



# **Financial Sector Reform (Consequential Amendments) Act 1998**

**No. 48, 1998**

**An Act to make consequential amendments related to the enactment of the *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998*, and for other purposes**



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# Financial Sector Reform (Consequential Amendments) Act 1998

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**An Act to make consequential amendments related to the enactment of the *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998*, and for other purposes**

[Assented to 29 June 1998]

The Parliament of Australia enacts:

## **1 Short title**

This Act may be cited as the *Financial Sector Reform (Consequential Amendments) Act 1998*.

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## 2 Commencement

- (1) Subject to this section, this Act commences on the day on which it receives the Royal Assent.
- (2) Subject to subsections (3) to (14), Schedules 1, 2 and 3 commence on the commencement of the *Australian Prudential Regulation Authority Act 1998*.
- (3) Items 7, 8 and 9 of Schedule 1 commence on the later of the following times:
  - (a) the commencement of the *Australian Prudential Regulation Authority Act 1998*;
  - (b) immediately after the commencement of Part 1 of Schedule 2 to the *Crimes (Superannuation Benefits) Amendment Act 1998*.
- (4) Item 25 of Schedule 1 to this Act commences on the later of the following times:
  - (a) the commencement of the *Australian Prudential Regulation Authority Act 1998*;
  - (b) immediately after the commencement of item 9 of Schedule 1 to the *Cheques and Payment Orders Amendment Act 1998*.
- (5) If item 2 of Schedule 1 to the *Cheques and Payment Orders Amendment Act 1998* commences on or before the commencement of the *Australian Prudential Regulation Authority Act 1998*, item 26 of Schedule 1 to this Act does not commence.
- (6) Items 39, 40 and 41 of Schedule 1 commence on the later of the following times:
  - (a) the commencement of the *Australian Prudential Regulation Authority Act 1998*;
  - (b) immediately after the commencement of Part 1 of Schedule 1 to the *Crimes (Superannuation Benefits) Amendment Act 1998*.
- (7) If item 24 of Schedule 2 to the *Insurance Laws Amendment Act 1998* commences on or before the commencement of the *Australian Prudential Regulation Authority Act 1998*, items 109 to 113 of Schedule 1 to this Act do not commence.



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- (8) If the *Small Superannuation Accounts Amendment Act 1998* commences on or before the commencement of the *Australian Prudential Regulation Authority Act 1998*, items 163 and 164 of Schedule 1 to this Act do not commence.
- (9) If Schedule 2 to the *Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Act 1998* commences on or before the commencement of the *Australian Prudential Regulation Authority Act 1998*, items 170 to 178 of Schedule 1 to this Act do not commence.
- (10) If:
- (a) Part 1 of Schedule 1 to the *Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Act 1998* commences on or before the commencement of the *Australian Prudential Regulation Authority Act 1998*; and
  - (b) subsection (9) does not apply;
- items 174 and 176 of Schedule 1 to this Act do not commence.
- (11) If Schedule 4 to the *Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Act 1998* commences on or before the commencement of the *Australian Prudential Regulation Authority Act 1998*, items 179 to 181 of Schedule 1 to this Act do not commence.
- (12) If Schedule 8 to the *Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Act 1998* commences on or before the commencement of the *Australian Prudential Regulation Authority Act 1998*, item 192 of Schedule 1 to this Act does not commence.
- (13) Items 1, 6, 18, 20 and 21 of Schedule 2 commence immediately after the commencement of Schedule 1 to the *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998*.
- (14) Items 4, 6, 12, 14, 15, 16 and 28 of Schedule 3 commence immediately after the commencement of the *Managed Investments Act 1998*.

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### 3 Schedule(s)

Subject to section 2, each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Note: If:

- (a) an Act is amended by an item in a Schedule to this Act; and
- (b) the short title of the Act is changed on or before the commencement of the item;

the amendment made by the item has effect as an amendment of the Act under its new short title—see section 10 of the *Acts Interpretation Act 1901*.

### 4 Transitional provisions

*Treatment of approvals of banks under the Anglo-Australian Telescope Agreement Act 1970*

- (1) An approval of a bank that is in force immediately before the commencement of item 5 of Schedule 1 for the purposes of subsection 12(3) of the *Anglo-Australian Telescope Agreement Act 1970* as then in force is to be taken, after that commencement, to be an approval of the bank for the purposes of the definition of **ADI** in subsection 12(3) of that Act as in force immediately after that commencement.

*Treatment of approvals and authorisations under the Bankruptcy Act 1966*

- (2) An approval of a bank, or an authorisation of a person, that is in force immediately before the commencement of item 10 of Schedule 1 for the purposes of the definition of **approved bank** in subsection 5(1) of the *Bankruptcy Act 1966* as then in force is to be taken, after that commencement, to be an approval of the bank or an authorisation of the person for the purposes of the definition of **ADI** in subsection 5(1) of that Act as in force immediately after that commencement.

## **Schedule 1—Consequential amendment of Acts**

### ***Advisory Council for Inter-government Relations Act 1976***

#### **1 Subsection 2(1)**

Insert:

**ADI** (authorised deposit-taking institution) means:

- (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
- (b) the Reserve Bank of Australia; or
- (c) a bank incorporated under a law of a State.

#### **2 Subsection 2(1) (definition of *approved bank*)**

Repeal the definition.

#### **3 Subsection 16F(1)**

Omit “an approved bank or approved banks”, substitute “an ADI or ADIs”.

Note: The heading to section 16F is replaced by the heading “**Accounts with ADIs**”.

#### **4 Paragraph 16G(2)(a)**

Omit “approved bank”, substitute “ADI”.

### ***Anglo-Australian Telescope Agreement Act 1970***

#### **5 Subsection 12(1)**

Omit “approved bank or approved banks”, substitute “ADI or ADIs”.

Note: The heading to section 12 is replaced by the heading “**Accounts with ADIs**”.

#### **6 Subsection 12(3)**

Repeal the subsection, substitute:

- (3) In this section:

**ADI** (authorised deposit-taking institution) means:

- (a) an ADI within the meaning of the *Banking Act 1959*; or
- (b) the Reserve Bank of Australia; or
- (c) any other bank approved in writing for the purposes of this definition by the Treasurer.

### ***Australian Federal Police Act 1979***

#### **7 Subsection 54(2A) (including the note)**

Omit “the Insurance and Superannuation Commissioner” (wherever occurring), substitute “the Australian Securities and Investments Commission”.

#### **8 Subsection 54(2A)**

Omit “the relevant Commissioner”, substitute “the Australian Securities and Investments Commission, or the Commissioner of Taxation, as the case requires”.

#### **9 Subsection 54(2A) (note)**

Omit “he or she”, substitute “the Commission or the Commissioner”.

### ***Bankruptcy Act 1966***

#### **10 Subsection 5(1)**

Insert:

**ADI** (authorised deposit-taking institution) means:

- (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
- (b) the Reserve Bank of Australia; or
- (c) any other bank approved in writing for the purposes of this definition:
  - (i) by the Treasurer; or
  - (ii) by a person authorised in writing by the Treasurer to give approvals for the purposes of this definition.

#### **11 Subsection 5(1) (definition of *approved bank*)**

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Repeal the definition.

**12 Subsection 20B(4)**

Omit “approved bank or approved banks”, substitute “ADI or ADIs”.

**13 Subsection 20D(1)**

Omit “approved bank” (wherever occurring), substitute “ADI”.

**14 Subsection 20D(4)**

Omit “a bank or banks” (wherever occurring), substitute “an ADI or ADIs”.

**15 Subsection 20D(8) (paragraph (f) of the definition of *public securities*)**

Omit “a bank as defined by subsection 5(1) of the *Banking Act 1959*”, substitute “an ADI”.

**16 Subsection 20E(1)**

Omit “a bank or banks”, substitute “an ADI or ADIs”.

**17 Subsection 125(3)**

Insert:

*bank* means an ADI or any other bank.

**18 At the end of section 126**

Add:

(4) In this section:

*banker* means an ADI or any other banker.

**19 Paragraph 139U(3)(c)**

Omit “a bank”, substitute “an ADI”.

**20 Section 168**

Omit “banking”.

**21 At the end of section 169**

Add:

(5) In this section:

*bank* means an ADI or any other bank.

**22 Subsection 285(1)**

Omit “bank or other person”, substitute “institution”.

**23 Paragraph 285(2)(b)**

Omit “bank or building society”, substitute “institution”.

***Broadcasting Services Act 1992***

**24 Subclause 4(4) of Schedule 1 (paragraph (a) of the definition of *authorised lender*)**

Omit “a bank”, substitute “an ADI (authorised deposit-taking institution)”.

***Cheques Act 1986***

**25 Subsection 3(1) (paragraph (b) of the definition of *financial institution*)**

Repeal the paragraph, substitute:

(b) a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*; or

***Cheques and Payment Orders Act 1986***

**26 Subsection 3(1) (paragraph (b) of the definition of *bank*)**

Repeal the paragraph, substitute:

(b) a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*;

***Child Care Payments Act 1997***

**27 Section 5**

Insert:

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*bank* includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

**28 Subsections 62(1) and (2)**

Omit “bank”, substitute “\*bank”.

**29 Subsection 67(1)**

Omit “bank”, substitute “\*bank”.

**30 Subsection 114(1)**

Omit “bank”, substitute “\*bank”.

**31 Subsection 119(1)**

Omit “bank”, substitute “\*bank”.

***Coal Mining Industry (Long Service Leave Funding) Act 1992***

**32 Subsection 4(1) (definition of *approved bank*)**

Repeal the definition.

**33 Subsection 4(1)**

Insert:

*bank* includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

***Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992***

**34 At the end of section 7**

Add:

(4) In this section:

*bank* includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

### ***Commonwealth Electoral Act 1918***

#### **35 Subsection 170(3)**

Omit “banker’s cheque”, substitute “cheque drawn by a bank or other financial institution on itself”.

### ***Commonwealth Inscribed Stock Act 1911***

#### **36 At the end of section 52A**

Add:

(2) In this section:

*bank* includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

### ***Crimes (Currency) Act 1981***

#### **37 Subsection 28(1)**

Omit “a bank (including an officer of the Reserve Bank Service)”, substitute “an ADI or of the Reserve Bank Service”.

#### **38 Subsection 28(3)**

Repeal the subsection, substitute:

(3) In subsection (1):

*ADI* (authorised deposit-taking institution) means a body corporate that is an ADI for the purposes of the *Banking Act 1959*.

### ***Crimes (Superannuation Benefits) Act 1989***

#### **39 Subsection 41(5A) (including the note)**



Omit “the Insurance and Superannuation Commissioner” (wherever occurring), substitute “the Australian Securities and Investments Commission”.

**40 Subsection 41(5A)**

Omit “the relevant Commissioner”, substitute “the Australian Securities and Investments Commission, or the Commissioner of Taxation, as the case requires”.

**41 Subsection 41(5A) (note)**

Omit “he or she”, substitute “the Commission or the Commissioner”.

***Debits Tax Administration Act 1982***

**42 Subsection 3(1) (at the end of the definition of *bank*)**

Add:

Note: Not all persons carrying on banking business are called banks. For example, an ADI (authorised deposit-taking institution) under the *Banking Act 1959* carries on banking business. If its business includes the keeping of accounts that may be drawn on by cheque, it will be a *bank* for the purposes of this Act.

***Defence Force Retirement and Death Benefits Act 1973***

**43 At the end of section 40**

Add:

(2) In this section:

*bank* includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

***Education Services for Overseas Students (Registration of Providers and Financial Regulation) Act 1991***

**44 Subsection 6A(6)**

Insert:

*ADI* (authorised deposit-taking institution) means:

- (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
- (b) the Reserve Bank of Australia.

**45 Subsection 6A(6) (paragraph (a) of the definition of *notified trust account*)**

Omit “a branch in Australia of a bank (within the meaning of the *Banking Act 1959*)”, substitute “an ADI in Australia”.

**46 Subsection 6A(6) (paragraph (c) of the definition of *notified trust account*)**

Omit “bank”, substitute “ADI”.

***Farm Household Support Act 1992***

**47 Subsection 3(1)**

Insert the following entry in its appropriate alphabetical position (determined on a letter-by-letter basis):

*bank*

***Financial Corporations (Transfer of Assets and Liabilities) Act 1993***

**48 Section 3**

Insert:

*ADI* (authorised deposit-taking institution) means a body corporate that is an ADI for the purposes of the *Banking Act 1959*.

**49 Section 3**

Insert:

*ADI authority* means an authority under subsection 9(3) of the *Banking Act 1959*.

**50 Section 3 (definition of *banking authority*)**

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Repeal the definition.

**51 Section 3**

Insert:

*eligible foreign ADI* means an ADI:

- (a) that is a foreign ADI for the purposes of the *Banking Act 1959*; and
- (b) that:
  - (i) was granted its ADI authority before this Act commenced; or
  - (ii) is or was granted its ADI authority after this Act commenced pursuant to an application made either before, or not later than 3 years after, this Act commenced.

**52 Section 3 (definition of *eligible foreign bank*)**

Repeal the definition.

**53 Section 3**

Insert:

*eligible local ADI* means a local ADI that was granted its ADI authority on or before 18 June 1993.

**54 Section 3 (definition of *eligible local bank*)**

Repeal the definition.

**55 Section 3 (definition of *eligible subsidiary*)**

Omit “bank” (wherever occurring), substitute “ADI”.

**56 Section 3:**

Insert:

*local ADI* means an ADI that is incorporated under a law of the Commonwealth, a State or a Territory relating to companies.

**57 Section 3 (definition of *local bank*)**

Repeal the definition.

