Australian Securities and Investments Commission Act 2001

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Volume 1:	**Parts 1 to 3B** **sections 1 to 93H**
Volume 2:	Parts 4 to 44 sections 94 to 366 Endnotes

Each volume has its own contents

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About this compilation

This compilation

This is a compilation of the *Australian Securities and Investments Commission Act 2001* that shows the text of the law as amended and in force on 7 July 2026 (the ***compilation date***).

The notes at the end of this compilation (the ***endnotes***) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. Any uncommenced amendments affecting the law are accessible on the Register (www.legislation.gov.au).

Application, saving and transitional provisions

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Editorial changes

For more information about any editorial changes made in this compilation, see the endnotes.

Presentational changes

The *Legislation Act 2003* provides for First Parliamentary Counsel to make presentational changes to a compilation. Presentational changes are applied to give a more consistent look and feel to legislation published on the Register, and enable the user to more easily navigate those documents.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. Any modifications affecting the law are accessible on the Register.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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An Act to provide for the Australian Securities and Investments Commission and certain other bodies, and for other purposes

Part 1—Preliminary

Division 1—Objects

1 Objects

(1) The objects of this Act are:

(a) to provide for the Australian Securities and Investments Commission (***ASIC***) which will administer such laws of the Commonwealth, a State or a Territory as confer functions and powers under those laws on ASIC; and

(b) to provide for ASIC's functions, powers and business; and

(d) to establish a Takeovers Panel, a Companies Auditors Disciplinary Board, a Financial Reporting Council, an Australian Accounting Standards Board, an Auditing and Assurance Standards Board and a Parliamentary Joint Committee on Corporations and Financial Services.

(2) In performing its functions and exercising its powers, ASIC must strive to:

(a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and

(b) promote the confident and informed participation of investors and consumers in the financial system; and

(d) administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and

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(e) receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it; and

(f) ensure that information is available as soon as practicable for access by the public; and

(g) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.

(2A) Without limiting subsection (2), ASIC must consider the effects that the performance of its functions and the exercise of its powers will have on competition in the financial system.

(3) This Act has effect, and is to be interpreted, accordingly.

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Division 2—Citation

1A Short title

This Act may be cited as the *Australian Securities and Investments Commission Act 2001*.

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Division 3—Commencement and application

2 Commencement

This Act commences at the same time as the *Corporations Act 2001*.

4 Application of this Act

(1) This Act applies:
  (a) in this jurisdiction; and
  (b) in a State that is not a referring State (but only to the extent to which the application would be within the legislative powers of the Parliament (including powers it has under paragraphs 51(xxxvii) and (xxxix) of the Constitution)); and
  (c) in such external Territories (if any) as are prescribed.

(2) Without limiting paragraph (1)(c), if an external Territory is prescribed, regulations prescribing the external Territory may provide:
  (a) that only some of the provisions of this Act apply in the external Territory; and
  (b) that provisions that apply in the external Territory only apply in specified circumstances.

(3) If an external Territory is prescribed for the purposes of paragraph (1)(c), in a provision of this Act that applies (either generally or in particular circumstances) in the external Territory, a reference to a term covered by subsection (4) includes a reference to that external Territory (including its coastal sea).

(4) For the purposes of subsection (3), the following terms are covered:
  (a) "Australia";
  (b) "Commonwealth";
  (c) "Territory";

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(d) "this jurisdiction";
(e) a term the definition of which includes a term mentioned in paragraphs (a) to (d).

4A Application of the *Criminal Code*

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

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Division 4—Interpretation

5 Interpretation

(1) In this Act, unless the contrary intention appears:

AASB means the Australian Accounting Standards Board.

absent from office, in relation to a holder of an office, means:

(a) absent from duty or from Australia; or

(b) unable, for any reason, to perform the functions of the office.

accounting member of the Disciplinary Board has the meaning given by subsection 203(1A).

affairs, in relation to a body corporate, has the same meaning as in section 232 of the Corporations Act.

arrangement has the meaning given by subsection 761B(1) of the Corporations Act.

ASIC means the Australian Securities and Investments Commission.

ASIC delegate means a person to whom, or a body to which, a function or power is delegated under section 102.

assist, in relation to an ASIC delegate, means:

(a) to perform functions:

(i) as a member, officer or employee of the ASIC delegate; and

(ii) in connection with the ASIC delegate's performance or exercise of a function or power delegated under section 102; or

(b) to perform services for the ASIC delegate in connection with the ASIC delegate's performance or exercise of a function or power delegated under section 102.

