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FSR GPS: ASIC Breach Reporting

How to assess criminal offence provisions

This edition of *Guidelines, Principles and Strategies (GPS)* outlines how to assess criminal offences in the context of ASIC's breach reporting regime.

- A breach of certain civil penalty provisions and offences under financial services law is automatically reportable to ASIC under section 912DAA of the *Corporations Act 2001* (Cth).
 - In our experience however, some licensees are over-reporting insofar as where conduct has occurred contrary to a criminal offence provision, it is (incorrectly) assumed by the licensee that the conduct is automatically reportable.
 - However, for non-compliance to amount to the commission of an offence, unless the offence provision is one of strict liability or absolute liability, one or more **fault elements** must be satisfied for an offence to have been committed.
 - Often, an offence will not have been committed because a **fault element** for that offence has not been satisfied. Fault elements include, for example, a requirement that the licensee must have intended to not perform a certain act, or that they must have been reckless as to a circumstance.
 - Even if the offence does not expressly specify a fault element, section 5.6 of the Commonwealth *Criminal Code* provides that a fault element may need to be read into the provision.
- Most ordinary offences that are deemed significant under the Corporations Act contain one or more "silent" fault elements that are not specified in the provision but still need to be applied in assessing whether an offence has been committed.
 - Consequently, a licensee's breach reporting toolbox should include this important "all-en key"; otherwise over-reporting is inevitable.

Example

The ordinary criminal offence in section 1021O(3) relates to a failure to pay client application money into an appropriate client monies account in accordance with section 1017E(2). This offence is deemed significant for breach reporting purposes.

Even though no fault element for this offence is expressly specified in the Corporations Act, the effect of section 5.6 of Criminal Code is that fault elements **must be read into the criminal offence provision**.

Accordingly, this offence will not be committed unless it can be proven that the licensee both:

- **was reckless** to the position that they were required to pay the client application money into a client monies account; and
- **intended** to not pay the client application money into a client monies account.

This means that this deemed significant offence will not have been committed unless both of the above fault elements have been satisfied.



Step 1

What physical elements need to be proven?

What are the physical elements of the offence?

- Each criminal offence is made up of one or more **physical elements**.
- For a licensee to commit a criminal offence, each physical element of the offence must be proven.
- Each paragraph of an obligation will usually constitute a separate physical element.

Example: Section 952C(3) establishes an ordinary offence for giving a defective disclosure document. There are **two** physical elements that must be proven:

- the **first** physical element is that the providing entity must have been required to give the disclosure document: section 952C(3)(a); and
- the **second** physical element is that the providing entity must have not given that document by the required time: section 952C(3)(b).

Step 2

Does a fault element need to be proven?

Does the legislation state that strict or absolute liability applies?

If no, then a fault element must be proven

- If the legislation does not expressly state that strict liability or absolute liability applies, then a fault element needs to be proven for the physical element.
- **If the fault element is not proven, then the offence has not been committed.**

Example: The obligation to keep a record of further advice (**ROA**) in section 946B(3A) is not an offence of strict liability. This means that for an offence to have been committed, the licensee must have acted **intentionally** in not keeping a further advice ROA.

If yes, then no fault element needs to be proven

- Where the legislation expressly states that strict liability or absolute liability applies to the physical element of the offence, no fault element needs to be proven.
- However, some statutory defences may apply, even for strict liability offences.

Example: For the offence of giving a defective disclosure document (whether or not known to be defective), section 952E(7) states that strict liability applies to the physical element in section 952E(1)(b).



Step 3

What is the “silent” fault element which must exist for an offence to occur?

Does the physical element involve only conduct, or does it involve a circumstance / result?

- Most offences in the Corporations Act do not specify what fault element must be proven.
- This is because the applicable fault element is instead specified in schedule 1 to the *Criminal Code Act 1995* (Cth) (**Criminal Code**).

If the physical element consists of only **conduct**, then **intention** is the fault element that must be proven

- Where the physical element consists only of conduct, then the applicable fault element that must be proven is that the licensee must have **intended** that conduct to occur: *Criminal Code s 5.6(1)*.

Example: For the ordinary offence of giving a defective disclosure document in section 952C(3), the physical element in section 952C(3)(b) of *not giving a disclosure document by the time required* consists only of conduct, so **intention** is the relevant fault element.

This means that for an offence of section 952C(3) to have been committed, the licensee must have **intended** to have not given the disclosure document by the time required.

If the physical element involves a **circumstance** or **result**, then **recklessness** is the fault element that must be proven

- Where the physical element involves a circumstance or result, then the applicable fault element that must be proven is that the person must have been **reckless** as to that circumstance or result: *Criminal Code s 5.6(2)*.
- Proof of **knowledge** or **intention** will also satisfy a fault element of recklessness: *Criminal Code s 5.6(4)*

Example: For the ordinary offence of failing to give a PDS in section 1012C(3), the physical element in paragraph (a)(i) of being *required by a provision of this Part to give another person a PDS* is a physical element involving a circumstance, so **recklessness** is the relevant fault element that must be proven.

This means that for an offence of s1012C(3) to have been committed, the licensee must have **been reckless** to the fact that a PDS was required to have been given (or otherwise knowledge or intent existed).



Step 4

Are all the **physical** and **fault** elements made out?

An offence will not have been committed unless each applicable physical element and fault element has been made out.

Example: Failing to give a record of further advice (ROA)

Section 942B(8), as modified by reg 7.7.10AC(2), establishes an offence for failing to give a further advice ROA on request. For a licensee to commit this offence, each of the following physical and fault elements must be made out:

Physical elements that must be proven (s942B(8))	Fault elements that must be proven (Criminal Code s5.6)
1 The FSG included a statement to the effect that a client may request an ROA.	The licensee was reckless (which includes knowledge or intent) that the FSG included this statement.
2 The client had been provided with further advice to which that statement applies.	The licensee was reckless (which includes knowledge or intent) that the client had been provided with further advice.
3 The client had not already been provided with an ROA for that advice.	The licensee was reckless (which includes knowledge or intent) that the client had not already been provided with the ROA. <i>This means that if the licensee reasonably believed that an ROA had already been given, then this fault element is not satisfied and therefore no criminal offence has been committed.</i>
4 The licensee did not comply with a request from the client to provide the ROA.	The licensee intended to not comply with the client's request to receive a copy of the ROA.



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