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**58 Section 3**

Insert:

*newly established local ADI* means a local ADI that:

- (a) was granted its ADI authority before this Act commenced but after 18 June 1993; or
- (b) is or was granted its ADI authority after this Act commenced pursuant to an application made either before, or not later than 3 years after, this Act commenced.

**59 Section 3 (definition of *newly established local bank*)**

Repeal the definition.

**60 Section 6**

Omit “bank” (wherever occurring), substitute “ADI”.

**61 Section 6**

Omit “a banking authority”, substitute “an ADI authority”.

**62 Subsections 7(2), (3), (4) and (5)**

Omit “bank” (wherever occurring), substitute “ADI”.

**63 Paragraphs 7(6)(a) and (7)(a) and (b)**

Omit “a banking authority”, substitute “an ADI authority”.

***Financial Transaction Reports Act 1988***

**64 Subsection 3(1)**

Insert:

*ADI* (authorised deposit-taking institution) means:

- (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
- (b) the Reserve Bank of Australia; or
- (c) a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution.

**65 Subsection 3(1) (definition of *bank*)**

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Repeal the definition.

Note: The heading to section 24 is altered by omitting “**bank**”.

## **66 Subsection 3(1)**

Insert:

*banker* includes a body corporate that is an ADI.

## **67 Subsection 3(1) (paragraph (a) of the definition of *financial institution*)**

Repeal the paragraph, substitute:

(a) an ADI; or

## **68 Subsection 15(4)**

Omit “A bank”, substitute “An ADI”.

## **69 Subsection 15(4)**

Omit “the bank”, substitute “the ADI”.

## **70 Paragraph 15(5)(a)**

Omit “a bank”, substitute “an ADI”.

## **71 Subparagraphs 17B(1)(b)(i) and (ii)**

Omit “a bank”, substitute “an ADI”.

## **72 Section 17C**

Repeal the section, substitute:

### **17C ADI acting on behalf of another ADI**

For the purposes of this Division, if:

(a) an ADI (the *first ADI*) is acting on behalf of, or at the request of, another ADI (the *second ADI*); and

(b) the second ADI is (whether or not as a result of one or more previous applications of this section) acting on behalf of, or at the request of, a person who is not an ADI;

the first ADI is taken to be acting on behalf of that person.

**73 Paragraph 23A(1)(a)**

Omit “a bank (the *transferor bank*)”, substitute “an ADI (the *transferor ADI*)”.

Note: The heading to section 23A is replaced by the heading “**Active ADI accounts transferred to another ADI—obligations of ADIs in relation to records of information**”.

**74 Paragraph 23A(1)(a)**

Omit “transferor bank by”, substitute “transferor ADI by”.

**75 Paragraph 23A(1)(b)**

Omit “another bank (the *transferee bank*)”, substitute “another ADI (the *transferee ADI*)”.

**76 Subparagraph 23A(1)(b)(ii) and subsections 23(2), (4), (5) and (6)**

Omit “bank” (wherever occurring), substitute “ADI”.

Note: The headings to subsections 23A(2), (4), (5) and (6) are altered by omitting “bank” (wherever occurring) and substituting “ADI”.

**77 Subsection 23B(1)**

Omit “a bank (the *transferor bank*)”, substitute “an ADI (the *transferor ADI*)”.

Note: The heading to section 23B is replaced by the heading “**Closed ADI accounts transferred to another ADI—obligations of ADIs in relation to records of information**”.

**78 Paragraph 23B(1)(a)**

Omit “the transferor bank by”, substitute “the transferor ADI by”.

**79 Paragraph 23B(1)(c)**

Omit “transferor bank”, substitute “transferor ADI”.

**80 Paragraph 23B(1)(c)**

Omit “another bank (the *transferee bank*)”, substitute “another ADI (the *transferee ADI*)”.

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**81 Paragraph 23B(1)(d) and subsections 23B(2), (3), (4) and (5)**

Omit “bank” (wherever occurring), substitute “ADI”.

Note: The headings to subsections 23B(2), (3), (4) and (5) are altered by omitting “bank” (wherever occurring) and substituting “ADI”.

***Health Insurance Act 1973*****82 Subsection 3(1)**

Insert:

*bank* includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

***Income Tax Assessment Act 1936*****83 Subsection 6(1)**

Insert:

*bank* or *banker* includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

**84 Paragraph 16(4)(hc)**

Omit “the Insurance and Superannuation Commissioner, for the purpose of the administration of the *Superannuation Entities (Taxation) Act 1987*”, substitute “the Australian Prudential Regulation Authority, for the purpose of the administration of the *Superannuation (Excluded Funds) Taxation Act 1987*”.

**85 Paragraph 16(4)(hca)**

Omit “the Insurance and Superannuation Commissioner”, substitute “the Australian Prudential Regulation Authority or the Australian Securities and Investments Commission”.

**86 After paragraph 16(4)(hca)**

Insert:

(hcb) the Australian Prudential Regulation Authority, for the purpose of the administration of the *Financial Institutions Supervisory Levies Collection Act 1998*;

**87 Paragraph 128AE(2)(a)**

Repeal the paragraph, substitute:

- (a) a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*; or

**88 Section 159GZA (paragraph (a) of the definition of *financial institution*)**

Repeal the paragraph, substitute:

- (a) a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*; or

**89 Paragraphs 159GZLA(1)(a) and 159GZLB(1)(a)**

Omit “bank within the meaning of the *Banking Act 1959*”, substitute “body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*”.

**90 Section 160ZZV (definition of *foreign bank*)**

Omit “foreign bank as defined by subsection 5(1) of the *Banking Act 1959*”, substitute “body corporate that is a foreign ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*”.

**91 Section 202A (paragraph (b) of the definition of *bank*)**

Repeal the paragraph, substitute:

- (b) a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*; or

**92 Subsection 262A(1B)**

Omit “(within the meaning of the *Banking Act 1959*)”.

**93 At the end of section 262A**

Add:

- (6) In this section:



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*foreign bank* means body corporate that is a foreign ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

**94 Subsections 275A(2), (4), (5) and (6)**

Omit “the Insurance and Superannuation Commissioner”, substitute “the Australian Prudential Regulation Authority”.

**95 Subparagraph 300A(2)(b)(i)**

Omit “the Insurance and Superannuation Commissioner”, substitute “the Australian Prudential Regulation Authority”.

**96 Subparagraph 300B(2)(b)(i)**

Omit “the Insurance and Superannuation Commissioner”, substitute “the Australian Prudential Regulation Authority”.

**97 Section 317 (paragraph (a) of the definition of *AFI*)**

Repeal the paragraph, substitute:

- (a) a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*;

***Insurance Act 1973***

**98 Subsection 3(1)**

Insert:

*ADI* (authorised deposit-taking institution) means a body corporate that is an ADI for the purposes of the *Banking Act 1959*.

**99 Subsection 3(1)**

Insert:

*bank* or *banker* includes, but is not limited to, a body corporate that is an ADI.

**100 Subsection 3(1) (paragraph (c) of the definition of *insurance business*)**

Omit “a bank within the meaning of the *Banking Act 1959*”, substitute “an ADI”.

**101 Subparagraph 30(1)(d)(ii)**

Omit “a bank as defined in subsection 5(1) of the *Banking Act 1959*”, substitute “an ADI”.

**102 Paragraph 30(4A)(a)**

Omit “a bank as defined by subsection 5(1) of the *Banking Act 1959*”, substitute “an ADI”.

**103 Subparagraph 49B(1)(b)(iii)**

Repeal the subparagraph, substitute:  
(iii) an ADI; or

**104 Subparagraph 49B(2)(b)(iii)**

Repeal the subparagraph, substitute:  
(iii) an ADI; or

**105 Subparagraph 49E(1)(e)(ii)**

Omit “a bank as defined in subsection 5(1) of the *Banking Act 1959*”, substitute “an ADI”.

**106 Paragraph 49E(7)(a)**

Omit “a bank as defined in subsection 5(1) of the *Banking Act 1959*”, substitute “an ADI”.

**107 Subsection 119(1)**

Omit “a bank within the meaning of the *Banking Act 1959*”, substitute “an ADI”.

**108 Subsection 119(2)**

After “A bank”, insert “(including an ADI)”.

**109 Subparagraph 2(1) of the Schedule**

Omit “a bank within the meaning of the *Banking Act 1959*”, substitute “an ADI”.

**110 Subparagraph 2(4) of the Schedule**

Omit “a bank” (first occurring), substitute “an ADI”.

**111 Subparagraph 2(4) of the Schedule**

Omit “a bank within the meaning of the *Banking Act 1959*”, substitute “an ADI”.

**112 Subparagraph 9(1) of the Schedule**

Omit “a bank within the meaning of the *Banking Act 1959*”, substitute “an ADI”.

**113 Subparagraph 9(2) of the Schedule**

After “A bank”, insert “(including an ADI)”.

***Insurance (Agents and Brokers) Act 1984***

**114 Section 9**

Insert:

*bank* includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

**115 Subsection 26(1A)**

Before “includes”, insert “, in addition to the meaning it is given in section 9,”.

***Life Insurance Act 1995***

**116 Dictionary in the Schedule**

Insert:

*bank* includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

***Loan (Income Equalization Deposits) Act 1976***

**117 At the end of section 14**

Add:

(2) In this section:

*bank* includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

### ***Management and Investment Companies Act 1983***

#### **118 Subsection 3(1)**

Insert:

*ADI* (authorised deposit-taking institution) means:

- (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
- (b) the Reserve Bank of Australia; or
- (c) any other bank constituted by a law of a State or internal Territory.

#### **119 Subsection 3(1) (definition of *bank*)**

Repeal the definition.

#### **120 Paragraph 37(1)(a)**

Omit “a bank”, substitute “an ADI”.

### ***National Health Act 1953***

#### **121 At the end of section 82ZL**

Add:

(3) In this section:

*bank account* includes, but is not limited to, an account with a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

### ***Navigation Act 1912***

#### **122 Subsection 6(1)**

Insert:

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*bank* includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

***Northern Territory (Lessees' Loans Guarantee) Act 1954***

**123 Section 3**

Insert:

*ADI* (authorised deposit-taking institution) means:

- (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
- (b) the Reserve Bank of Australia.

**124 Section 3 (definition of *bank*)**

Repeal the definition.

**125 Subsection 4(1)**

Omit "a bank", substitute "an ADI".

**126 Subsections 4(1), (2) and (3)**

Omit "the bank", substitute "the ADI".

***Parliamentary Contributory Superannuation Act 1948***

**127 Sub-subparagraph 26B(4)(c)(iv)(E)**

Omit "the Insurance and Superannuation Commissioner", substitute "the Australian Securities and Investments Commission".

***Pooled Development Funds Act 1992***

**128 Subsection 4(1)**

Insert:

*ADI* (authorised deposit-taking institution) means:

- (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
  - (b) the Reserve Bank of Australia; or
-

(c) a bank constituted by a law of a State or internal Territory.

**129 Subsection 4(1) (definition of *bank*)**

Repeal the definition.

**130 Subsection 31(1)**

Omit “a bank or”, substitute “an ADI or a”.

***Prawn Export Promotion Act 1995***

**131 At the end of section 9**

Add:

(5) In this section:

*bank* includes, but is not limited to, an ADI (authorised deposit-taking institution) within the meaning of the *Banking Act 1959*.

***Prices Surveillance Act 1983***

**132 Subsection 3(1)**

Insert:

*banker* includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

***Privacy Act 1988***

**133 Subsection 6(1) (paragraph (b) of the definition of *bank*)**

Repeal the paragraph, substitute:

(b) a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*; or

***Proceeds of Crime Act 1987***

**134 Subsection 4(1)**

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Insert:

**ADI** (authorised deposit-taking institution) means:

- (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
- (b) the Reserve Bank of Australia; or
- (c) a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution.

**135 Subsection 4(1) (definition of *bank*)**

Repeal the definition.

**136 Subsection 66(5)**

Omit “bankers’ books”, substitute “the books of an ADI”.

**137 Subsection 66(15) (definition of *bankers’ books*)**

Repeal the definition.

**138 Subsection 66(15)**

Insert:

***books of an ADI*** means any accounting records used in the ordinary business of an ADI, including ledgers, day-books, cash-books and account books.

**139 Paragraph 78A(1)(a)**

Omit “a bank (the *transferor bank*)”, substitute “an ADI (the *transferor ADI*)”.

Note: The heading to section 78A is replaced by the heading “**Active ADI accounts transferred to another ADI—obligations of ADIs in relation to documents**”.

**140 Paragraph 78A(1)(a)**

Omit “the transferor bank by”, substitute “the transferor ADI by”.

**141 Paragraph 78A(1)(b)**

Omit “another bank (the *transferee bank*)”, substitute “another ADI (the *transferee ADI*)”.

**142 Subparagraph 78A(1)(b)(ii)**

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Omit “bank” (wherever occurring), substitute “ADI”.

**143 Subsections 78A(2), (4) and (5)**

Omit “bank” (wherever occurring), substitute “ADI”.

Note: The headings to subsections 78A(2), (4) and (5) are altered by omitting “bank” (wherever occurring) and substituting “ADI”.

**144 Paragraph 78B(1)(a)**

Omit “a bank (the *transferor bank*)”, substitute “an ADI (the *transferor ADI*)”.

Note: The heading to section 78B is replaced by the heading “**Closed ADI accounts transferred to another ADI—obligations of ADIs in relation to documents**”.

**145 Paragraph 78B(1)(a)**

Omit “the transferor bank by”, substitute “the transferor ADI by”.

**146 Paragraph 78B(1)(c)**

Omit “transferor bank”, substitute “transferor ADI”.

**147 Paragraph 78B(1)(c)**

Omit “another bank (the *transferee bank*)”, substitute “another ADI (the *transferee ADI*)”.