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AUASB means the Auditing and Assurance Standards Board.

audit deficiency report has the meaning given by subsection 50C(1).

Australia means the Commonwealth of Australia and, when used in a geographical sense, includes each Territory.

Note 1: The Australian Capital Territory, the Jervis Bay Territory, the Northern Territory, Norfolk Island and the Territories of Christmas Island and of Cocos (Keeling) Islands are covered by the definition of ***Territory*** in this subsection.

Note 2: The meaning of ***Australia*** is affected by subsection 4(3) (when used in a provision applying in an external Territory).

Australian auditor means:

(a) an individual auditor; or

(b) an audit firm; or

(c) an audit company;

that is conducting, or that has conducted, audits undertaken for the purposes of the *Australian Charities and Not-for-profits Commission Act 2012* or the Corporations Act and includes a registered company auditor who is participating in, or has participated in, audits of that kind.

benefit derived and detriment avoided:

(a) because of an offence—has the meaning given by section 93F; and

(b) because of the contravention of a civil penalty provision—has the meaning given by section 12GBCE.

books includes:

(a) a register; and

(b) financial reports or financial records, however compiled, recorded or stored; and

(c) a document; and

(ca) sustainability reports or sustainability records, however compiled, recorded or stored; and

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(d) banker's books; and
(e) any other record of information.

business member of the Disciplinary Board has the meaning given by subsection 203(1A).

Chairperson means:
(a) except in Part 11 or in relation to the Disciplinary Board—the Chairperson of ASIC; and
(b) in Part 11 or in relation to the Disciplinary Board—the Chairperson of the Disciplinary Board.

Commonwealth means the Commonwealth of Australia and, when used in a geographical sense, includes each Territory.

Note: The Australian Capital Territory, the Jervis Bay Territory, the Northern Territory, Norfolk Island and the Territories of Christmas Island and of Cocos (Keeling) Islands are covered by the definition of ***Territory*** in this subsection.

contravention:
(a) in relation to an offence against a law—includes:
(i) an offence against section 6 of the *Crimes Act 1914*; and
(ii) an ancillary offence (within the meaning of the *Criminal Code*);
relating to the offence against the law; and
(b) in relation to a civil penalty provision—has a meaning affected by section 12GBCL.

Corporations Act means the *Corporations Act 2001* and regulations and rules made under that Act.

corporations legislation means:
(a) this Act; and
(b) the Corporations Act.

court, except in section 248, includes a tribunal having power to require the production of documents or the answering of questions.

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CSC (short for Commonwealth Superannuation Corporation) has the same meaning as in the *Governance of Australian Government Superannuation Schemes Act 2011*.

dealing in a financial product has the meaning given by section 766C of the Corporations Act and ***deal*** in a financial product has a corresponding meaning.

Deputy Chairperson means:

(a) in relation to the Disciplinary Board—the Deputy Chairperson of the Disciplinary Board; and

(b) in any other case—a Deputy Chairperson of ASIC.

Disciplinary Board means the Companies Auditors Disciplinary Board.

eligible employee has the same meaning as in the *Superannuation Act 1976*.

eligible person, in relation to a person, means a person who:

(a) if the first-mentioned person is a body corporate (other than a CCIV)—is or has been an officer of the body within the meaning of the corporations legislation (other than the excluded provisions); or

(aa) if the first-mentioned person is a CCIV—is or has been:

(i) an officer of the CCIV; or

(ii) an officer of an officer of the CCIV; or

(b) in any case:

(i) is or has been an employee, agent, banker, solicitor or auditor of; or

(ii) is acting, or has acted, in any other capacity on behalf of;

the first-mentioned person.

Note: For paragraph (aa), ***officer*** is defined in this subsection.

engage in conduct:

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(a) in Division 2 of Part 2—has the meaning given by subsection 12BA(2); and
(b) in the other provisions of this Act—means do an act or omit to do an act.

examination means an examination of a person pursuant to a requirement made under section 19.

excluded provisions means section 12A and Division 2 of Part 2.

expenses, in relation to an investigation under Division 1 of Part 3, includes costs and expenses incurred in relation to a proceeding begun under section 50 as a result of the investigation.

external Territory:
(a) means a Territory referred to in section 122 of the Constitution, where an Act makes provision for the government of the Territory as a Territory; but
(b) does not include a Territory covered by the definition of ***Territory*** in this subsection.

