Item 3 also repeals paragraph 1.0.05A(2)(c) of the Corporations Regulations and substitutes it with a new paragraph to update the reference to the Corporations Act. This reflects that Schedule 11 to the Act repealed section 912D of Corporations Act and replaced it with new provisions, so former subsection 912D(2) was replaced with subsection 912DAC(1). These provisions require financial services licensees to notify ASIC when the licensee becomes a participant in a licensed market or a licensed CS facility (or ceases to be such a participant). New paragraph 1.0.05A(2)(b) of the Corporations Regulations provides that such a notice may be lodged with ASIC in the prescribed form. There are no substantive changes to the operation of this provision as a result of this change.

Similarly, item 5 amends regulation 7.6.02A of the Corporations Regulations by updating the reference to subparagraph 912D(1)(a)(iii) to paragraph 912D(3)(c). This regulation specifies Commonwealth legislation for the purposes of the breach reporting regime. The provisions of the specified Commonwealth legislation are considered to be core obligations under the breach reporting regime, in so far as they cover conduct relating to the provision of financial services. Significant breaches or likely breaches of core obligations (or investigations into whether such a matter has or will occur) are required to be reported under the new breach reporting regime.



There are no substantive changes to the operation of this provision as a result of this change.

Item 6 repeals paragraph 7.6.02A(ac) of the Corporations Regulations, which specifies the *Clean Energy Act 2011* as such a Commonwealth legislation. This reflects that the *Clean Energy Act 2011* was repealed in 2014.

Item 7 amends paragraph 7.6.02A(d) to update the reference to the *Financial Sector (Transfer and Restructure) Act 1999*, as the short title of that Act was amended by the *Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Act 2018*.

Item 4 is a consequential amendment that takes into account new subregulation 7.6.02A(2) of the Corporations Regulations, which prescribes the civil penalty provisions that are not taken to be significant for the purposes of paragraph 912D(4)(b) of the Corporations Act.

#### *Application*

The former breach reporting regime will continue to have some application on and after 1 October 2021. In particular, the application provisions in Schedule 11 to the Act provides that the former breach reporting regime continues to apply in relation to breaches and likely breaches that occurred before 1 October 2021, if, before 1 October 2021, the licensee knew the breach or likely breach occurred.

Item 11 ensures the provisions that are repealed by the Regulations continue to apply in relation to the former breach reporting regime in these circumstances. This mirrors the application provisions relating to the Corporations Act amendments in Schedule 11 to the Act.

#### ***Amendments to the National Consumer Credit Protection Regulations 2010***

##### *Provisions that are not taken to be significant if contravened*

Item 13 prescribes the following civil penalty provisions for the purposes of paragraph 50A(4)(b) of the Credit Act:

<b>Provision</b>	<b>Description</b>
<b><i>National Consumer Credit Protection Act 2009</i></b>	
<b>52(2)</b>	Obligation to cite the licensee's Australian credit licence number in a document of a kind prescribed by the regulations
<b>53(1)</b>	Obligation to lodge an annual compliance certificate
<b>53(4)</b>	Obligation to ensure an annual compliance certificate is lodged
<b>71(1)</b>	Obligation to notify ASIC when credit representative is authorised
<b>71(2)</b>	Obligation to notify licensee of sub-authorisation