**148 Paragraph 78B(1)(d) and subsections 78B(2), (3) and (4)**

Omit “bank” (wherever occurring), substitute “ADI”.

Note: The headings to subsections 78B(2), (3) and (4) are altered by omitting “bank” (wherever occurring) and substituting “ADI”.

***Reserve Bank Act 1959***

**149 Subsection 5(1)**

Insert:

*ADI* (authorised deposit-taking institution) means a body corporate that is an ADI for the purposes of the *Banking Act 1959*.

**150 Subsection 5(1) (definition of *bank*)**

Repeal the definition.



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Note: The heading to section 43 is replaced by the heading “**Bank not to issue notes other than Australian notes**”.

**151 Subsection 74(2)**

Omit “other bank”, substitute “ADI”.

**152 Paragraph 75(c)**

Omit “a bank”, substitute “an ADI”.

**153 Section 86**

Omit “section 16”, substitute “subsection 13A(3)”.

**154 Section 86**

Omit “a bank specified in the First Schedule to that Act”, substitute “an ADI”.

Note: The heading to section 86 is altered by omitting “**banks**” and substituting “**ADIs**”.

***Retirement Savings Accounts Act 1997***

**155 Subsection 11(2)**

Omit “a bank,”, substitute “an ADI or a”.

**156 Section 16**

Insert:

*ADI* (authorised deposit-taking institution) means a body corporate that is an ADI for the purposes of the *Banking Act 1959*.

**157 Section 16 (definition of *bank*)**

Repeal the definition.

**158 Section 16 (definition of *contribution*)**

Omit “a bank or”, substitute “an ADI or a”.

**159 Subsection 23(1)**

Omit “a bank,”, substitute “an ADI or a”.

**160 Paragraph 33(2)(b)**

Omit “a bank,”, substitute “an ADI or a”.

***Sales Tax Assessment Act 1992***

**161 At the end of section 91G**

Add:

(11) In this section:

*bank* includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

***Sales Tax (Exemptions and Classifications) Act 1992***

**162 At the end of item 100 in Schedule 1**

Add:

(3) In this item:

*bank* includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

***Small Superannuation Accounts Act 1995***

**163 Paragraph 64(1)(b)**

Omit “the Insurance and Superannuation Commissioner”, substitute “the Australian Securities and Investments Commission”.

**164 Subsection 64(6)**

Repeal the subsection.

**165 Section 75**

Omit “Insurance and Superannuation Commissioner” (wherever occurring), substitute “Australian Securities and Investments Commission”.

**166 Subsections 76(2), (6), (7) and (8)**

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Omit “Insurance and Superannuation Commissioner”, substitute  
“Australian Securities and Investments Commission”.

Note: The heading to subsection 76(2) is altered by omitting “*Insurance and Superannuation Commissioner*” and substituting “*Australian Securities and Investments Commission*”.

### ***Social Security Act 1991***

#### **167 Section 3 (index)**

Insert the following entry in its appropriate alphabetical position,  
determined on a letter-by-letter basis:

bank	23(1)
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#### **168 Subsection 23(1)**

Insert:

***bank*** includes, but is not limited to, a body corporate that is an  
ADI (authorised deposit-taking institution) for the purposes of the  
*Banking Act 1959*.

### ***Student and Youth Assistance Act 1973***

#### **169 Subsection 3(1)**

Insert:

***bank*** includes, but is not limited to, a body corporate that is an  
ADI (authorised deposit-taking institution) for the purposes of the  
*Banking Act 1959*.

### ***Superannuation Act 1976***

#### **170 Subsection 3(1)**

Insert:

***ASIC*** means the Australian Securities and Investments  
Commission.

#### **171 Subsection 3(1) (definition of *ISC*)**

Repeal the definition.

**172 Paragraph 3B(1)(a)**

Omit “*Superannuation Entities (Taxation) Act 1987*”, substitute  
“*Superannuation (Excluded Funds) Taxation Act 1987*”.

**173 At the end of section 96A**

Add:

(2) In this section:

*bank* includes, but is not limited to, a body corporate that is an  
ADI (authorised deposit-taking institution) for the purposes of the  
*Banking Act 1959*.

**174 Paragraph 110R(7)(b)**

Omit “the ISC”, substitute “ASIC”.

**175 Subsection 119(3)**

Omit “the ISC”, substitute “ASIC”.

**176 Subsection 139AA(3)**

Omit “the ISC”, substitute “ASIC”.

**177 Subsection 155C(3) (paragraph (b) of the definition of  
*eligible regulatory law*)**

Omit “*Superannuation Entities (Taxation) Act 1987*”, substitute  
“*Superannuation (Excluded Funds) Taxation Act 1987*”.

**178 Subsection 155C(3) (after paragraph (b) of the definition  
of *eligible regulatory law*)**

Insert:

(ba) the *Financial Institutions Supervisory Levies Collection Act*  
1998; or

***Superannuation Act 1990***

**179 Subsection 44(1)**

Insert:

*bank* includes, but is not limited to, any body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

**180 Subsection 49(3) (paragraph (b) of the definition of *eligible regulatory law*)**

Omit “*Superannuation Entities (Taxation) Act 1987*”, substitute “*Superannuation (Excluded Funds) Taxation Act 1987*”.

**181 Subsection 49(3) (after paragraph (b) of the definition of *eligible regulatory law*)**

Insert:

(ba) the *Financial Institutions Supervisory Levies Collection Act 1998*; or

***Superannuation Contributions Tax (Assessment and Collection) Act 1997***

**182 Subsection 32(8)**

Omit “the Insurance and Superannuation Commissioner”, substitute “the Australian Prudential Regulation Authority or the Australian Securities and Investments Commission”.

Note: The heading to subsection 32(8) is altered by omitting “*to Insurance and Superannuation Commissioner*” and substituting “*for the purpose of the Superannuation Industry (Supervision) Act 1993*”.

***Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997***

**183 Subsection 28(8)**

Omit “the Insurance and Superannuation Commissioner”, substitute “the Australian Prudential Regulation Authority or the Australian Securities and Investments Commission”.

Note: The heading to subsection 28(8) is altered by omitting “*to Insurance and Superannuation Commissioner*” and substituting “*for the purpose of the Superannuation Industry (Supervision) Act 1993*”.

***Superannuation Industry (Supervision) Act 1993***

**184 Subsection 10(1)**

Insert:

*ADI* (authorised deposit-taking institution) means:

- (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
- (b) a State bank.

**185 Subsection 10(1) (definition of *approved bank*)**

Repeal the definition.

**186 Subsection 10(1) (paragraph (a) of the definition of *approved guarantee*)**

Omit “approved bank”, substitute “ADI”.

**187 Subsection 10(1) (paragraph (b) of the definition of *approved guarantee*)**

Omit “non-bank”, substitute “non-ADI”.

**188 Subsection 10(1) (definition of *approved non-bank financial institution*)**

Omit “*non-bank*”, substitute “*non-ADI*”.

**189 Paragraph 71(1)(b)**

Omit “approved bank”, substitute “ADI”.

**190 Paragraph 71(1)(ba)**

Omit “non-bank”, substitute “non-ADI”.

**191 Paragraph 105(1)(a)**

Omit “*Superannuation Entities (Taxation) Act 1987*”, substitute “*Superannuation (Excluded Funds) Taxation Act 1987*”.

***Superannuation (Productivity Benefit) Act 1988***

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**192 Paragraph 6(6)(e)**

Omit “the Insurance and Superannuation Commissioner”, substitute “the Australian Securities and Investments Commission”.

***Telecommunications Act 1997*****193 Paragraph 219(3)(a)**

Repeal the paragraph, substitute:

- (a) a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*; or
- (aa) the Reserve Bank of Australia; or

***Trade Practices Act 1974*****194 Subsection 4(1)**

Insert:

***banker*** includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

***Veterans’ Entitlements Act 1986*****195 Section 5 (index)**

Insert the following entry in its appropriate alphabetical position, determined on a letter-by-letter basis:

bank

5Q(1)

**196 Subsection 5Q(1)**

Insert:

***bank*** includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

***Wool International Act 1993*****197 At the end of section 22Y**

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Add:

(2) In this section:

**bank** includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) within the meaning of the *Banking Act 1959*.



## **Schedule 2—Unconscionable conduct and consumer protection in relation to the supply of financial services**

### **Part 1—Amendment of the Australian Securities and Investments Commission Act 1989**

#### **1 Subsection 1B(1)**

After “section 12A”, insert “and Division 2 of Part 2”.

#### **2 Subsection 5(1) (subparagraph (a)(iii) of the definition of *national scheme law*)**

Add “(other than section 12A and Division 2 of Part 2)”.

#### **3 Part 2 (heading)**

Repeal the heading, substitute:

### **Part 2—The Commission and consumer protection in relation to financial services**

#### **4 Before section 7**

Insert:

#### **Division 1—Establishing the Commission**

#### **5 At the end of paragraph 11(1)(c)**

Add “(other than section 12A and Division 2 of Part 2)”.

#### **6 Subsection 12A(1)**

After “on it by or under”, insert “Division 2 of Part 2 of this Act and by or under”.

#### **7 At the end of Part 2**

Add:

## **Division 2—Unconscionable conduct and consumer protection in relation to financial services**

### **Subdivision A—Application**

#### **12AA Constitutional operation of Division**

- (1) Without prejudice to its effect apart from this section, this Division also has effect as provided by this section.
- (2) This Division has, by force of this subsection, the effect it would have if:
  - (a) references in this Division to trade or commerce were, by express provision, confined to trade or commerce:
    - (i) between Australia and places outside Australia; or
    - (ii) among the States; or
    - (iii) within a Territory, between a State and a Territory or between 2 Territories; or
    - (iv) by way of the supply of services to the Commonwealth or an authority or instrumentality of the Commonwealth; and
  - (b) section 12DJ were, by express provision, confined in its operation to engaging in conduct to the extent to which the conduct takes place in the course of or in relation to:
    - (i) trade or commerce between Australia and places outside Australia; or
    - (ii) trade or commerce among the States; or
    - (iii) trade or commerce within a Territory, between a State and a Territory or between 2 Territories; or
    - (iv) the supply of services to the Commonwealth or an authority or instrumentality of the Commonwealth; and
  - (c) reference in Subdivision E (sections 12EA to 12ED) to a contract for the supply of services or to the supply of services were, by express provision, confined to a contract made, or to the supply of services:
    - (i) in the course of, or in relation to, trade or commerce between Australia and places outside Australia; or

- (ii) in the course of, or in relation to, trade or commerce among the States; or
  - (iii) in the course of, or in relation to, trade or commerce within a Territory, between a State and a Territory or between 2 Territories; and
- (d) references in this Division to a corporation, except a reference in section 12BA, included a reference to a person other than a corporation.
- (3) In addition to the effect that this Division has as provided by subsection (2), the provisions of Subdivision C (sections 12CA to 12CB) and Subdivision D (sections 12DA to 12DN) have, by force of this subsection, the effect they would have if:
  - (a) those provisions were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct involves the use of postal, telegraphic or telephonic services or takes place in a radio or television broadcast; and
  - (b) references in those provisions to a corporation included a reference to a person other than a corporation.
- (4) In addition to the effect that this Division has as provided by subsections (2) and (3), the provisions of Subdivision C (sections 12CA to 12CB) and Subdivision D (sections 12DA to 12DN) also have, by force of this subsection, the effect they would have if:
  - (a) those provisions were, by express provision, confined in their operation to engaging in conduct in a Territory; and
  - (b) references in those provisions to a thing done by a corporation in trade or commerce included a reference to a thing done in the course of the promotional activities of a professional person.

**12AB Subdivision E (sections 12EA to 12ED) does not apply to contracts entered into before 1 October 1974**

Subdivision E (sections 12EA to 12ED) does not apply to a contract entered into before 1 October 1974.

### **12AC Division extends to some conduct outside Australia**

- (1) This Division extends to the engaging in conduct outside Australia by:
  - (a) bodies corporate incorporated or carrying on business within Australia; or
  - (b) Australian citizens; or
  - (c) persons ordinarily resident within Australia.
- (2) If a claim under section 12GF is made in a proceeding, a person may rely at a hearing in respect of that proceeding on conduct to which a provision of this Division extends because of subsection (1) of this section only if the Minister consents in writing to the reliance.
- (3) A person other than the Minister or the Commission may apply to the Court for an order under subsection 12GM(1) or (2) in a proceeding in respect of conduct to which a provision of this Division extends because of subsection (1) of this section only if the Minister consents in writing to the application.
- (4) The Minister must give a consent under subsection (2) or (3) in respect of a proceeding unless, in the Minister's opinion:
  - (a) the law of the country in which the conduct concerned was engaged in required or specifically authorised the engaging in of the conduct; and
  - (b) it is not in the national interest to give the consent.

### **12AD Application of Division to Commonwealth and Commonwealth authorities**

- (1) Subject to this section, this Division binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth.
- (2) Subject to subsections (3), (4), (5) and (6), this Division applies as if:
  - (a) the Commonwealth, in so far as it carries on a business otherwise than by an authority of the Commonwealth; and

- (b) each authority of the Commonwealth (whether or not acting as an agent of the Crown in right of the Commonwealth) in so far as it carries on a business;  
were a corporation.
- (3) Nothing in this Division makes the Crown in right of the Commonwealth liable to a pecuniary penalty or to be prosecuted for an offence.
- (4) The protection in subsection (3) does not apply to an authority of the Commonwealth.
- (5) For the purposes of this section, the following transactions do not amount to carrying on a business:
  - (a) a transaction involving only persons who are all acting for the Crown in right of the Commonwealth (and none of whom is an authority of the Commonwealth);
  - (b) a transaction involving only persons who are all acting for the same authority of the Commonwealth;
  - (c) a transaction involving only the Crown in right of the Commonwealth and one or more non-commercial authorities of the Commonwealth;
  - (d) a transaction involving only non-commercial authorities of the Commonwealth.
- (6) Subsection (5) does not limit the things that do not amount to carrying on a business for the purposes of this section.
- (7) For the purposes of this section, an authority of the Commonwealth is **non-commercial** if:
  - (a) it is constituted by only one person; and
  - (b) it is neither a trading corporation nor a financial corporation.