Note: The Australian Capital Territory, the Jervis Bay Territory, the Northern Territory, Norfolk Island and the Territories of Christmas Island and of Cocos (Keeling) Islands are covered by the definition of ***Territory*** in this subsection.

fail means refuse or fail.

financial product:
(a) in Division 2 of Part 2—has the meaning given by section 12BAA; and
(b) in the other provisions of this Act—has the meaning given by Division 3 of Part 7.1 of the Corporations Act.

financial service:
(a) in Division 2 of Part 2—has the meaning given by section 12BAB; and
(b) in the other provisions of this Act—has the same meaning as it has in the Corporations Act.

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Note: Some provisions of of the Corporations Act have a modified meaning when applying to CCIVs (see Part 8B.7 of that Act).

Financial Services and Credit Panel means a panel convened under subsection 139(1).

foreign business law means:

(a) a law of a foreign country that regulates, or relates to the regulation of, business or persons engaged in business; or

(b) a law, or rules or regulations (however described), that an international business regulator administers or enforces.

foreign country includes:

(a) a part of a foreign country; and

(b) when used in a provision of this Act that does not apply (either generally or in particular circumstances) to a particular external Territory—that external Territory (but only to the extent that the provision does not apply in that external Territory).

FRC means the Financial Reporting Council.

give has:

(a) in relation to a document—a meaning affected by section 86; and

(b) in relation to information—a meaning affected by section 6.

hearing, in this section and Part 3, means a hearing before ASIC and, in sections 52, 54, 55 and 56, includes a part of such a hearing.

House means a House of the Parliament.

information has a meaning affected by section 6.

international accounting standards means accounting standards made by:

(a) the International Accounting Standards Board; or

(b) another body specified by the regulations.

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international auditing standards means auditing standards made by:

(a) the International Auditing and Assurance Standards Board; or

(b) another body specified by the regulations.

international business regulator means a body that satisfies the following conditions:

(a) the body has functions relating to the regulation, in 2 or more countries, of business, or persons engaged in business;

(b) those functions are conferred on the body by:

(i) a law or laws in force in those countries; or

(ii) a treaty, or other international agreement, to which those countries are parties; or

(iii) without limiting subparagraphs (i) and (ii)—a parliament or other body established by or under a treaty, or other international agreement, to which those countries are parties.

international sustainability standards means sustainability standards made by:

(a) the International Sustainability Standards Board; or

(b) another body specified by the regulations.

Note: Sustainability standards include standards relating to climate.

investigate, in relation to ASIC, means investigate in the course of performing or exercising any of ASIC's functions and powers.

meeting means:

(a) in Part 4—a meeting of ASIC;

(c) in Part 11—a meeting of the Disciplinary Board.

member means:

(a) except in Division 2 of Part 4, in Part 10, 11, 12 or 14, or in relation to a Division, the Takeovers Panel, a Financial Services and Credit Panel, the Disciplinary Board, the FRC,

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the AASB or the Parliamentary Committee—a member of ASIC; and

(aa) in relation to a Financial Services and Credit Panel—a member of the panel appointed under subsection 140(1); and

(c) in Part 10 or in relation to the Takeovers Panel—a member of the Takeovers Panel; and

(d) in Part 11 or in relation to the Disciplinary Board—the Chairperson or any other member of the Disciplinary Board; and

(e) in relation to the FRC—a member of the FRC; and

(ea) in relation to the AASB—a member of the AASB; and

(eb) in relation to the AUASB—a member of the AUASB; and

(f) in Part 14 or in relation to the Parliamentary Committee—a member of the Parliamentary Committee.

Office of the AASB means the Office of the Australian Accounting Standards Board.

Office of the AUASB means the Office of the Auditing and Assurance Standards Board.

officer means:

(a) an officer within the meaning of the Corporations Act; or

(b) a provisional liquidator.

old ASIC Act means the *Australian Securities and Investments Commission Act 1989* as in force from time to time before the commencement of this Act.

Panel Chairperson has the meaning given by subsection 210A(3A) (about constituting a Panel of the Disciplinary Board).

Panel of the Disciplinary Board means a Panel constituted by the Chairperson of the Disciplinary Board under section 210A to hear a particular matter.