<b>Provision</b>	<b>Description</b>
<b>71(4)</b>	Obligation to notify ASIC of change in details of credit representative
<b>88(1)</b>	Obligation to keep financial and other records as required
<b>113(1)</b>	Obligation to give a consumer the licensee's credit guide before providing credit assistance to the consumer in relation to a credit contract
<b>120(1)</b>	Obligation to give preliminary assessment to consumer in relation to credit assistance quote if requested
<b>124B(1)</b>	Obligation to display information as required and ensure website complies with prescribed requirements if the licensee represents that the licensee provides credit assistance in relation to small amount credit contracts
<b>126(1)</b>	Obligation to give a consumer the licensee's credit guide when it becomes apparent the licensee will enter into a credit contract with the consumer
<b>127(1)</b>	Obligation to give a debtor the licensee's credit guide after the licensee is assigned any rights or obligations of a credit provider under the credit contract
<b>132(2)</b>	Obligation to give a copy of the assessment to a consumer in relation to credit contracts if requested
<b>133AC(2)</b>	Obligation to ensure the licensee's website can generate a Key Facts Sheet if the licensee has a website that can be used to apply for or make an inquiry about one or more standard home loans of the licensee
<b>133AD(2)</b>	Obligation to provide Key Facts Sheet or other required information to a consumer for a standard home loan of the licensee
<b>133AE(2)</b>	Obligation to tell a consumer what information the licensee needs to prepare the Key Facts Sheet for a standard home loan
<b>133BC(1)</b>	Obligation to ensure an application form for a credit card contract includes an up-to-date Key Facts Sheet
<b>133BD(1)</b>	Obligation to not enter into credit card contract unless Key Facts Sheet has been provided
<b>133BFA(2)</b>	Obligation to establish and maintain a website with the capacity for a consumer to request a reduction of their credit limit
<b>133BJ(1)</b>	Obligation to keep a record of consents and withdrawals relating to the imposition of fees, charges, or higher rate of interest because credit card was used in excess of the credit limit
<b>133BU(2)</b>	Obligation to establish and maintain a website with the capacity for a consumer to request termination of their credit card contract
<b>133CR(1)</b>	Obligation on eligible licensees to supply mandatory credit information on 50 per cent of their eligible credit accounts to eligible credit reporting bodies

<b>Provision</b>	<b>Description</b>
<b>133CR(3)</b>	Obligation on eligible licensees to supply mandatory credit information on the remainder of their eligible credit accounts to eligible credit reporting bodies
<b>133CU(1)</b>	Obligation on certain licensees to make ongoing supplies of mandatory credit information
<b>133DC(2)</b>	Obligation to make reverse mortgage information statement available through website
<b>133DD(2)</b>	Obligation to give consumer a reverse mortgage information statement
<b>133DE(1)</b>	Obligation to not use the term ‘reverse mortgage’ or a similar term when offering to provide a credit service to a consumer about a credit contract or mortgage
<b>133DE(2)</b>	Obligation on credit providers to not use the term ‘reverse mortgage’ or a similar term when offering to provide a credit service to a consumer about a credit contract or mortgage
<b>136(1)</b>	Failure to give a consumer the licensee’s credit guide when it becomes apparent the licensee is likely to provide credit assistance to the consumer in relation to a consumer lease
<b>143(1)</b>	Failure to give a preliminary assessment to a consumer if requested
<b>149(1)</b>	Failure to give a consumer the licensee’s credit guide after it becomes apparent the licensee is likely to enter into a consumer lease with the consumer
<b>150(1)</b>	Failure to give a lessee the licensee’s credit guide after the licensee is assigned any rights or obligations of a lessor under the consumer lease
<b>155(2)</b>	Obligation to give a copy of the assessment to the consumer after the consumer lease has been entered into, if requested
<b>158(1)</b>	Failure to give the credit representative’s credit guide
<b>160(1)</b>	Failure to give a debtor the licensee’s or credit representative’s credit guide after the licensee or credit representative becomes authorised to collect repayments by the debtor on behalf of the credit provider
<b>160(2)</b>	Failure to give a lessee the licensee’s or credit representative’s credit guide after the licensee or credit representative becomes authorised to collect payments by the lessee on behalf of the lessor
<b>160B(1)</b>	Obligation to not use terms ‘independent’, ‘impartial’ or ‘unbiased’ or similar in representations to a consumer when offering to provide a credit service to the consumer
<b>160C(1)</b>	Obligation to not use terms ‘financial counsellor’ or ‘financial counselling’ or similar in representations to a consumer when offering to provide a credit

<b>Provision</b>	<b>Description</b>
	service to the consumer
<b>238D</b>	Obligation to comply with enforcement code provisions of an approved code of conduct if the person holds out that they comply with the approved code of conduct
<b>174(3) of the Code</b>	Obligation for consumer lease to contain specified matters
<b><i>Other legislation</i></b>	
All civil penalty provisions in all Commonwealth legislation covered by paragraph (d) of the definition of credit legislation (in so far as it covers conduct relating to credit activities)	

Item 13 also prescribes the following key requirements (as defined in section 111 of the National Credit Code) for the purposes of paragraph 50A(4)(c) of the Credit Act:

<b>Provision</b>	<b>Description</b>
<b><i>Key requirements – National Credit Code</i></b>	
<b>17(3)</b>	Requirement to include amount of credit to be provided in credit contract
<b>17(4)</b>	Requirement to include annual percentage rate or rates under the contract in the credit contract (other than a small amount credit contract)
<b>17(5)</b>	Requirement to include method of calculation of interest charges payable under the contract in the credit contract (other than a small amount credit contract)
<b>17(6)</b>	Requirement to include total amount of interest charges payable under the contract in the credit contract (other than a small amount credit contract)
<b>17(8)(a) and (b)</b>	Requirement to include information about credit fees and charges that are or may become payable under the contract in the credit contract
<b>17(9)</b>	Requirement to include information about changes that affect interest and credit fees and charges under the contract in the credit contract
<b>17(11)</b>	Requirement to include information about the default rate of interest under the contract in the credit contract
<b>17(15)(a) and (b)</b>	Requirement to include information about insurance financed under the contract in the credit contract
<b>17(15A)</b>	Requirement to include provisions if a person other than the debtor can occupy the reverse mortgaged property under the contract for a reverse mortgage in the credit contract
<b>34(6)</b>	Requirement to include information about interest charges in the statement of account
<b>35</b>	Requirement to ensure opening balance in each successive statement of account does not exceed the closing balance in the last statement of account

This means that a breach of any of these civil penalty provisions and key requirements is *not* taken to be significant for the purposes of paragraph 50A(4)(b) or 50A(4)(c) of the Credit Act respectively.

However, such a breach may still be significant and reportable under the breach reporting regime if one of the other circumstances in the deemed significance test in subsection 50A(4) apply, or if the breach is otherwise significant under the test in subsection 50A(5) of the Credit Act.

For example, if a credit licensee fails to give a consumer the licensee's credit guide before providing credit assistance to the consumer in relation to a credit contract (as required under subsection 113(1)), that breach is not taken to be significant for the purposes of paragraph 50A(4)(b) of the Credit Act. However, if that breach results in or is likely to result in material loss or damage to a credit activity client of the licensee, then the breach would be taken to be significant under

paragraph 50A(4)(e). Therefore, the breach would need to be reported to ASIC within the required timeframe.

A breach of a prescribed civil penalty provision or key requirement is not intended to be reportable under the breach reporting regime on the basis that it may also amount to a breach of the civil penalty provision in subsection 47(4) (relating to the general conduct obligations). This would otherwise undermine the rationale for prescribing the civil penalty provisions, which is set out below.

The rationale for prescribing these provisions is:

- a breach of these provisions may be minor, technical, or inadvertent in nature;
- given the frequency with which these documents must be provided (where relevant), it is possible minor, technical, or inadvertent breaches (that would not otherwise be significant) would result in a large regulatory burden if they were deemed automatically significant; and
- more material breaches of these provisions would be captured by the other limbs of the deemed significant test in subsection 50A(4) or by the test in subsection 50A(5) of the Credit Act.

*Breach reporting offences and civil penalty provisions that are subject to an infringement notice*

Item 14 prescribes the offence in subsection 50B(2) of the Credit Act as being subject to an infringement notice. This offence relates to a failure by a credit licensee to report a reportable situation to ASIC within the required timeframe where there are reasonable grounds to believe the reportable situation has arisen in relation to the licensee.

Item 15 prescribes the civil penalty provisions in subsections 50C(1) and (5) of the Credit Act as being subject to an infringement notice. These civil penalty provisions apply if a licensee fails to either lodge a breach report with ASIC about a mortgage broker that is engaged by *another* licensee, or provide a copy of that report to the other licensee, as required.

The penalties to be administered by way of an infringement notice in relation to item 14 are 20 per cent of the maximum financial penalty applicable to the primary offence. However, the amounts (which are 48 for individuals and 480 for corporates) exceed the recommended limits in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, being 12 for individuals and 60 for corporates. This is because the primary offence carries higher penalties to reflect the seriousness of the offence and the need for deterrence. Despite the higher penalty amounts, the infringement notice scheme remains an appropriate mechanism for efficient enforcement and effective deterrence of corporate and financial sector misconduct.