#### **12AE Saving of other laws and remedies**

- (1) Except as provided by subsection (2), Subdivision D (sections 12DA to 12DN) and Subdivision E (sections 12EA to 12ED) are not intended to exclude or limit the concurrent operation of any law of a State or Territory.
  - (2) If :
-

- (a) an act or omission of a person is both an offence against section 12GB and an offence under the law of a State or Territory; and
  - (b) the person is convicted of either of those offences;the person is not liable to be convicted of the other of those offences.
- (3) Except as expressly provided by Subdivision D (sections 12DA to 12DN) or Subdivision E (sections 12EA to 12ED), nothing in those Subdivisions is taken to limit, restrict or otherwise affect any right or remedy a person would have had if that Subdivision had not been enacted.
- (4) This Division does not affect the operation of:
  - (a) the law relating to restraint of trade in so far as that law is capable of operating concurrently with this Division; or
  - (b) the law relating to breaches of confidence;but nothing in the law referred to in paragraph (a) or (b) affects the interpretation of this Division.

## **Subdivision B—Interpretation**

### **12BA Interpretation**

- (1) In this Division, unless the contrary intention appears:
  - acquire*, in relation to services, includes accept.
  - acquisition* of services has the meaning given by section 12BD.
  - authority*, in relation to a State or Territory (including an external Territory), means:
    - (a) a body corporate established for a purpose of the State or the Territory by or under a law of the State or Territory; or
    - (b) an incorporated company in which the State or the Territory, or a body corporate referred to in paragraph (a), has a controlling interest.

*authority of the Commonwealth* means:

- (a) a body corporate established for a purpose of the Commonwealth by or under a law of the Commonwealth or a law of a Territory; or
- (b) an incorporated company in which the Commonwealth, or a body corporate referred to in paragraph (a), has a controlling interest.

**business** includes a business not carried on for profit.

**consumer** has the meaning given by section 12BC.

**conduct** has the meaning given by subsection (2).

**contract** has the meaning given by section 12BE.

**corporation** means a body corporate that:

- (a) is a foreign corporation; or
- (b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed; or
- (c) is incorporated in a Territory; or
- (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c).

**covenant** means a covenant (including a promise not under seal) annexed to or running with an estate or interest in land (whether at law or in equity and whether or not for the benefit of other land) and **proposed covenant** has a corresponding meaning.

**engage in conduct** has the meaning given by subsection (2).

**Family Court Judge** means a Judge of the Family Court (including the Chief Judge, the Deputy Chief Judge, a Judge Administrator or a Senior Judge).

**financial corporation:**

- (a) means a financial corporation within the meaning of paragraph 51(xx) of the Constitution; and
- (b) includes a body corporate that carries on as its sole or principal business the business of:
  - (i) banking (other than State banking not extending beyond the limits of the State concerned); or

- (ii) insurance (other than State insurance not extending beyond the limits of the State concerned).

***financial product*** means:

- (a) a facility for taking money on deposit (otherwise than as part-payment for identified services) made available in the course of conducting a banking business within the meaning of the *Banking Act 1959*; or
- (b) a security; or
- (c) a futures contract; or
- (d) a contract of insurance (including a life policy or a sinking fund policy within the meaning of the *Life Insurance Act 1995*); or
- (e) a retirement savings account within the meaning of the *Retirement Savings Accounts Act 1997*; or
- (f) a superannuation interest within the meaning of the *Superannuation Industry (Supervision) Act 1993*;

but does not include a foreign exchange contract.

***financial service*** means a service that:

- (a) consists of providing a financial product; or
- (b) is otherwise supplied in relation to a financial product.

***foreign corporation*** means a foreign corporation within the meaning of paragraph 51(xx) of the Constitution and includes a body corporate that is incorporated in an external Territory.

***misleading*** has the meaning given by section 12BB.

***price*** includes a charge of any description.

***provision***, in relation to an understanding, means any matter forming part of the understanding.

***re-supply*** of services has the meaning given by section 12BD.

***send*** includes deliver, and ***sent*** and ***sender*** have corresponding meanings.

***services*** includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or



facilities that are, or are to be, provided, granted or conferred in trade or commerce but does not include:

- (a) the supply of goods within the meaning of the *Trade Practices Act 1974*; or
- (b) the performance of work under a contract of service.

**supply:**

- (a) includes provide, grant or confer when used as a verb in relation to services; and
  - (b) has a corresponding meaning when used as a noun;
- and **supplied** and **supplier** have corresponding meanings.

**supply** of services has the meaning given by section 12BD.

**Territory** means:

- (a) an internal Territory; or
- (b) the Territory of Christmas Island; or
- (c) the Territory of Cocos (Keeling) Islands.

**the Court** or **the Federal Court** means the Federal Court of Australia.

**trade or commerce** means trade or commerce within Australia or between Australia and places outside Australia.

**trading corporation** means a trading corporation within the meaning of paragraph 51(xx) of the Constitution.

**unsolicited financial services** means financial services supplied to a person without any request made by the person or on the person's behalf.

(2) In this Division:

- (a) a reference to engaging in conduct is a reference to doing or refusing to do any act, including:
  - (i) making, or giving effect to a provision of, a contract or arrangement; or
  - (ii) arriving at, or giving effect to a provision of, an understanding; or
  - (iii) requiring the giving of, or giving, a covenant; and

- (b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in paragraph (a), is a reference to doing or refusing to do any act, including:
  - (i) making, or giving effect to a provision of, a contract or arrangement; or
  - (ii) arriving at, or giving effect to a provision of, an understanding; or
  - (iii) requiring the giving of, or giving, a covenant; and
- (c) a reference to refusing to do an act includes a reference to:
  - (i) refraining (otherwise than inadvertently) from doing that act; or
  - (ii) making it known that that act will not be done; and
- (d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the person will accept applications, offers or proposals for the person to do that act or to do that act on that condition, as the case may be.

### **12BB Misleading representations**

- (1) For the purposes of section 12CB and Subdivision D (sections 12DA to 12DN), if a corporation makes a representation about a future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation is taken to be misleading.
- (2) For the purpose of applying subsection (1) to a proceeding concerning a representation made by a corporation about a future matter, the corporation is taken not to have had reasonable grounds for making the representation unless it adduces evidence to the contrary.
- (3) Subsection (1) does not limit by implication the meaning of a reference in this Division to:
  - (a) a misleading representation; or
  - (b) a representation that is misleading in a material particular; or
  - (c) conduct that is misleading or is likely or liable to mislead.

## **12BC Consumers**

- (1) For the purposes of this Division, unless the contrary intention appears, a person is taken to have acquired particular financial services as a consumer if, and only if:
  - (a) the price of the services did not exceed the prescribed amount; or
  - (b) if the price of the services exceeded the prescribed amount—the services were of a kind ordinarily acquired for personal, domestic or household use; or
  - (c) if the services were acquired by a person within the meaning of subsection (2) and the price of the services exceeded the prescribed amount—the services were of a kind ordinarily acquired for business use.
- (2) For the purposes of this Division, **person** includes:
  - (a) a person or corporation employing fewer than 20 people; or
  - (b) if the person or corporation is engaged in the manufacture of any goods—a person or corporation employing fewer than 100 people.
- (3) For the purposes of subsection (1):
  - (a) the prescribed amount is:
    - (i) \$40,000; or
    - (ii) if a greater amount is prescribed for the purposes of this paragraph—that greater amount; and
  - (b) subject to paragraph (c), the price of services purchased by a person is taken to have been the amount paid or payable by the person for the services; and
  - (c) if a person purchased services together with other property or services, or with both other property and services, and a specified price was not allocated to the services in the contract under which they were purchased, the price of the services is taken to have been:
    - (i) the price at which, at the time of the acquisition, the person could have purchased the services from the supplier without the other property or services; or
    - (ii) if, at the time of the acquisition, the services were only available for purchase from the supplier together with

- the other property or services but, at that time, services of the kind acquired were available for purchase from another supplier without other property or services—the lowest price at which the person could, at that time, reasonably have purchased services of that kind from another supplier; or
- (iii) if, at the time of the acquisition, services of the kind acquired were not available for purchase from any supplier except together with other property or services—the value of the services at that time; and
- (d) if a person acquired services otherwise than by way of purchase, the price of the services is taken to have been:
- (i) the price at which, at the time of the acquisition, the person could have purchased the services from the supplier; or
- (ii) if, at the time of the acquisition, the services were not available for purchase from the supplier, or were available only together with other property or services, but, at that time, services of the kind acquired were available for purchase from another supplier—the lowest price at which the person could, at that time, reasonably have purchased services of that kind from another supplier; or
- (iii) if services of the kind acquired were not available, at the time of the acquisition, for purchase from any supplier, or were not available except together with other property or services—the value of the services at that time; and
- (e) without limiting by implication the meaning of the expression *services* in subsection 12BA(1), the obtaining of credit by a person in connection with the person's acquisition of services is taken to be the acquisition by the person of a service and any amount by which the amount paid or payable by the person for the services is increased by reason of the person's so obtaining credit is taken to be paid or payable by the person for that service.
- (4) If it is alleged in a proceeding under this Division, or in any other proceeding in respect of a matter arising under this Division, that a person was a consumer in relation to particular services, it is
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presumed that the person was a consumer in relation to those services unless the contrary is established.

### **12BD Acquisition, supply and re-supply**

In this Division, unless the contrary intention appears:

- (a) a reference to the supply or acquisition of services includes a reference to agreeing to supply or acquire services; and
- (b) a reference to the supply or acquisition of services includes a reference to the supply or acquisition of services together with property or other services, or both; and
- (c) a reference to the re-supply of services (the *original services*) acquired from a person (the *original supplier*) includes a reference to:
  - (i) a supply of the original services to another person in an altered form or condition; and
  - (ii) a supply to another person of other services that are substantially similar to the original services and could not have been supplied if the original services had not been acquired by the person who acquired them from the original supplier.

### **12BE Application of Division in relation to leases and licences of land and buildings**

In this Division:

- (a) a reference to a contract includes a reference to a lease of, or a licence in respect of, land or a building or part of a building (despite the express references in this Division to such leases or licences); and
- (b) a reference to making or entering into a contract, in relation to such a lease or licence, is a reference to granting or taking the lease or licence.

## **Subdivision C—Unconscionable conduct**

### **12CA Unconscionable conduct within the meaning of the unwritten law of the States and Territories**

- (1) A corporation must not, in trade or commerce, engage in conduct in relation to financial services if the conduct is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.
- (2) This section does not apply to conduct that is prohibited by section 12CB.

### **12CB Unconscionable conduct**

- (1) A corporation must not, in trade or commerce, in connection with the supply or possible supply of financial services to a person, engage in conduct that is, in all the circumstances, unconscionable.
- (2) Without limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of services to a person (the *consumer*), the Court may have regard to:
  - (a) the relative strengths of the bargaining positions of the corporation and the consumer; and
  - (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation; and
  - (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the services; and
  - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the services; and
  - (e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent services from a person other than the corporation.

- (3) A corporation is not taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of financial services to a person merely because the corporation:
  - (a) institutes legal proceedings in relation to that supply or possible supply; or
  - (b) refers a dispute or claim in relation to that supply or possible supply to arbitration.
- (4) For the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of financial services to a person:
  - (a) the Court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
  - (b) the Court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.
- (5) A reference in this section to financial services is a reference to financial services of a kind ordinarily acquired for personal, domestic or household use.

## **Subdivision D—Consumer protection**

### **12DA Misleading or deceptive conduct**

- (1) A corporation must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in sections 12DB to 12DN limits by implication the generality of subsection (1).

### **12DB False or misleading representations**

A corporation must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:

- (a) falsely represent that services are of a particular standard, quality, value or grade; or
- (b) falsely represent that a particular person has agreed to acquire services; or
- (c) represent that services have sponsorship, approval, performance characteristics, uses or benefits they do not have; or
- (d) represent that the corporation has a sponsorship, approval or affiliation it does not have; or
- (e) make a false or misleading representation with respect to the price of services; or
- (f) make a false or misleading representation concerning the need for any services; or
- (g) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

**12DC False representations and other misleading or offensive conduct in relation to securities that involve interests in land**

- (1) A corporation must not, in trade or commerce, in connection with the sale or grant, or the possible sale or grant, of a security that consists of or includes an interest in land, or in connection with the promotion by any means of the sale or grant of an interest in land:
  - (a) represent that the corporation has a sponsorship, approval or affiliation it does not have; or
  - (b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the security, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put or the existence or availability of facilities associated with the land; or
  - (c) offer gifts, prizes or other free items with the intention of not providing them or of not providing them as offered.
- (2) A corporation must not use physical force or undue harassment or coercion in connection with the sale or grant, or the possible sale or



grant, of a security that consists of or includes an interest in land or the payment for an interest in land.

(3) In this section:

*interest*, in relation to land, means:

- (a) a legal or equitable estate or interest in the land; or
- (b) a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in an incorporated company that owns the land or building; or
- (c) a right, power or privilege over, or in connection with, the land.