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Parliamentary Committee means the Parliamentary Joint Committee on Corporations and Financial Services.

penalty applicable:

(a) to an offence committed by an individual:

(i) in Division 2 of Part 2—has the meaning given by section 12GBCA; and

(ii) in the other provisions of this Act——has the meaning given by section 93D; and

(b) to an offence committed by a body corporate:

(i) in Division 2 of Part 2—has the meaning given by section 12GBCA; and

(ii) in the other provisions of this Act——has the meaning given by section 93E.

person has the same meaning as in Chapter 7 of the of the Corporations Act.

Note: See sections 761F (which deals with partnerships) and 761FA (which deals with multiple trustees) of the Corporations Act.

power includes an authority.

prescribed means prescribed by this Act or the regulations.

President means the President of the Takeovers Panel.

proceeding means:

(a) a proceeding in a court; or

(b) a proceeding or hearing before, or an examination by or before, a tribunal;

whether the proceeding, hearing or examination is of a civil, administrative, criminal, disciplinary or other nature.

produce, except in Part 3, includes permit access to.

professional accounting body means a body prescribed by the regulations for the purposes of this definition.

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property means any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action and money.

record, in relation to an examination, means the whole or a part of a record made under section 24 of statements made at the examination.

regulations means regulations made under this Act.

report includes an interim report.

Schedule 2 to the Corporations Act means Schedule 2 to the *Corporations Act 2001* and rules made under that Schedule.

security has the meaning given by subsection 92(5) of the Corporations Act.

senior staff member means a staff member identified as a senior staff member in a determination made under section 122A.

staff member means:

(a) a person employed under section 120; or

(b) a person engaged under subsection 121(1); or

(c) any of the officers, employees and persons who under section 122 are to assist ASIC.

statement, in relation to an examination, includes a question asked, an answer given, and any other comment or remark made, at the examination.

superannuation benefits includes:

(a) benefits in the nature of superannuation benefits; and

(b) benefits similar to benefits provided under the *Superannuation Act 1976*; and

(c) benefits similar to the benefits provided under the *Superannuation Act 1990*.

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Takeovers Panel means the Takeovers Panel continued in existence by section 261.

Takeovers Panel proceedings means proceedings before the Takeovers Panel on:

(a) an application made to the Takeovers Panel under the Corporations Act; or

(b) a reference of a decision to the Takeovers Panel for review under the Corporations Act.

Territory:

(a) means the following:

(i) the Australian Capital Territory;

(ii) the Jervis Bay Territory;

(iii) the Northern Territory;

(iv) Norfolk Island;

(v) the Territory of Christmas Island;

(vi) the Territory of Cocos (Keeling) Islands; and

(b) when used in a geographical sense—includes the Territory's coastal sea (if any).

Note 1: The term ***external Territory*** is defined in this subsection to be any Territory, other than a Territory covered by this definition, that is referred to in section 122 of the Constitution, where an Act makes provision for the government of the Territory as a Territory.

Note 2: The meaning of ***Territory*** is affected by subsection 4(3) (when used in a provision applying in an external Territory).

this Act includes the regulations.

this jurisdiction means:

(a) each referring State (including, when used in a geographical sense, its coastal sea); and

(b) each Territory.

Note 1: ***Territory***, when used in a geographical sense, includes the Territory's coastal sea, but the term does not include an external Territory. See the definitions of ***Territory*** and ***external Territory*** in this subsection.

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Note 2: The meaning of ***this jurisdiction*** is affected by subsection 4(3) (when used in a provision applying in an external Territory).

tribunal means:

(a) a tribunal in Australia; or

(b) any other body, authority or person in Australia having power, by law or by consent of parties, to hear, receive or examine evidence.

trust property, in relation to a trustee company, means property that is or was held by the trustee company as trustee.

virtual enquiry technology means any technology that allows a person to appear at all or part of a hearing, examination or other enquiry without being physically present at the hearing, examination or other enquiry.

witness:

(a) in relation to a hearing before ASIC, means a person appearing at the hearing to give evidence; or

(b) in relation to Takeovers Panel proceedings, means a person appearing in the proceedings to give evidence.

written record, in relation to an examination, means:

(a) a record of the examination:

(i) that is made in writing; or

(ii) as reduced to writing; or

(b) a part of such a record.

(2) Subject to this Act, Part 1.2 (Interpretation) of the Corporations Act applies for the purposes of this Act as if the provisions of this Act were provisions of that Act.

