Where the question goes

OPEN SOURCE	Corporations Act 2001 (Cth) ("s" below); Criminal Code (Cth) Pt 2.5; the judgments. the LAWS5014 notes (course notes and two scaffolds); statutes read live (date in each footer).

ROUTER · THE QUESTION INVOLVES → PAGE

What ASIC or the company can get for a contravention	ss 1317E–1317Q, 206C	CORP · 1 Civil penalties
What kind of company; registration; pty or public	ss 112–119	CORP · 2 Types
An offer of shares or debentures; is a prospectus needed?	ss 700, 706, 708	CORP · 3 Raising money (1)
A defective prospectus; an offer without one	ss 728–733, 1041H	CORP · 4 Raising money (2)
Is the company insolvent? Administration; liquidation; preferences	ss 95A, 435A, 588FA	CORP · 5 Insolvency (1)
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The company as a separate person; groups	ss 119, 124, 516	CORP · 7 Personality
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The constitution; altering it; class rights	ss 134–140, 246B	CORP · 9 Constitution
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Is the company bound by a contract; liable in tort?	ss 126, 128–129	CORP · 12 Contract and tort
Is the company guilty of an offence?	Criminal Code Pt 2.5	CORP · 13 Crime
Good faith; proper purpose; who is a director	ss 9, 181, 187	CORP · 14 Duties (1)
A director's own interest; profits; related parties	ss 182–183, 191, 208	CORP · 15 Duties (2)
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Ratification; relief; indemnity	ss 199A–199C, 1317S, 1318	CORP · 17 Consequences
A member treated unfairly; injunction	ss 232–234, 1324	CORP · 18 Members (1)
A member sues for the company; winding up	ss 236–237, 461	CORP · 19 Members (2)
Which case to cite	the judgments	CORP · 20– Cases

THE ANSWER, IN ORDER (EVERY PAGE)

1	Who, and in what capacity	The company; the director, officer, member or creditor; the provision or duty.
2	The rule and its source	The section of the Act, the general law rule, or both (they run side by side).
3	The test	State it with its elements, from the page.
4	Apply; defences	Apply each element; then the statutory defence or the other side's best answer.
5	Consequence; who sues	Civil penalty orders (CORP 1); compensation; the member's remedy (CORP 18–19); relief (CORP 17).

Civil penalties ss 1317E–1317Q, 206C

USE THIS PAGE WHEN	a contravention of the Act, and the question asks what ASIC or the company can obtain.
OPEN	ss 79, 206C, 1317E–1317Q.
FIRST QUESTION, ALWAYS	is the provision in the s 1317E(3) table?

RELATED PAGES · CORP 14–17 · CORP 6 · CORP 19.

1317E — the table

A director breaches a statutory duty

→ "[A] provision specified in column 1 of the following table is a civil penalty provision" (s 1317E(3)(a)). Corporation/scheme: ss 180(1), 181–183 ("officers' duties"), 209(2), 588G(2). Financial services: ss 674A, 675A. Uncategorised: ss 727(6), 728(4). s 1041H is not in the table. On proof the Court "must make a declaration of contravention" (s 1317E(1)); start within 6 years (s 1317K).

s 79 — involved

Someone helped the contravener

→ One who attempts, or "is involved in a contravention", "is taken to have contravened the provision" (s 1317E(4)). Involved: aiding, abetting, counselling or procuring; inducing; conspiring; or being "in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to" it (s 79).

1317G — serious

ASIC wants a penalty

→ Needs a declaration, and for a corporation/scheme provision the contravention "materially prejudices the interests of the corporation … or its members", "materially prejudices the corporation's ability to pay its creditors", or "is serious" (s 1317G(1)(b)). Maximum: s 1317G(3) (individual), (4) (body corporate).

1317GAB — relinquishment

The contravener profited

→ After a declaration, an order to pay "an amount equal to the benefit derived and detriment avoided" (s 1317GAB(1)), even with a pecuniary penalty (s 1317GAB(3)).