#### **12DD Cash price to be stated in certain circumstances**

A corporation must not, in trade or commerce, in connection with:

- (a) the supply or possible supply of financial services; or
- (b) the promotion by any means of the supply or use of financial services;

make a representation about an amount that, if paid, would constitute a part of the consideration for the supply of the services unless the corporation also specifies the cash price for the services.

#### **12DE Offering gifts and prizes**

A corporation must not, in trade or commerce, in connection with:

- (a) the supply or possible supply of financial services; or
- (b) the promotion by any means of the supply or use of financial services;

offer gifts, prizes or other free items with the intention of not providing them, or of not providing them as offered.

#### **12DF Certain misleading conduct in relation to financial services**

A corporation must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any financial services.

### **12DG Bait advertising**

- (1) A corporation must not, in trade or commerce, advertise financial services for supply at a specified price, if there are reasonable grounds, of which the corporation is aware or ought reasonably to be aware, for believing that the corporation will not be able to offer for supply those services at that price:
  - (a) for a period that is; and
  - (b) in quantities that are;reasonable having regard to the nature of the market in which the corporation carries on business and the nature of the advertisement.
- (2) A corporation that has, in trade or commerce, advertised financial services for supply at a specified price must offer such services for supply at that price:
  - (a) for a period that is; and
  - (b) in quantities that are;reasonable having regard to the nature of the market in which the corporation carries on business and the nature of the advertisement.
- (3) In a prosecution of a corporation under Subdivision G (sections 12GA to 12GO) in relation to a failure to offer financial services to a person (the *customer*) in accordance with subsection (2), it is a defence if the corporation establishes that:
  - (a) it offered to supply, or to procure another person to supply, services of the kind advertised to the customer within a reasonable time, in a reasonable quantity and at the advertised price; or
  - (b) it offered to supply immediately, or to procure another person to supply within a reasonable time, equivalent services to the customer in a reasonable quantity and at the price at which the first-mentioned services were advertised;and, in either case, if the offer was accepted by the customer, the corporation has so supplied, or procured another person to supply, services.

### **12DH Referral selling**

A corporation must not, in trade or commerce, induce a consumer to acquire financial services by representing that the consumer will,

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after the contract to acquire the services is made, receive a rebate, commission or other benefit in return for:

- (a) giving the corporation the names of prospective customers;  
or
- (b) otherwise assisting the corporation to supply financial services to other consumers;

if receipt of the rebate, commission or other benefit is contingent on an event occurring after that contract is made.

**12DI Accepting payment without intending or being able to supply as ordered**

A corporation must not, in trade or commerce, accept payment or other consideration for financial services if, at the time of the acceptance:

- (a) the corporation intends:
  - (i) not to supply the services; or
  - (ii) to supply services materially different from the services in respect of which the payment or other consideration is accepted; or
- (b) there are reasonable grounds, of which the corporation is aware or ought reasonably to be aware, for believing that the corporation will not be able to supply the services within the period specified by the corporation or, if no period is specified, within a reasonable time.

**12DJ Harassment and coercion**

A corporation must not use physical force, or undue harassment or coercion, in connection with:

- (a) the supply or possible supply of financial services to a consumer; or
- (b) the payment for financial services by a consumer.

**12DK Pyramid selling of securities**

- (1) A corporation contravenes this section if:

- (a) the corporation is the promoter of, or (if there are more than one) one of the promoters of, or is a participant in, a trading scheme to which this section applies; and
  - (b) a person who is a participant in that trading scheme, or has applied or been invited to become a participant in that trading scheme, makes any payment to or for the benefit of the corporation; and
  - (c) the person is induced to make the payment because the prospect is held out to him or her of receiving payments or other benefits in respect of the introduction (whether by himself or herself or by another person) of other persons who become participants in that trading scheme.
- (2) A corporation also contravenes this section if:
  - (a) the corporation is the promoter of, or (if there are more than one) one of the promoters of, is a participant in, or is otherwise acting in accordance with, a trading scheme to which this section applies; and
  - (b) the corporation, by holding out to any person the prospect of receiving payments or other benefits in respect of the introduction (whether by himself or herself or by another person) of other persons who become participants in that trading scheme, attempts to induce that person:
    - (i) if he or she is already a participant in that trading scheme, to make any payment to or for the benefit of the promoter or any of the promoters or to or for the benefit of a participant in that trading scheme; or
    - (ii) if he or she is not already a participant in that trading scheme, to become such a participant and to make a payment of a kind mentioned in subparagraph (i).
- (3) A corporation also contravenes this section if the corporation promotes, or takes part in the promotion of, a scheme under which:
  - (a) a payment is to be made by a person who participates, or who has applied or been invited to participate, in the scheme to or for the benefit of the corporation or another person who takes part in the promotion of the scheme or to or for the benefit of another person who participates in the scheme; and

- (b) the inducement for making the payment is the holding out to the person who makes or is to make the payment the prospect of receiving payments from other persons who may participate in the scheme.
- (4) For the purposes of subsection (1), (2) or (3):
  - (a) a prospect of a kind mentioned in that subsection is taken to be held out to a person whether it is held out so as to confer on him or her a legally enforceable right or not; and
  - (b) in determining whether an inducement or attempt to induce is made by holding out a prospect of a kind mentioned in that subsection, it is sufficient if a prospect of that kind constitutes or would constitute a substantial part of the inducement; and
  - (c) any reference to the making of a payment to or for the benefit of a person includes a reference to the making of a payment partly to or for the benefit of that person and partly to or for the benefit of one or more other persons.
- (5) For the purposes of this section, a scheme is a trading scheme to which this section applies if the scheme includes the following elements:
  - (a) securities are to be provided by the person promoting the scheme (the ***promoter***) or, in the case of a scheme promoted by 2 or more persons acting in concert (the ***promoters***), are to be provided by one or more of those persons; and
  - (b) the securities so provided are to be supplied to or for other persons under transactions arranged or effected by persons who participate in the scheme (each of whom is in this section referred to as a ***participant***), being persons not all of whom are promoters.
- (6) For the purposes of subsection (5):
  - (a) a scheme shall be taken to include the element referred to in paragraph (5)(b) whether a participant who is not a promoter acts in relation to a transaction referred to in that paragraph in the capacity of a servant or agent of the promoter or of one of the promoters or in any other capacity; and

- (b) a scheme includes any arrangements made in connection with the carrying on of a business, whether those arrangements are made or recorded wholly or partly in writing or not; and
- (c) a reference to the provision of a security by a person includes a reference to the provision of a security under arrangements to which that person is a party.

## **12DL Unsolicited credit and debit cards**

- (1) A corporation must not send a person:
  - (a) a debit card that allows access to an account that is a financial product; or
  - (b) an article that may be used as a debit card of that kind; except in accordance with subsection (2).
- (2) A corporation may send the person the card:
  - (a) in pursuance of a request in writing by the person who will be under a liability to the person who issued the card in respect of the use of the card; or
  - (b) in renewal or replacement of, or in substitution for:
    - (i) a card of the same kind previously sent to the first-mentioned person in pursuance of a request in writing by the person who was under a liability to the person who issued the card previously so sent in respect of the use of that card; or
    - (ii) a card of the same kind previously sent to the first-mentioned person and used for a purpose for which it was intended to be used.
- (3) Subsection (1) applies only in relation to the sending of a card by or on behalf of the person who issued the card.
- (4) A corporation must not take any action that enables a person who has a credit card to use the card as a debit card except in accordance with a request in writing by the person.

- (5) In this section:

***article*** includes a token, card or document.

***credit card*** means:

- (a) any article of a kind commonly known as a credit card; or
- (b) any similar article intended for use in obtaining cash, goods or services on credit;

and includes any article of a kind that persons carrying on business commonly issue to their customers or prospective customers for use in obtaining goods or services from those persons on credit.

***debit card*** means an article intended for use by a person in obtaining access to an account that is:

- (a) held by the person for the purpose of withdrawing or depositing cash or obtaining goods or services; and
- (b) a financial product.

### **12DM Assertion of right to payment for unsolicited financial services**

- (1) A corporation must not, in trade or commerce, assert a right to payment from a person for unsolicited financial services unless the corporation has reasonable cause to believe that there is a right to payment.
- (2) For the purposes of this section, a corporation is taken to assert a right to a payment from a person for unsolicited financial services if the corporation:
  - (a) makes a demand for the payment or asserts a present or prospective right to the payment; or
  - (b) threatens to bring any legal proceedings with a view to obtaining the payment; or
  - (c) places, or causes to be placed, the name of the person on a list of defaulters or debtors, or threatens to do so, with a view to obtaining the payment; or
  - (d) invokes, or causes to be invoked, any other collection procedure, or threatens to do so, with a view to obtaining the payment; or
  - (e) sends any invoice or other document stating the amount of the payment or setting out the price of the services and not stating as prominently (or more prominently) that no claim is made to the payment or to payment of the price.

- (3) For the purposes of this section, an invoice or other document purporting to have been sent by or on behalf of a corporation is taken to have been sent by that corporation unless the contrary is established.
- (4) In a proceeding against a corporation in respect of a contravention of this section, the burden lies on the corporation of proving that the corporation had reasonable cause to believe that there was a right to payment.

**12DN Application of provisions of Division to prescribed information providers**

- (1) Nothing in section 12DA, 12DB, 12DC or 12DF applies to a prescribed publication of matter by a prescribed information provider, other than:
  - (a) a publication of matter in connection with:
    - (i) the supply or possible supply of financial services; or
    - (ii) the sale or grant, or possible sale or grant, of securities that consist of, or include, interests in land; or
    - (iii) the promotion by any means of the supply or use of financial services; or
    - (iv) the promotion by any means of the sale or grant of securities that consist of, or include, interests in land;if:
    - (v) the services were relevant services, or the interests in land were relevant interests in land, as the case may be, in relation to the prescribed information provider; or
    - (vi) the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with:
      - (A) a person who supplies financial services of that kind, or who sells or grants securities of that kind; or
      - (B) a body corporate that is related to a body corporate that supplies financial services of that kind, or that sells or grants securities of that kind; or
  - (b) a publication of an advertisement.



- (2) For the purposes of this section, a publication by a prescribed information provider is a prescribed publication if:
- (a) in any case—the publication was made by the prescribed information provider in the course of carrying on a business of providing information; or
  - (b) in the case of a person who is a prescribed information provider by virtue of paragraph (a), (b) or (c) of the definition of ***prescribed information provider*** in subsection (3) (whether or not the person is also a prescribed information provider by virtue of another operation of that definition)—the publication was by way of a radio or television broadcast by the prescribed information provider.
- (3) In this section:

***prescribed information provider*** means a person who carries on a business of providing information and, without limiting the generality of the foregoing, includes:

- (a) the holder of a licence granted under the *Broadcasting Services Act 1992*; and
- (b) a person who is the provider of a broadcasting service under a class licence under that Act; and
- (c) the holder of a licence continued in force by subsection 5(1) of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*; and
- (d) the Australian Broadcasting Corporation; and
- (e) the Special Broadcasting Service Corporation.

***relevant financial services***, in relation to a prescribed information provider, means financial services of a kind supplied by the prescribed information provider or, if the prescribed information provider is a body corporate, by a body corporate that is related to the prescribed information provider.

***relevant interests in land***, in relation to a prescribed information provider, means interests in land, being interests of a kind sold or granted by the prescribed information provider or, if the prescribed information provider is a body corporate, by a body corporate that is related to the prescribed information provider.

**Subdivision E—Conditions and warranties in consumer transactions**

**12EA Conflict of laws**

If:

- (a) the proper law of a contract for the supply by a corporation of financial services to a consumer would, but for a term that it should be the law of some other country or a term to the like effect, be the law of any part of Australia; or
- (b) a contract for the supply by a corporation of financial services to a consumer contains a term that purports to substitute, or has the effect of substituting, provisions of the law of some other country, or of a State or Territory, for all or any of the provisions of this Subdivision (sections 12EA to 12ED);

this Subdivision applies to the contract notwithstanding that term.

**12EB Application of provisions not to be excluded or modified**

- (1) A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void if it purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying:
  - (a) the application of all or any of the provisions of this Subdivision (sections 12EA to 12ED); or
  - (b) the exercise of a right conferred by such a provision; or
  - (c) any liability of the corporation for breach of a condition or warranty implied by such a provision.
- (2) A term of a contract is not taken to exclude, restrict or modify the application of a provision of this Subdivision unless the term does so expressly or is inconsistent with that provision.

**12EC Limitation of liability for breach of certain conditions or warranties**

- (1) Subject to this section, a term of a contract for the supply by a corporation of financial services other than services of a kind ordinarily acquired for personal, domestic or household use is not
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void under section 12EB merely because the term limits the liability of the corporation for a breach of a condition or warranty to:

- (a) the supplying of the services again; or
  - (b) the payment of the cost of having the services supplied again.
- (2) Subsection (1) does not apply in relation to a term of a contract if the person to whom the services were supplied establishes that it is not fair or reasonable for the corporation to rely on that term of the contract.
- (3) In determining for the purposes of subsection (2) whether or not reliance on a term of a contract is fair or reasonable, a court must have regard to all the circumstances of the case and, in particular, to the following matters:
  - (a) the strength of the bargaining positions of the corporation and the person to whom the services were supplied (the **buyer**) relative to each other, taking into account, among other things, the availability of equivalent services and suitable alternative sources of supply;
  - (b) whether the buyer received an inducement to agree to the term or, in agreeing to the term, had an opportunity to acquire the services or equivalent services from any source of supply under a contract that did not include that term;
  - (c) whether the buyer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties).