Note: Part 1.2 of the Corporations Act includes the Dictionary in section 9 of that Act, so the definitions in that section apply for the purposes of this Act unless this Act otherwise provides.

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6 Giving information

A reference in this Act to giving information includes a reference to:

(a) explaining or stating a matter; or

(b) identifying a person, matter or thing; or

(c) disclosing information; or

(d) answering a question.

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Part 2—Australian Securities and Investments Commission and consumer protection in relation to financial services

Division 1—Australian Securities and Investments Commission

8 ASIC is a body corporate

(1) ASIC:

(a) is a body corporate, with perpetual succession; and

(b) has a common seal; and

(c) may, subject to subsection (5), acquire, hold and dispose of real and personal property; and

(ca) may enter into contracts; and

(d) may sue and be sued in its corporate name.

Note: ASIC was established by section 7 of the *Australian Securities and Investments Commission Act 1989* and is continued in existence by section 261 of this Act.

(1A) However, ASIC is taken, for the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):

(a) to be a non-corporate Commonwealth entity, and not to be a corporate Commonwealth entity; and

(b) to be a part of the Commonwealth; and

(c) not to be a body corporate.

(2) ASIC may enter into contracts in its own right.

(3) Any real or personal property held by ASIC is held for and on behalf of the Commonwealth.

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(4) Any money received by ASIC is received for and on behalf of the Commonwealth.

(5) ASIC cannot hold real or personal property or money on trust.

Note: Any real or personal property or money that ASIC would otherwise hold on trust is held by the Commonwealth on trust.

(6) Despite any rule of equity, ASIC may, for and on behalf of the Commonwealth, perform all the duties and exercise all the powers of the Commonwealth as trustee in relation to any real or personal property or money held on trust by the Commonwealth.

(7) To avoid doubt, a right to sue is taken not to be personal property for the purposes of subsection (3).

8A ASIC's liabilities are Commonwealth liabilities

(1) Any financial liabilities of ASIC are taken to be liabilities of the Commonwealth.

(2) For the purposes of this section:

financial liability means a liability to pay a person an amount where the amount, or the method for working out the amount, has been determined.

9 Membership

(1) ASIC is to consist of not fewer than 3 nor more than 8 members.

(2) The Governor-General appoints the members on the nomination of the Minister.

(3) At least 3 of the members must be appointed as full-time members and each of the remaining members (if any) may be appointed as a full-time member or as a part-time member.

(4) The Minister is to nominate a person as a member only if the Minister is satisfied that the person is qualified for appointment by

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virtue of his or her knowledge of, or experience in, one or more of the following fields, namely:

(a) business;
(b) administration of companies;
(c) financial markets;
(d) financial products and financial services;
(e) law;
(f) economics;
(g) accounting.

(5) The performance of ASIC's functions or the exercise of ASIC's powers is not affected by reason only that the number of members, or the number of full-time members, is less than 3 unless a continuous period of 3 months has elapsed since the number of members, or the number of full-time members, as the case may be, fell below 3.

(6) For the purposes of subsection (5), an acting member is taken to be a member.

9A Application of the finance law

For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):

(a) ASIC is a listed entity; and
(b) the Chairperson is the accountable authority of ASIC; and
(c) the following persons are officials of ASIC:
  (i) the Chairperson;
  (ii) the other members of ASIC;
  (iii) staff members; and
(d) the purposes of ASIC include the functions of ASIC referred to in sections 11 and 12A.

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10 Chairperson and Deputy Chairpersons

(1) The Governor-General is to appoint as Chairperson of ASIC a person who is, or is to be, a full-time member.

(2) The Governor-General may appoint as a Deputy Chairperson of ASIC a person who is, or is to be, a full-time member.

Note: For the manner in which the Chairperson and a Deputy Chairperson may be referred to, see section 18B of the *Acts Interpretation Act 1901*.

(3) Not more than 2 persons may hold office as Deputy Chairperson at any one time.

10A Chairperson not subject to direction by ASIC on certain matters

The Chairperson of ASIC is not subject to direction by ASIC in relation to the Chairperson's performance of functions, or exercise of powers, under:

(a) the *Public Governance, Performance and Accountability Act 2013*; or

(b) Part 6 or 7 of this Act.

11 Corporations legislation functions and powers and other functions and powers

(1) ASIC has such functions and powers as are conferred on it by or under the corporations legislation (other than the excluded provisions).