The penalties to be administered by infringement notice in relation to item 15 are set by section 288L of the Credit Act. They are 50 for individuals and 250 for corporates in relation to each of subsections 50C(1) and 50C(5). They are less than 20 percent of the maximum penalties applicable to the substantive provisions, which are 5,000

penalty units. The infringement notice penalty amounts exceed the recommended limit of 12 (individual) and 60 (corporate) penalty units. Consistent with the stronger penalty framework introduced by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*, the penalty amounts provide an appropriate and adequate deterrent from misconduct and an efficient mechanism to avoid a breach going to court, and ensure payments of penalties under infringement notices do not simply become a cost of doing business.

The offence under item 14 is strict liability and the provision relating to item 15 is a civil penalty provision with no fault element. Including the provisions in the infringement notice scheme is therefore appropriate.

Infringement notices in relation to items 14 and 15 are issued under Part 6-5B of the Credit Act. Items 14 and 15 prescribe provisions that are brought into the operation of the Part by virtue of section 288K.

Section 288J(1) states “[i]f ASIC believes on reasonable grounds that a person has contravened a provision subject to an infringement notice under this Part, ASIC may give the person an infringement notice for the alleged contravention.”

Accordingly, ASIC is authorised to issue the infringement notices in relation to items 14 and 15. ASIC may delegate this power in accordance with section 102 of the *Australian Securities and Investments Commission Act 2001*.

Prescribing this offence and these civil penalty provisions as being subject to an infringement notice is appropriate as there may be a high volume of contraventions (ranging in severity) of these provisions. The Attorney-General’s Department’s *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* highlights failing to comply with reporting obligations as an example of a case where issuing infringement notices may be appropriate.

Minor contraventions may be caused by poor internal processes. Where this is the case, the use of infringement notices may lead to a faster rectification of processes, as licensees are put on notice by ASIC sooner.

The ability to give an infringement notice (along with the other existing enforcement options) provides ASIC sufficient flexibility to pursue the most appropriate action in each case, which will depend on its assessment of various considerations. These options are consistent with the options that apply in relation to the breach reporting regime in the Corporations Act.

### ***Other amendments***

Item 2 updates the reference in the table in clause 1 of Schedule 1 to the *Corporations (Fees) Regulations 2001* to confirm that financial services licensees are not required to pay a fee on lodging a breach report.

As the former breach reporting regime in the Corporations Act will continue to have some application on and after 1 October 2021, item 1 ensures the existing reference in clause 1 of Schedule 1 to the *Corporations (Fees) Regulations 2001* which is being repealed continues to apply in relation to the former breach reporting regime, to the extent that regime applies.

Item 12 inserts a new item in the table in clause 1 of Schedule 1 to the *National Consumer Credit Protection (Fees) Regulations 2010* to specify that credit licensees are not required to pay a fee on lodging a breach report.



## **Statement of Compatibility with Human Rights**

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

*Financial Sector Reform (Hayne Royal Commission Response—Breach Reporting and Remediation) Regulations 2021*

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 *Financial Sector Reform (Hayne Royal Commission Response—Breach Reporting and Remediation) Regulations 2021* (the Regulations) support the amendments in Schedule 11 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (the Act).

Schedule 11 to the Act implements the Government's response to recommendations 1.6, 2.8 and 7.2 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry by:

- clarifying and strengthening the breach reporting regime for financial services licensees in the Corporations Act;
- introducing a comparable breach reporting regime for credit licensees in the Credit Act; and
- requiring financial services licensees and credit licensees to report serious compliance concerns about financial advisers and mortgage brokers respectively.

To support these amendments, the Regulations amend the *Corporations Regulations 2001*, the *National Consumer Credit Protection Regulations 2010*, the *Corporations (Fees) Regulations 2001* and the *National Consumer Credit Protection (Fees) Regulations 2010* to:

- prescribe civil penalty provisions and key requirements that are *not* taken to be significant (and therefore may not be reportable) under the relevant breach reporting regime if those provisions are contravened;
- ensure certain breach reporting offences and civil penalty provisions are subject to an infringement notice; and
- make minor and technical amendments, including updating references to the Corporations Act.

**Human rights implications**

The Regulations do not engage any of the applicable rights or freedoms.

**Conclusion**

The Regulations are compatible with human rights as it does not raise any human rights issues.