### **12ED Warranties in relation to the supply of financial services**

- (1) In every contract for the supply of financial services by a corporation to a consumer in the course of a business, there is an implied warranty that:
  - (a) the services will be rendered with due care and skill; and
  - (b) any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.
- (2) If:

- (a) a corporation supplies financial services to a consumer in the course of a business; and
  - (b) the consumer, expressly or by implication, makes known to the corporation:
    - (i) any particular purpose for which the services are required; or
    - (ii) the result that he or she desires the services to achieve;there is an implied warranty that:
  - (c) the services supplied under the contract for the supply of the services; and
  - (d) any materials supplied in connection with those services; will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except if the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the corporation's skill or judgment.
- (3) A reference in this section to financial services does not include a reference to services that are, or are to be, provided, granted or conferred under a contract of insurance.

## **Subdivision F—Alternative dispute resolution**

### **12FA Industry codes to be approved by Commission**

- (1) The Commission has the function of monitoring and promoting market integrity and consumer protection in relation to:
- (a) the Australian financial system; and
  - (b) the provision of financial services.
- Without limiting paragraph (b), the Commission has the function of promoting the adoption of, and approving and monitoring compliance with, industry standards and codes of practice (including standards and codes in relation to the resolution of disputes between the providers of financial services and consumers).
- (2) The Commission must not approve an industry code under subsection (1) unless the Commission is satisfied with the procedures for alternative dispute resolution, having regard to any of the following guidelines:
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- (a) they do not permit a complaint or dispute to be considered unless it has first been lodged with the relevant corporation and:
    - (i) has been resolved by the corporation, but not to the satisfaction of the complainant; or
    - (ii) has not been resolved by the corporation and 90 days have elapsed since the complaint or dispute was lodged;
  - (b) they provide for any systemic, persistent or deliberate conduct to be reported to the Commission;
  - (c) they operate free of charge to the complainant;
  - (d) they cover a sufficiently broad range of complaints, with the terms of reference of the scheme to be determined after consultation with consumer organisations and the Commission;
  - (e) they provide for independence from the parties to the complaint;
  - (f) they are overseen by a body which includes consumer representation (appointed or approved by the Minister with responsibility for consumer affairs) and a person appointed by the Commission;
  - (g) they accord with the principles of natural justice (including that information used by the decision-maker is provided to the complainant unless prohibited by law, and that reasons for decisions are given in writing);
  - (h) they provide for decisions to be made by reference to what is fair in all the circumstances, observing applicable law and relevant judicial authority and having regard to good practice in the relevant industry;
  - (i) they have appropriate published procedures, including suitable standards of timeliness;
  - (j) they include arrangements for appropriate promotion of the procedures;
  - (k) they are supported by adequate resources, including staff whose responsibility is to assist consumers in making their complaints, if necessary by investigating the conduct of a financial services provider;
  - (l) decisions made under them will be observed by the relevant corporations;
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- (m) they provide adequate remedies;
  - (n) they provide for the maintenance and publication of appropriate statistics on its operations;
  - (o) they provide for the provision to the Commission and the relevant industry associations, details of the decisions made in respect of all complaints, or a representative selection of complaints, including the reasons for the decisions but excluding any information that would identify any of the parties to the complaint.
- (3) The Commission may revoke an approval given under subsection (1) if the Commission is satisfied that the code no longer meets, or substantially meets, the guidelines of subsection (2).

## **Subdivision G—Enforcement and remedies**

### **12GA Interpretation**

In this Subdivision, unless the contrary intention appears:

- (a) a reference to the Court in relation to a matter is a reference to any court having jurisdiction in the matter; and
- (b) a reference to the Federal Court is a reference to the Federal Court of Australia; and
- (c) a reference to a judgment is a reference to a judgment, decree or order, whether final or interlocutory.

### **12GB Offences against Subdivision D or E**

- (1) A person who:
- (a) contravenes; or
  - (b) aids, abets, counsels or procures a person to contravene; or
  - (c) induces, or attempts to induce, a person whether by threats or promises or otherwise, to contravene; or
  - (d) is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of; or
  - (e) conspires with others to contravene;
- a provision of Subdivision D or E (sections 12DA to 12ED) other than section 12DA, is guilty of an offence punishable on conviction:
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- (f) in the case of a person who is not a body corporate—by a fine not exceeding 400 penalty units; or
- (g) in the case of a person who is a body corporate—by a fine not exceeding 2,000 penalty units.

(2) If:

- (a) a person is convicted of 2 or more offences constituted by, or relating to, contraventions of the same provision of Subdivision D or E (sections 12DA to 12ED); and
- (b) the contraventions appear to the Court to have been of the same nature or a substantially similar nature and to have occurred at or about the same time;

the Court must not, in respect of the offences, impose on the person fines that, in the aggregate, exceed the maximum fine that would be applicable in respect of one offence by that person against that provision. This applies whether or not the person is also convicted of an offence or offences constituted by, or relating to, another contravention or other contraventions of that provision that were of a different nature or occurred at a different time.

(3) If:

- (a) a person is convicted of an offence constituted by, or relating to, a contravention of a provision of Subdivision D or E (sections 12DA to 12ED); and
- (b) a fine has, or fines have, previously been imposed on the person by the Court for an offence or offences constituted by, or relating to, another contravention or other contraventions of the same provision, being a contravention that, or contraventions each of which, appears to the Court to have been of the same nature as, or of a substantially similar nature to, and to have occurred at or about the same time as, the contravention referred to in paragraph (a);

the Court must not, in respect of the offence referred to in paragraph (a), impose on the person a fine that exceeds the amount (if any) by which the maximum fine applicable (under subsection (1)) in respect of the offence referred to in paragraph (a) is greater than the amount of the fine, or the sum of the amounts of the fines, referred to in paragraph (b). This applies whether or not a fine has, or fines have, also previously been imposed on the person for an offence or offences constituted by, or relating to, a contravention or

contraventions of that provision that were of a different nature or occurred at a different time.

- (4) In proceedings under this section against a person for contravening a provision of Subdivision D or E (sections 12DA to 12ED), the Court may:
- (a) grant an injunction under section 12GD against the person in relation to:
    - (i) the conduct that constitutes, or is alleged to constitute, the contravention; or
    - (ii) other conduct of that kind; or
  - (b) make an order under section 12GE in relation to the contravention.
- (5) Sections 5, 7 and 7A of the *Crimes Act 1914* do not apply in relation to an offence against subsection (1).
- (6) A prosecution for an offence against subsection (1) may be commenced within 3 years after the commission of the offence.

### **12GC Enforcement and recovery of certain fines**

- (1) If a person on whom a fine has been imposed for an offence against section 12GB or subsection 12GN(5) defaults in payment of the fine, a Court may:
- (a) exercise any power that the Court has apart from this section with respect to the enforcement and recovery of fines imposed by the Court; or
  - (b) make an order, on the application of the Minister or the Commission, declaring that the fine is to have effect, and may be enforced, as if it were a judgment debt under a judgment of the Court.
- (2) If a person in relation to whom an order is made under subsection (1) in respect of a fine gives security for the payment of the fine, the Court must cancel the order in respect of the fine.
- (3) If the Court makes an order in relation to a person in respect of a fine, the Court may, at any time before the order is executed in respect of the fine, allow the person a specified time in which to



pay the fine or allow the person to pay the fine by specified instalments, and, in that case:

- (a) the order must not be executed unless the person fails to pay the fine within that time or fails to pay an instalment at or before the time when it becomes payable, as the case may be; and
  - (b) if the person pays the fine within that time or pays all the instalments, as the case may be, the order is taken to have been discharged in respect of the fine.
- (4) Subject to subsection (7), an order under subsection (1) in respect of a fine ceases to have effect:
  - (a) on payment of the fine; or
  - (b) if the fine is not paid—on full compliance with the order.
- (5) The term of a sentence of imprisonment imposed by an order under a law of a State or Territory applied by section 15A of the *Crimes Act 1914* in respect of a fine must be calculated at the rate of one day's imprisonment for each \$25 of the amount of the fine that is from time to time unpaid.
- (6) Subject to subsection (7), if a person is required to serve periods of imprisonment under an order or orders under subsection (1) in respect of 2 or more fines, those periods of imprisonment must be served consecutively.
- (7) Subject to subsection (8), if:
  - (a) a person would, but for this subsection, be required under an order or orders under subsection (1) in respect of 3 or more fines to serve periods of imprisonment in respect of those fines exceeding in the aggregate 3 years; and
  - (b) those fines were imposed (whether or not in the same proceedings) for offences constituted by contraventions that occurred within a period of 2 years, being contraventions that appear to the Court to have been of the same nature or a substantially similar nature;the Court must, by order, declare that the order or orders are to cease to have effect in respect of those fines after the person has served an aggregate of 3 years' imprisonment in respect of those fines.

- (8) If subsection (7) would, but for this subsection, apply to a person with respect to offences committed by the person within 2 or more overlapping periods of 2 years, the Court must make an order under that subsection with respect to one only of those periods, being whichever period would give the person the maximum benefit from the application of that subsection.
- (9) For the purposes of subsection (8), the Court may vary or revoke an order made under subsection (7).
- (10) Paragraphs 15A(1)(b), (c) and (d) of the *Crimes Act 1914* do not apply with respect to fines referred to in subsection (1).

## **12GD Injunctions**

- (1) If, on the application of the Minister, the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:
  - (a) a contravention of a provision of this Division; or
  - (b) attempting to contravene such a provision; or
  - (c) aiding, abetting, counselling or procuring a person to contravene such a provision; or
  - (d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision; or
  - (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
  - (f) conspiring with others to contravene such a provision;the Court may grant an injunction in such terms as the Court determines to be appropriate.
- (2) If an application for an injunction under subsection (1) has been made, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that a person has engaged, or is proposing to engage, in conduct of a kind mentioned in subsection (1).

- (3) If in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).
- (4) The Court may rescind or vary an injunction granted under subsection (1) or (3).
- (5) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:
  - (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
  - (b) whether or not the person has previously engaged in conduct of that kind; and
  - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.
- (6) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:
  - (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
  - (b) whether or not the person has previously refused or failed to do that act or thing; and
  - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.
- (7) If the Minister or the Commission makes an application to the Court for the grant of an injunction under this section, the Court must not require the applicant or any other person, as a condition of granting an interim injunction, to give any undertakings as to damages.
- (8) If, in a case to which subsection (7) does not apply:
  - (a) the Court would, but for this subsection, require a person to give an undertaking as to damages or costs; and
  - (b) the Minister gives the undertaking;

the Court must accept the undertaking by the Minister and must not require a further undertaking from any other person.

### **12GE Order to disclose information or publish advertisement**

Without limiting the generality of section 12GD, if, on the application of the Minister or the Commission, the Court is satisfied that a person has engaged in conduct constituting a contravention of a provision of Subdivision D or E (sections 12DA to 12ED), the Court may make either or both of the following orders:

- (a) an order requiring that person or a person involved in the contravention to disclose to the public, to a particular person or to persons included in a particular class of persons, in such manner as is specified in the order, such information, or information of such a kind, as is so specified, being information that is in the possession of the person to whom the order is directed or to which that person has access;
- (b) an order requiring that person or a person involved in the contravention to publish, at his or her own expense, in a manner and at times specified in the order, advertisements the terms of which are specified in, or are to be determined in accordance with, the order.

### **12GF Actions for damages**

- (1) A person who suffers loss or damage by conduct of another person that contravenes a provision of Subdivision D or E (sections 12DA to 12ED) may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.
- (2) An action under subsection (1) may be commenced within 3 years after the date on which the cause of action accrued.

### **12GG Finding in proceedings to be evidence**

In a proceeding against a person under section 12GF or in an application under subsection 12GM(2) for an order against a person, a finding of any fact by a court made in proceedings under section 12GD or 12GE, or for an offence against section 12GB, in

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which that person has been found to have contravened, or to have been involved in a contravention of, a provision of this Division is prima facie evidence of that fact. The finding may be proved by production of a document under the seal of the court from which the finding appears.

### **12GH Conduct by directors, servants or agents**

- (1) If, in a proceeding under this Subdivision in respect of conduct engaged in by a body corporate, being conduct in relation to which the Division applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, servant or agent of the body corporate, being a director, servant or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind.
- (2) Any conduct engaged in on behalf of a body corporate:
  - (a) by a director, servant or agent of the body corporate within the scope of the person's actual or apparent authority; or
  - (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant or agent of the body corporate, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, servant or agent;is taken, for the purposes of this Division, to have been engaged in also by the body corporate.
- (3) If, in a proceeding under this Subdivision in respect of conduct engaged in by a person other than a body corporate, being conduct in relation to which a provision of this Division applies, it is necessary to establish the state of mind of the person, it is sufficient to show that a servant or agent of the person, being a servant or agent by whom the conduct was engaged in within the scope of the servant's or agent's actual or apparent authority, had that state of mind.
- (4) Conduct engaged in on behalf of a person (the *principal*) other than a body corporate:
  - (a) by a servant or agent of the person within the scope of the actual or apparent authority of the servant or agent; or

- (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a servant or agent of the principal, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the servant or agent;
- is taken, for the purposes of this Division, to have been engaged in also by the principal.
- (5) A reference in this section to the state of mind of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for the person's intention, opinion, belief or purpose.

## **12GI Defences**

- (1) Subject to subsection (3), in a prosecution under this Subdivision in relation to a contravention of a provision of Subdivision D or E (sections 12DA to 12ED), it is a defence if the defendant establishes:
  - (a) that the contravention in respect of which the proceeding was instituted was due to reasonable mistake; or
  - (b) that the contravention in respect of which the proceeding was instituted was due to reasonable reliance on information supplied by another person; or
  - (c) that:
    - (i) the contravention in respect of which the proceeding was instituted was due to the act or default of another person, to an accident or to some other cause beyond the defendant's control; and
    - (ii) the defendant took reasonable precautions and exercised due diligence to avoid the contravention.
- (2) In paragraphs (1)(b) and (c), **another person** does not include a person who was:
  - (a) a servant or agent of the defendant; or
  - (b) in the case of a defendant being a body corporate, a director, servant or agent of the defendant;at the time when the contravention occurred.