(2) ASIC also has the following functions:

(a) to provide such staff and support facilities to the Takeovers Panel, the Disciplinary Board and the Review Board as are necessary or desirable for the performance and exercise by the Takeovers Panel, the Disciplinary Board and the Review Board of their respective functions and powers;

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(aa) to provide such staff and support facilities to Financial Services and Credit Panels as are necessary or desirable for the performance and exercise by the panels of their functions and powers;

(b) to advise the Minister about any changes to the corporations legislation (other than the excluded provisions) that, in ASIC's opinion, are needed to overcome, or would assist in overcoming, any problems that ASIC has encountered in the course of performing or exercising any of its functions and powers.

(3) ASIC may, on its own initiative or when requested by the Minister, advise the Minister, and make to the Minister such recommendations as it thinks fit, about any matter connected with:

(a) a proposal to make corporations legislation, or to make amendments of the corporations legislation (other than the excluded provisions); or

(b) the operation or administration of the corporations legislation (other than the excluded provisions); or

(c) law reform in relation to the corporations legislation (other than the excluded provisions); or

(d) companies or a segment of the financial products and financial services industry; or

(e) a proposal for improving the efficiency of the financial markets.

(4) ASIC has power to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions.

(6) Subject to this Act, ASIC has the general administration of this Act.

(8) ASIC may, with the consent of the Minister, enter into an agreement or arrangement with a State or Territory for the performance of functions or the exercise of powers by ASIC as an agent of the State or Territory.

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(9) ASIC has such functions and powers as are referred to in such an agreement or arrangement. However, ASIC is not under a duty to perform such functions or exercise such powers.

(9A) ASIC may have functions or powers conferred on it by or under a law of a State or Territory if:

(a) that law provides for, or relates to, the repeal, amendment or termination (however described) of the operation of, any of the replaced legislation within the meaning of item 22 of Schedule 8 to the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999*; and

(b) the conferral of the powers or functions is in accordance with:

(i) provisions of an agreement entered into by the Commonwealth and the State or Territory, being provisions approved by the Minister for the purposes of this subsection; or

(ii) an approval given by the Minister for the purposes of this subsection.

ASIC has the functions and powers so conferred by that law. However, ASIC is not under a duty to perform such functions or exercise such powers.

(10) ASIC may, with the written consent of the Minister, enter into an agreement or arrangement with a regulatory body of a foreign country under which ASIC undertakes to assist that regulatory body to ascertain whether Australian auditors comply with audit requirements that are:

(a) imposed by or under laws of that foreign country; or

(b) adopted as professional standards in that foreign country.

(11) The Minister may, in writing, vary or revoke the Minister's consent mentioned in subsection (10).

(12) If ASIC enters into an agreement or arrangement with a regulatory body under subsection (10), it must, as soon as practicable after

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entering into that agreement or arrangement, by notice published in the *Gazette*:

(a) set out the identifying particulars of the regulatory body; and

(b) give brief particulars of the agreement or arrangement entered into; and

(c) identify the audit requirements to which the agreement or arrangement relates.

(13) A notice published under subsection (12) is not a legislative instrument.

(14) ASIC has the following functions:

(a) to assist a regulatory body with which it has entered into an agreement or arrangement under subsection (10) to examine the policies and working practices of an Australian auditor, so as to help the regulatory body to ascertain compliance with audit requirements to which the agreement or arrangement relates;

(b) to disclose to a regulatory body with which it has entered into an agreement or arrangement under subsection (10) the information that ASIC has obtained in assisting in such an examination.

(15) In performing the function referred to in paragraph (14)(a), ASIC may examine policies and working practices of an auditor in general or in their application to particular audits or in both of those respects.

(16) ASIC is not under a duty to perform a function referred to in subsection (14) or to exercise a power in relation to such a function.

(16A) ASIC has the functions and powers of a home regulator or a host regulator for a passport fund under the Memorandum of Cooperation. However, ASIC is not under a duty to perform such functions or exercise such powers.

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(17) ASIC is not subject to any directions of the Minister in relation to:
(a) entering into an agreement or arrangement under subsection (8) or (10); or
(b) performing functions or exercising powers referred to in subsection (9); or
(c) performing functions conferred under subsection (9A), (14) or (16A) or exercising any related powers.