1317H — resulted from

The company lost money

→ Compensation where the person contravened a corporation/scheme provision and "the damage resulted from the contravention" (s 1317H(1)); damage includes "profits made by any person resulting from the contravention" (s 1317H(2)). No declaration needed (note to s 1317H(1)).

1317J — no one else

Who may apply

→ ASIC: declaration, pecuniary penalty, compensation (s 1317J(1)). The company: compensation (s 1317J(2)) and may intervene (s 1317J(3)). Anyone damaged by a financial services contravention: s 1317HA (s 1317J(3A)). "No person may apply … unless permitted by this section" (s 1317J(4)); a member goes to CORP 19.

s 206C — justified

Ban the director

→ On ASIC's application, after a s 1317E declaration of a corporation/scheme provision or s 727(6) or 728(4), the Court may disqualify "for a period that the Court considers appropriate" if "satisfied that the disqualification is justified" (s 206C(1)).

1317N — same conduct

Criminal charges as well

→ Convicted first: no declaration, penalty or relinquishment (s 1317M). Criminal proceedings started: proceedings for a declaration, penalty or relinquishment order "are stayed", then resumed or dismissed (s 1317N). Criminal after civil: allowed (s 1317P(1)).

DECIDE

Which orders, and who asks?

1 Is the provision in the s 1317E(3) table?
- **NO** → no civil penalty: offence, damages under s 1041I for a s 1041H contravention, or general law

YES ↓

2 Did the person contravene, attempt, or was the person involved (ss 79, 1317E(4))?
- **NO** → no civil penalty liability for that person

YES ↓

3 Convicted of an offence for substantially the same conduct (s 1317M)?
- **YES** → no declaration, penalty or relinquishment; compensation still open (s 1317H)

NO ↓

4 Corporation/scheme provision: material prejudice or serious (s 1317G(1)(b))?
- → **YES** declaration, pecuniary penalty, relinquishment, s 206C (ASIC applies), compensation; other categories: no threshold, a declaration suffices
- **NO** declaration, relinquishment, s 206C (ASIC applies), compensation; no pecuniary penalty

SAY

_s_ is a corporation/scheme civil penalty provision. (s 1317E(3)) _X_ was knowingly concerned in the contravention, so is taken to have contravened _s_. (ss 79, 1317E(4)) On proof the Court must declare the contravention; it _materially prejudiced the company's ability to pay its creditors / is serious_, so a pecuniary penalty is open. (ss 1317E(1), 1317G(1)(b)) The company may seek compensation for _loss_, including _profits made_, without a declaration. (ss 1317H, 1317J(2))

ASIC may seek disqualification: _conduct_ shows it is justified. (s 206C)

MARKS LOST

1. Treating s 1041H as a civil penalty provision (it is not in the s 1317E(3) table).
2. Letting a member apply for a civil penalty order (s 1317J(4)).
3. Requiring a declaration before compensation (note to s 1317H(1)).
4. Skipping the s 1317G(1)(b) threshold: material prejudice or seriousness.
5. Forgetting accessories (ss 79, 1317E(4)).
6. Getting the order of civil and criminal proceedings wrong (ss 1317M–1317P).
7. Citing s 674(2) as the civil penalty for continuous disclosure: the table now lists ss 674A and 675A.

Types of company; registration ss 112–119

USE THIS PAGE WHEN	what kind of company it is; whether a proprietary company may do something; when the company came into existence.
OPEN	ss 9, 45A, 112–119, 124, 201A, 204A, 516–517.
FIRST QUESTION, ALWAYS	proprietary or public, and limited how?