- (3) If a defence provided by subsection (1) involves an allegation that a contravention was due to reliance on information supplied by another person or to the act or default of another person, the defendant is not, without leave of the Court, entitled to rely on that defence unless he or she has, not later than 7 days before the day on which the hearing of the proceeding commences, served on the person by whom the proceeding was instituted a notice in writing giving such information that would identify or assist in the identification of the other person as was then in his or her possession.
- (4) In a proceeding under this Subdivision in relation to a contravention of a provision of Subdivision D or E (sections 12DA to 12ED) committed by the publication of an advertisement, it is a defence if the defendant establishes that he or she is a person whose business it is to publish or arrange for the publication of advertisements and that he or she received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to a contravention of a provision of Subdivision D or E.

#### **12GJ Jurisdiction of courts**

- (1) Jurisdiction is conferred on the Federal Court in any matter:
  - (a) arising under this Division; or
  - (b) arising under Part 3 in its application in relation to an investigation of a contravention of this Division;in respect of which a civil proceeding may be instituted under this Subdivision or under Part 3 as so applying.
- (2) With respect to any matter arising under this Division in respect of which a civil proceeding is instituted by a person other than the Minister or the Commission:
  - (a) the several courts of the States are invested with federal jurisdiction within the limits of their several jurisdictions, whether those limits are as to locality, subject-matter or otherwise; and
  - (b) subject to the Constitution, jurisdiction is conferred on the several courts of the Territories.

- (3) Nothing in subsection (2) is taken to enable an inferior court of a State or Territory to grant a remedy other than a remedy of a kind that the court is able to grant under the law of that State or Territory.
- (4) The jurisdiction conferred by subsection (1) on the Federal Court is exclusive of the jurisdiction of any other court other than the jurisdiction of the several courts of the States and Territories under subsection (2) and the jurisdiction of the High Court under section 75 of the Constitution.

## **12GK Transfer of matters**

- (1) If:
  - (a) a civil proceeding instituted by a person other than the Minister or the Commission is pending in the Federal Court; and
  - (b) a matter for determination in the proceeding arose under this Division;the Federal Court may, subject to subsection (2), upon the application of a party or of the Federal Court's own motion, transfer the matter to a court of a State or Territory and may also transfer to that court any other matter for determination in the proceeding.
- (2) The Federal Court must not transfer a matter to another court under subsection (1) unless the other court has power to grant the remedies sought before the Federal Court in the matter and it appears to the Federal Court that:
  - (a) the matter arises out of or is related to a proceeding that is pending in the other court; or
  - (b) it is otherwise in the interests of justice that the matter be determined by the other court.
- (3) If the Federal Court transfers a matter to another court under subsection (1):
  - (a) further proceedings in the matter must be as directed by the other court; and



- (b) the judgment of the other court in the matter is enforceable throughout Australia and the external Territories as if it were a judgment of the Federal Court.
- (4) If:
  - (a) a proceeding is pending in a court (other than the Supreme Court) of a State or Territory; and
  - (b) a matter for determination in the proceeding arose under this Division;the court must, if directed to do so by the Federal Court, transfer to the Federal Court the matter and such other matters for determination in the proceeding, as the Federal Court decides, the determination of which would, apart from any law of a State or of the Northern Territory relating to cross-vesting of jurisdiction, be within the jurisdiction of the Federal Court.
- (5) If:
  - (a) a proceeding is pending in a court (other than the Supreme Court) of a State or Territory; and
  - (b) a matter for determination in the proceeding arose under this Division;the court may, subject to subsection (6), upon the application of a party or of the court's own motion, transfer the matter to a court (other than the Supreme Court) of a State or Territory other than the State or Territory referred to in paragraph (a).
- (6) The court must not transfer the matter to another court under subsection (5) unless the other court has power to grant the remedies sought in the matter and it appears to the court that:
  - (a) the matter arises out of or is related to a proceeding that is pending in the other court; or
  - (b) it is otherwise in the interests of justice that the matter be determined by the other court.
- (7) If a court transfers a matter to another court under subsection (5), further proceedings in the matter must be as directed by the other court.

## **12GL Transfer of certain proceedings to Family Court**

- (1) Subject to subsection (2), if:
  - (a) a civil proceeding is pending in the Federal Court; and
  - (b) a matter for determination in the proceeding arises under this Division;the Federal Court may, on the application of a party to the proceeding or of its own motion, transfer the proceeding to the Family Court.
- (2) A proceeding that is pending in the Federal Court at the commencement of this section must not be transferred to the Family Court unless the parties to the proceeding consent to the transfer.
- (3) Subject to subsection (4), if a proceeding is transferred to the Family Court:
  - (a) the Family Court has jurisdiction to hear and determine the proceeding; and
  - (b) the Family Court also has jurisdiction to hear and determine matters not otherwise within its jurisdiction (whether under paragraph (a) or otherwise):
    - (i) that are associated with matters arising in the proceeding; or
    - (ii) that, apart from subsection 32(1) of the *Federal Court of Australia Act 1976*, the Federal Court would have had jurisdiction to hear and determine in the proceeding; and
  - (c) the Family Court may, in and in relation to the proceeding:
    - (i) grant such remedies; and
    - (ii) make orders of such kinds; and
    - (iii) issue, and direct the issue of, writs of such kinds; as the Federal Court could have in and in relation to the proceeding; and
  - (d) remedies, orders and writs granted, made or issued by the Family Court in and in relation to the proceeding have effect, and may be enforced by the Family Court, as if they had been granted, made or issued by the Federal Court; and
  - (e) appeals lie from judgments of the Family Court given in and in relation to the proceeding as if the judgments were

judgments of the Federal Court constituted by a single Judge of that Court, and do not otherwise lie; and

- (f) subject to paragraphs (a) to (e) (inclusive), this Division, the regulations, the *Federal Court of Australia Act 1976*, the Rules of Court made under that Act, and other laws of the Commonwealth, apply in and in relation to the proceeding as if:
- (i) a reference to the Federal Court (other than in the expression *the Court or a Judge*) included a reference to the Family Court; and
  - (ii) a reference to a Judge of the Federal Court (other than in the expression *the Court or a Judge*) included a reference to a Family Court Judge; and
  - (iii) a reference to the expression *the Court or a Judge* when used in relation to the Federal Court included a reference to a Family Court Judge sitting in Chambers; and
  - (iv) a reference to a Registrar of the Federal Court included a reference to a Registrar of the Family Court; and
  - (v) any other necessary changes were made.
- (4) If any difficulty arises in the application of paragraphs (3)(c), (d) and (f) in or in relation to a particular proceeding, the Family Court may, on the application of a party to the proceeding or of its own motion, give such directions, and make such orders, as it considers appropriate to resolve the difficulty.
- (5) An appeal does not lie from a decision of the Federal Court in relation to the transfer of a proceeding under this Division to the Family Court.

## **12GM Other orders**

- (1) Without limiting the generality of section 12GD, if, in a proceeding instituted under, or for an offence against, this Division, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of a provision of this Division, the Court may, whether or not it grants an injunction under section 12GD or makes an order under section 12GE or 12GF, make such

order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (7) of this section) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

- (2) Without limiting the generality of section 12GD, the Court may, on the application of:

- (a) a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in in contravention of a provision of this Division; or
- (b) the Commission in accordance with subsection (3) on behalf of such a person or persons;

make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (7)) if the Court considers that the order or orders concerned will:

- (c) compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage; or
  - (d) prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person or persons.
- (3) If, in a proceeding instituted for an offence against section 12GB or instituted by the Commission or the Minister under section 12GD, a person is found to have engaged in conduct in contravention of a provision of this Division, the Commission may make an application under subsection (2) on behalf of one or more persons identified in the application who have suffered, or are likely to suffer, loss or damage by the conduct. The Commission must not make such an application except with the consent in writing given before the application is made by the person, or by each of the persons, on whose behalf the application is made.
- (4) An application may be made under subsection (2) in relation to a contravention of this Division notwithstanding that a proceeding has not been instituted under another provision of this Part in relation to that contravention.
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- (5) An application under subsection (2) may be commenced:
- (a) in the case of conduct in contravention of Subdivision C (sections 12CA and 12CB)—at any time within 2 years after the day on which the cause of action accrued; or
  - (b) in the case of conduct in contravention of Subdivision D or E (sections 12DA to 12ED)—at any time within 3 years after the day on which the cause of action accrued.
- (6) For the purpose of determining whether to make an order under this section in relation to a contravention of Subdivision C (sections 12CA and 12CB), the Court may have regard to the conduct of parties to the proceeding since the contravention occurred.
- (7) Without limiting the generality of subsections (1) and (2), the orders referred to in those subsections include the following:
- (a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after a date before the date on which the order is made;
  - (b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after a date before the date on which the order is made;
  - (c) an order refusing to enforce any or all of the provisions of such a contract;
  - (d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage;
  - (e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage;

- (f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage;
- (g) an order, in relation to an instrument creating or transferring an interest in land, directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to execute an instrument that:
  - (i) varies, or has the effect of varying, the first-mentioned instrument; or
  - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument.
- (8) The powers conferred on the Court under this section in relation to a contract or covenant do not affect any powers that any other court may have in relation to the contract or covenant in proceedings instituted in that other court in respect of the contract or covenant.
- (9) In subsection (7):

*interest*, in relation to land, has the same meaning as in subsection 12DC(3).

**12GN Power of Court to prohibit payment or transfer of moneys or other property**

- (1) If:
    - (a) proceedings have been commenced against a person for an offence against section 12GB; or
    - (b) an application has been made under section 12GD for an injunction against a person in relation to a contravention of a provision of this Division; or
    - (c) an action has been commenced under subsection 12GF(1) against a person in relation to a contravention of a provision of Subdivision D or E (sections 12DA to 12ED); or
    - (d) an application for an order under subsection 12GM(2) or (3) has been or may be made against a person in relation to a contravention of a provision of this Division;
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the Court may, on the application of the Minister or the Commission, make an order or orders mentioned in subsection (2) if the Court is satisfied that:

- (e) it is necessary or desirable to do so for the purpose of preserving money or other property held by or on behalf of a person referred to in paragraph (a), (b), (c) or (d), as the case may be (the **relevant person**), if the relevant person is liable or may become liable under this Division to pay moneys by way of a fine, damages, compensation, refund or otherwise or to transfer, sell or refund other property; and
  - (f) it will not unduly prejudice the rights and interests of any other person.
- (2) The orders referred to in subsection (1) are the following:
- (a) an order prohibiting, either absolutely or subject to conditions, a person who is indebted to the relevant person or to an associate of the relevant person from making a payment in total or partial discharge of the debt to, or to another person at the direction or request of, the person to whom the debt is owed;
  - (b) an order prohibiting, either absolutely or subject to conditions, a person who is holding money or other property on behalf of the relevant person or on behalf of an associate of the relevant person from paying all or any of the money, or transferring, or otherwise parting with possession of, the other property, to, or to another person at the direction or request of, the person on whose behalf the money or other property is held;
  - (c) an order prohibiting, either absolutely or subject to conditions, the taking or sending by any person of money of the relevant person or of an associate of the relevant person to a place outside the State or Territory in which the money is held;
  - (d) an order prohibiting, either absolutely or subject to conditions, the taking, sending or transfer by any person of other property of the relevant person or of an associate of the relevant person to a place outside the State or Territory in which the other property is located;

- (e) an order appointing, if the relevant person is a natural person, a receiver or trustee of the property or of part of the property of the relevant person with such powers as are specified in the order.
- (3) Subject to subsection (4), an order under this section may be expressed to operate:
  - (a) for a period specified in the order; or
  - (b) until proceedings under any other provision of this Part in relation to which the order was made have been concluded.
- (4) An order under this section made on an application *ex parte* must not be expressed to operate for a period exceeding 30 days.
- (5) A person who contravenes or fails to comply with an order by the Court under this section that is applicable to the person is guilty of an offence punishable on conviction:
  - (a) in the case of a person not being a body corporate—by a fine not exceeding 200 penalty units; or
  - (b) in the case of a person being a body corporate—by a fine not exceeding 1,000 penalty units.
- (6) Nothing in this section affects the powers that the Court has apart from this section.
- (7) This section has effect subject to the *Bankruptcy Act 1966*.
- (8) A reference in this section to a person who is an associate of a relevant person is a reference to:
  - (a) a person holding money or other property on behalf of the relevant person; or
  - (b) if the relevant person is a body corporate—a wholly owned subsidiary of the relevant person.

## **12GO Enforcement of undertakings—Secretary to the Department**

- (1) The Secretary to the Department may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Secretary has a power or function under this Division.



- (2) The person may withdraw or vary the undertaking at any time, but only with the consent of the Secretary to the Department.
- (3) If the Secretary to the Department considers that the person who gave the undertaking has breached any of its terms, the Secretary may apply to the Court for an order under subsection (4).
- (4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:
  - (a) an order directing the person to comply with that term of the undertaking;
  - (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
  - (c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
  - (d) any other order that the Court considers appropriate.

## **Subdivision H—Miscellaneous**

### **12HA Relationship of this Subdivision to Part 3**

- (1) The powers (and any restrictions on them) in this Subdivision are in addition to any powers the Commission has under Part 3 when investigating a contravention, or suspected contravention, of a provision of this Division. The powers may be used only when the Commission is so investigating.
- (2) For the purposes of Part 3, an exercise of a power in this Subdivision is taken to be an exercise of that power under, or for the purposes of, Part 3.