12 Directions by Minister

(1) The Minister may, by legislative instrument, give ASIC a direction about policies it should pursue, or priorities it should follow, in performing or exercising any of its functions or powers under the corporations legislation (other than the excluded provisions).

(2) The Minister must not give a direction under subsection (1) unless he or she has:
(a) notified ASIC in writing that he or she is considering giving the direction; and
(b) given the Chairperson an adequate opportunity to discuss with the Minister the need for the proposed direction.

(3) The Minister must not give a direction under subsection (1) about a particular case.

(4) ASIC must comply with a direction under subsection (1).

12A Other functions and powers

(1) ASIC has the functions and powers that are conferred on it by or under Division 2 of Part 2 of this Act and by or under the following:
(a) the *ASIC Supervisory Cost Recovery Levy Act 2017*;
(b) the *ASIC Supervisory Cost Recovery Levy (Collection) Act 2017*;

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(ba) the *Financial Services Compensation Scheme of Last Resort Levy (Collection) Act 2023*;
(c) the *Insurance Contracts Act 1984*;
(e) the *Life Insurance Act 1995*;
(f) the *Retirement Savings Accounts Act 1997*;
(g) the *Superannuation Industry (Supervision) Act 1993*;
(i) the *National Consumer Credit Protection Act 2009*;
(j) the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*;
(k) the *Business Names Registration Act 2011*;
(l) the *Business Names Registration (Transitional and Consequential Provisions) Act 2011*;
(m) the *Financial Accountability Regime Act 2023*;
(n) the *Financial Accountability Regime (Consequential Amendments) Act 2023*;
(o) the SPF provisions (within the meaning of the *Competition and Consumer Act 2010*).

(2) ASIC has the function of monitoring and promoting market integrity and consumer protection in relation to the Australian financial system.

(3) ASIC has the function of monitoring and promoting market integrity and consumer protection in relation to the payments system by:
(a) promoting the adoption of approved industry standards and codes of practice; and
(b) promoting the protection of consumer interests; and
(c) promoting community awareness of payments system issues; and
(d) promoting sound customer-banker relationships, including through:
(i) monitoring the operation of industry standards and codes of practice; and

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(ii) monitoring compliance with such standards and codes.

(4) Subsections (2) and (3) confer functions and powers to the extent to which they are not in excess of the legislative power of the Commonwealth.

(5) ASIC may:

(a) advise the Minister about any changes to a law listed in subsection (1) that ASIC thinks are needed to help overcome any problems that ASIC has encountered in the course of performing its functions or exercising any of its powers under that law; and

(b) advise the Minister and make such recommendations as it thinks fit about any matter relating to its functions in subsections (2) and (3).

(6) ASIC has power to do whatever is necessary for or in connection with, or reasonably incidental to, the performance of its functions.

12AA Cooperation with APRA

(1) The object of this section is to require ASIC to support APRA in performing and exercising APRA's functions and powers effectively.

(2) In performing and exercising its functions and powers, ASIC must, so far as is practicable, work in cooperation with APRA.

(3) The performance or exercise of a function or power by ASIC is not invalid merely because of a failure by ASIC to comply with subsection (2).

(4) The performance or exercise of a function or power by ASIC does not give rise to an action or other proceeding for damages merely because of a failure by ASIC to comply with subsection (2).

(5) If a law (other than this section) requires ASIC to cooperate with APRA:

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(a) this section does not affect the operation of that law; and
(b) that law does not affect the operation of this section.

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

Subdivision A—Application

12AC Division extends to some conduct outside Australia

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.

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.

(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);

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(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 BA (sections 12BF to 12BM), Subdivision C (sections 12CA to 12CC), Subdivision D (sections 12DA to 12DN), Subdivision DA (sections 12DO to 12DZA) 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.

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(3) Except as expressly provided by Subdivision BA (sections 12BF to 12BM), Subdivision C (sections 12CA to 12CC), Subdivision D (sections 12DA to 12DN), Subdivision DA (sections 12DO to 12DZA) 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.

add-on insurance deferral period has the meaning given by section 12DP.

add-on insurance pre-deferral period has the meaning given by section 12DP.

add-on insurance product, in relation to a product or service, has the meaning given by section 12DO.

add-on risk product has the meaning given by subsection 12DMC(2).

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assert a right to payment has the meaning given by section 12BEA.

Australian Consumer Law means Schedule 2 to the *Competition and Consumer Act 2010* as applied under Subdivision A of Division 2 of Part XI of that Act.