RELATED PAGES · CORP 3 · CORP 7 · CORP 9.

s 112
types

Which kind of company is it?
→ Proprietary: limited by shares, or unlimited with share capital. Public: limited by shares, limited by guarantee, unlimited with share capital, or a no liability company (only if its "sole objects are mining purposes" and it cannot recover calls: s 112(2)); CCIV: limited by shares (s 112(1)). A public company is "a company other than a proprietary company or a CCIV and: …" (s 9).

s 113
50

A Pty company with many shareholders
→ "[N]o more than 50 non-employee shareholders" to be registered as, change to, or remain a proprietary company (s 113(1)). Joint holders count as one, "employee shareholder" is defined, and CSF shareholders are not counted (s 113(2)).

s 113(3)
Ch 6D

A Pty company offers shares to outsiders
→ It "must not engage in any activity that would require disclosure to investors under Chapter 6D", except an offer of shares or options to existing shareholders or to employees of the company or a subsidiary, or a CSF offer (s 113(3)). An offence of strict liability (s 113(3A)), but "[a]n act or transaction is not invalid merely because of a contravention" (s 113(4)); ASIC may require it to change to a public company (note to s 113, citing s 165 †). Then CORP 3.

s 45A
2 of 3

Small or large proprietary company
→ Small if at least 2 of: consolidated revenue less than $50 million; consolidated gross assets less than $25 million; fewer than 100 employees (s 45A(2), with the amounts prescribed by Corporations Regulations reg 1.0.02B); large if 2 of the reverse (s 45A(3)). The Act's own default figures ($25m, $12.5m, 50) are displaced by the regulation.

s 201A
reside

Directors and secretary needed
→ Proprietary: at least 1 director, who "must ordinarily reside in Australia" (s 201A(1)); a secretary is optional (s 204A(1)). Public: at least 3 directors, 2 ordinarily resident (s 201A(2)), and at least 1 resident secretary (s 204A(2)).

ss 516–517
unpaid

A member is asked to pay the company's debts
→ Limited by shares: a member "need not contribute more than the amount (if any) unpaid on the shares" (s 516). Limited by guarantee: no more than "the amount the member has undertaken to contribute to the company's property if the company is wound up" (s 517); a company limited by guarantee "does not have the power to issue shares" (s 124(1)). Unlimited: "no limit" (s 9).

s 119
registered

When did the company exist?
→ Application lodged with ASIC (s 117); ASIC registers it and issues a certificate (s 118). It "comes into existence as a body corporate at the beginning of the day on which it is registered" (s 119), with "the legal capacity and powers of an individual" (s 124(1)). Internal rules: replaceable rules, a constitution, or both (s 134; CORP 9).

DECIDE

Can it stay proprietary?

1 Registered as, or converted to, a proprietary company (s 45A(1))?
- **NO →** public company (s 9): at least 3 directors, 2 resident (s 201A(2)); a resident secretary (s 204A(2)); may offer under Ch 6D

YES ↓

2 More than 50 non-employee shareholders, counted under s 113(2)?
- **YES →** cannot remain proprietary (s 113(1))

NO ↓

3 An activity needing Ch 6D disclosure, beyond existing shareholders, employees or a CSF offer (s 113(3))?
- **YES** contravention (an offence, s 113(3A)); not invalid merely because of it (s 113(4)); ASIC may require change to public (note to s 113)
- **NO** within the proprietary rules

SAY

Co is a proprietary / public company limited by shares / guarantee. (ss 9, 112(1)) As a proprietary company it may have no more than 50 non-employee shareholders and may not make an offer needing Ch 6D disclosure, except to existing shareholders / employees of Co or a subsidiary. (s 113) The contravention does not invalidate the issue, but ASIC may require Co to become public. (s 113(4); note to s 113) Member 's liability is limited to the amount unpaid on the shares / the guaranteed amount. (ss 516, 517)

Co came into existence at the beginning of date, the day it was registered. (s 119)

MARKS LOST

1. Treating "public" as "listed": a public company is defined as "a company other than a proprietary company or a CCIV" (s 9); listing is not part of it.
2. Counting employee shareholders towards the 50 (s 113(1)–(2)).
3. Saying a s 113(3) contravention voids the issue (s 113(4)).
4. Giving a company limited by guarantee shares (s 124(1)).
5. A no liability company outside mining (s 112(2)–(3)).
6. Quoting the Act's default s 45A figures instead of the prescribed $50m / $25m / 100 (reg 1.0.02B).
7. Dating existence from the application, not registration (s 119).