### **12HB Disclosure of documents by the Commission**

- (1) If:
  - (a) a proceeding is instituted against a corporation or other person under section 12GD; or

- (b) an application is made under section 12GE or subsection 12GM(2) or 12GN(1) for an order against a corporation or other person;

the Commission must, at the request of the corporation or other person and upon payment of the prescribed fee (if any), furnish to the corporation or other person:

- (c) a copy of every document that has been furnished to, or obtained by, the Commission in connection with the matter to which the application, notice or proceeding relates and tends to establish the case of the corporation or other person; and
- (d) a copy of any other document in the possession of the Commission that comes to the attention of the Commission in connection with the matter to which the application, notice or proceeding relates and tends to establish the case of the corporation or other person;

not being a document obtained from the corporation or other person or prepared by an officer or professional adviser of the Commission.

- (2) If the Commission does not comply with a request under subsection (1), the Court must, subject to subsection (3), upon application by the corporation which, or other person who, made the request, make an order directing the Commission to comply with the request.
- (3) The Court may refuse to make an order under subsection (2) in respect of a document or part of a document if the Court considers it inappropriate to make the order by reason that the disclosure of the contents of the document or part of the document would prejudice any person, or for any other reason.
- (4) Before the Court gives a decision on an application under subsection (2), the Court may require any documents to be produced to it for inspection.
- (5) An order under this section may be expressed to be subject to conditions specified in the order.

## **12HC Prosecutions**

- (1) Prosecutions for offences:
-

- (a) against this Division; or
  - (b) against Part 3 in its application in relation to an investigation of a contravention of this Division;must be brought only in the Court.
- (2) Jurisdiction is conferred on the Court to hear and determine such prosecutions.
- (3) Proceedings before the Court under this section, other than proceedings instituted by:
  - (a) the Commission; or
  - (b) a person authorised in writing by the Commission; or
  - (c) a person authorised in writing by the Secretary to the Department;must not be instituted except with the consent in writing of the Minister or of a person authorised by the Minister in writing to give such consents.

## **12HD Jurisdiction of Court to make declarations and orders**

- (1) Subject to this section, a person may institute a proceeding in the Court seeking, in relation to a matter arising under this Division or under Part 3 in its application in relation to an investigation of a contravention of this Division, the making of:
  - (a) a declaration in relation to the operation or effect of any provision of:
    - (i) this Division other than the provisions of Subdivision E (sections 12EA to 12ED); or
    - (ii) Part 3 as so applying; or
  - (b) a declaration in relation to the validity of any act or thing done, proposed to be done or purporting to have been done, under this Division or Part 3 as so applying; or
  - (c) an order by way of, or in the nature of, prohibition, certiorari or mandamus;or both such a declaration and such an order, and the Court has jurisdiction to hear and determine the proceeding.
- (2) The Minister may institute a proceeding in the Court under this section and may intervene in any proceeding instituted in the Court

under this section or in a proceeding instituted in any other court in which a party is seeking the making of a declaration or an order of a kind mentioned in subsection (1).

- (3) In this section, *proceeding* includes a cross-proceeding.

## **Subdivision I—Transitional**

### **12IA Conduct engaged in in relation to financial services before commencement**

- (1) If:
- (a) conduct was, or may have been, engaged in in relation to financial services before the commencement of this Division; and
  - (b) the conduct contravened, or may have contravened, Part IVA or V of the *Trade Practices Act 1974*; and
  - (c) if the conduct had been engaged in after the commencement of this Division it would have, or may have, contravened this Division;

the Commission has, by virtue of this section, the same powers under the *Trade Practices Act 1974* in relation to the conduct as the Australian Competition and Consumer Commission.

- (2) The Commission's power of delegation under section 102 extends to the powers it has under subsection (1).

## **8 Before Division 1 of Part 3**

Insert:

## **Division 1A—Application of Part 3**

### **12B Application of Part 3**

- (1) If this Part is being applied as a law of a State, it has no effect in relation to an investigation of a contravention of Division 2 of Part 2.
- (2) If this Part is being applied in relation to an investigation of a contravention of Division 2 of Part 2:

- (a) subsection 35(1) has effect as if the words “within this jurisdiction” were omitted; and
  - (b) subsection 37(10) has effect as if the words “a State or the Capital Territory” were substituted for the words “another jurisdiction”; and
  - (c) section 81 has effect as if paragraph (a) were omitted; and
  - (d) section 86 has effect as if the words “of this jurisdiction” were omitted; and
  - (e) subsection 93(2) has effect as if the words “or of this or any other jurisdiction” were omitted.
- (3) If this Part is being applied in relation to an investigation of a contravention of Division 2 of Part 2, ignore any references in this Part to:
- (a) a corresponding law; and
  - (b) a corresponding law of another jurisdiction.

## **9 At the end of section 13**

Add:

- (6) If the Commission has reason to suspect that a contravention of a provision of Division 2 of Part 2 may have been committed, the Commission may make such investigation as it thinks appropriate.

Note: See section 12B on the application of this subsection as a law of a State.

## **10 After section 32**

Insert:

### **32A Notice to produce books about financial services**

The Commission may give to:

- (a) a person who supplies, or has supplied, a financial service; or
- (b) an eligible person in relation to that person;

a written notice requiring the production to a specified member or staff member, at a specified place and time, of specified books relating to:

- (c) the supply of the financial service; or
- (d) the financial service.

**11 At the end of section 33**

Add:

; or (c) a matter referred to in paragraph 32A(c) or (d).

**12 Subsection 34(3)**

After “32”, insert “, 32A”.

**13 Paragraph 49(1)(c)**

After “jurisdiction”, insert “, or Division 2 of Part 2”.

**14 Subsection 63(1)**

After “32,”, insert “32A,”.

**15 Subsection 67(2)**

After “jurisdiction”, insert “or of Division 2 of Part 2,”.

**16 After paragraph 80(1)(b)**

Insert:

or (c) a matter referred to in paragraph 32A(c) or (d);

**17 After paragraph 91(1)(b)**

Insert:

or (ba) a person is convicted of an offence against Division 2 of Part 2 in a prosecution; or

(bb) a judgment is awarded, or a declaration or other order is made, against a person under Division 2 of Part 2 in a proceeding in a court;

**18 At the end of subsection 102(2)**

Add:

; or (e) a member of the staff of the Australian Competition and Consumer Commission referred to in subsection 27(1) of the *Trade Practices Act 1974*.

**19 Before subsection 102(3)**

Insert:

- (2B) The Commission must not delegate a function or power to:
- (i) a person referred to in paragraph (2)(e); or
  - (ii) a person engaged under section 27A of the *Trade Practices Act 1974*;
- unless the Chairperson of the Australian Competition and Consumer Commission has agreed to the delegation in writing.

**20 Subsection 127(9) (paragraph (a) of the definition of *protected information*)**

After “body”, insert “or person”.

**21 Subsection 127(9) (paragraph (c) of the definition of *protected information*)**

After “body”, insert “or person”.

**22 At the end of section 138**

Add:

- (4) In relation to the Commission’s functions under subsection 12FA(1), the report must include information about the Commission’s monitoring and promotion of market integrity and consumer protection in relation to:
- (a) the Australian financial system; and
  - (b) the provision of financial services.

**23 Subsection 246(1)**

After “national scheme laws”, insert “, section 12A or Division 2 of Part 2,”.

## **Part 2—Amendment of the Trade Practices Act 1974**

### **24 Subsection 4(1)**

Insert:

*financial product* has the same meaning as in Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 1989*.

*financial service* has the same meaning as in Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 1989*.

### **25 After section 25**

Insert:

### **26 Delegation by Commission in relation to unconscionable conduct and consumer protection**

- (1) The Commission may, by resolution, delegate any of its functions and powers under or in relation to Parts IVA, V and VI and any of its powers under Part XII that relate to those Parts, to a staff member of the Australian Securities and Investments Commission within the meaning of section 5 of the *Australian Securities and Investments Commission Act 1989*.
- (2) The Commission must not delegate a function or power under subsection (1) unless the Chairperson of the Australian Securities and Investments Commission has agreed to the delegation in writing.

### **26 Before section 51AA**

Insert:

### **51AAB Part does not apply to financial services**

- (1) Section 51AA does not apply to conduct engaged in in relation to financial services.
- (2) Section 51AB does not apply to the supply, or possible supply, of services that are financial services.



## **27 Before section 51A**

Insert:

### **51AF Part does not apply to financial services**

- (1) This Part does not apply to the supply, or possible supply, of services that are financial services.
- (2) Without limiting subsection (1):
  - (a) sections 52 and 55A do not apply to conduct engaged in in relation to financial services; and
  - (b) if a security (within the meaning of the Corporations Law) consists of or includes an interest in land, section 53A does not apply to that interest; and
  - (c) section 63A does not apply to a debit card that allows access to an account that is a financial product.

- (3) In subsection (2):

*debit card* has the same meaning as in section 63A.

## **28 Subsection 73(1)**

After “section 74”, insert “of this Act or section 12ED of the *Australian Securities and Investments Commission Act 1989*”.

## **29 Subsection 73(2)**

After “section 74”, insert “of this Act or section 12ED of the *Australian Securities and Investments Commission Act 1989*”.

## **Schedule 3—Amendment of the Corporations Law**

### **Part 1—Changing “Australian bank” to “Australian ADI”**

#### **1 Amendment of the Corporations Law**

The provisions of the Corporations Law specified in this Part are amended by omitting “Australian bank” (wherever occurring) and substituting “Australian ADI”.

Note: The headings to sections 897, 931 and 1230 are altered by omitting “**bank account**” and substituting “**ADI account**”.

#### **2 Section 9 (paragraph (a) of the definition of *banker’s books*)**

#### **3 Section 9 (subparagraph (a)(i) of the definition of *clients’ segregated account*)**

#### **4 Section 9 (paragraph (i) of the definition of *managed investment scheme*)**

#### **5 Subparagraph 65(1)(b)(iii)**

#### **6 Subparagraph 324(3)(a)(i)**

#### **7 Paragraph 362(2)(b)**

#### **8 Subparagraph 362(2)(c)(iii)**

#### **9 Subsections 362(9) and (10)**

#### **10 Paragraph 421(1)(a)**

#### **11 Paragraph 437D(3)(a)**

#### **12 Subparagraph 448C(2)(a)(i)**

#### **13 Paragraph 468(2)(b)**

- 14 Subparagraph 532(3)(a)(i)**
- 15 Subsection 601DE(1)**
- 16 Subparagraph 857(4)(a)(i)**
- 17 Paragraph 866(1)(a)**
- 18 Paragraph 872(2)(a)**
- 19 Subsection 873(3)**
- 20 Paragraph 891(1)(a)**
- 21 Section 897**
- 22 Section 931**
- 23 Paragraph 1052(1)(f)**
- 24 Paragraphs 1083(1)(a) to (c)**
- 25 Paragraph 1083(3)(b)**
- 26 Sub-subparagraph 1209(5)(d)(iii)(A)**
- 27 Subsection 1215(1)**
- 28 Subparagraph 1215(4)(a)(i)**
- 29 Subsection 1218(2)**
- 30 Section 1230**

## Part 2—Other changes

### 31 Section 9

Insert:

*Australian ADI* means:

- (a) an ADI (authorised deposit-taking institution) within the meaning of the *Banking Act 1959*; and
- (b) a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution.

### 32 Section 9

Insert:

*bank* or *banker* includes, but is not limited to, a body corporate that is an ADI (authorised deposit-taking institution) for the purposes of the *Banking Act 1959*.

### 33 Section 9 (paragraphs (b) to (d) of the definition of *banker's books*)

Omit “Australian bank’s” (wherever occurring), substitute “Australian ADI’s”.

### 34 Section 9 (paragraph (c) of the definition of *debenture*)

Repeal the paragraph, substitute:

- (c) a document issued by an Australian ADI in the ordinary course of its banking business that evidences or acknowledges indebtedness of the ADI arising in the ordinary course of that business;

### 35 Section 9 (paragraph (j) of the definition of *participation interest*)

Repeal the paragraph, substitute:

- (j) a document issued or executed by an Australian ADI in the ordinary course of its banking business, being a document that evidences or acknowledges indebtedness of the ADI arising in the ordinary course of that business; or

**36 Section 9 (definition of *payment order*)**

Omit “, bank cheque”, substitute “(including a cheque that a bank or other institution draws on itself)”.

**37 Paragraph 437D(3)(b)**

Omit “bank’s”, substitute “ADI’s”.

**38 Subparagraph 437D(3)(c)(i)**

Omit “bank”, substitute “ADI”.

**39 Paragraph 461(j)**

Omit “the Insurance and Superannuation Commissioner”, substitute “the Australian Prudential Regulation Authority”.

**40 Paragraph 462(2)(h)**

Repeal the paragraph, substitute:

(h) the Australian Prudential Regulation Authority.

**41 Subsection 462(3)**

Omit “the Insurance and Superannuation Commissioner”, substitute “the Australian Prudential Regulation Authority”.

**42 Subsection 870(3)**

Omit “or bank cheque”, substitute “, or by cheque that a bank or other institution draws on itself,”.

**43 Subsection 1015A(2)**

Repeal the subsection.

**44 Paragraph 1083(1)(b)**

Omit “the bank”, substitute “it”.

**45 Paragraph 1083(1)(c)**

Omit “the bank”, substitute “it”.

**46 Subsection 1083(3)**

Omit “the bank”, substitute “the ADI”.

**47 Subsection 1083A(2)**

Repeal the subsection.

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*[Minister's second reading speech made in—  
Senate on 14 May 1998  
House of Representatives on 23 June 1998]*

(76/98)