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.

civil penalty provision has the meaning given by subsection 12GBA(6).

commission includes:

(a) any financial or other benefit in the nature of a commission; and

(b) in relation to an add-on risk product provided to a person in connection with the person providing a warranty to another person—the amount (if any) by which the consideration for the warranty exceeds so much of the consideration for the add-on risk product as relates to the warranty.

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It may take any form of monetary consideration, or any form of non-monetary consideration to which a monetary value can be assigned.

conduct has the meaning given by subsection (2).

consumer has the meaning given by section 12BC.

consumer contract has the meaning given by subsection 12BF(3).

contract has the meaning given by section 12BE.

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.

enforcement proceeding means a proceeding instituted under Subdivision G of Division 2 of Part 2 (other than sections 12GNB, 12GNE and 12GNF).

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

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 has the meaning given by section 12BAA.

financial service has the meaning given by section 12BAB.

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individual fine formula means the formula set out in subsection 93D(3).

infringement notice means an infringement notice issued under section 12GX.

Insurance Contracts Act insurance contract means a contract of insurance to which the *Insurance Contracts Act 1984* applies.

long-term lease, of a motor vehicle, means a contract for the hire of the motor vehicle for a fixed period of more than 4 months, or for an indefinite period.

misleading includes the meaning given by section 12BB.

money has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999*.

motor vehicle means:

(a) any motor-powered vehicle of a kind intended for use as land transport (other than rail transport), whether or not it is for use on a road; or

(b) any other vehicle of a kind intended to be towed by such a motor-powered vehicle;

but does not include a vehicle (other than a vehicle for use on a road) that is of a kind intended primarily for use by persons with restricted mobility.

National Credit Code has the same meaning as in the *National Consumer Credit Protection Act 2009*.

non-party means:

(a) in relation to conduct—a person who is not, or has not been, a party to an enforcement proceeding in relation to the conduct; or

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(b) in relation to a term of a contract—a person who is not, or has not been, a party to an enforcement proceeding in relation to the term.

payment period for an infringement notice, has the meaning given by section 12GXC.

pecuniary penalty order has the meaning given by subsection 12GBB(4).

price includes a charge of any description.

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

registrable superannuation entity has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

relinquishment order has the meaning given by subsection 12GBCC(1).

rely on, in relation to a term of a consumer contract or small business contract, includes the following:

(a) attempt to enforce the term;
(b) attempt to exercise a right conferred, or purportedly conferred, by the term;
(c) assert the existence of a right conferred, or purportedly conferred, by the term.

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:

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(a) the supply of goods within the meaning of the *Competition and Consumer Act 2010*; or
(b) the performance of work under a contract of service.

small business contract has the meaning given by subsection 12BF(4).

standard form contract has a meaning affected by section 12BK.

subject to an infringement notice under Subdivision GB of Division 2 of Part 2, has the meaning given by section 12GXA.

substantiation notice means a notice under section 12GY.

substantiation notice compliance period for a substantiation notice has the meaning given by subsection 12GYB(2).

superannuation trustee service has the same meaning as in the Corporations Act.

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.

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.

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transparent, in relation to a term of a consumer contract or small business contract, has the meaning given by subsection 12BG(3).

unfair, in relation to a term of a consumer contract or small business contract, has the meaning given by subsection 12BG(1).

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

upfront price has the meaning given by subsection 12BI(2).

(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,

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offers or proposals for the person to do that act or to do that act on that condition, as the case may be.

12BAA Definition of *financial product*

*General definition of **financial product***

(1) Subject to subsection (8), for the purposes of this Division, a ***financial product*** is a facility through which, or through the acquisition of which, a person does one or more of the following:
  (a) makes a financial investment (see subsection (4));
  (b) manages financial risk (see subsection (5));
  (c) makes non-cash payments (see subsection (6)).

(2) Subject to subsection (8), for the purposes of this Division, a particular facility that is of a kind through which people commonly make financial investments, manage financial risks or make non-cash payments is a ***financial product*** even if that facility is acquired by a particular person for some other purpose.

(3) A facility does not cease to be a financial product merely because:
  (a) the facility has been acquired by a person other than the person to whom it was originally issued; and
  (b) that person, in acquiring the product, was not making a financial investment or managing a financial risk.

*Meaning of **makes a financial investment***

(4) For the purposes of this section, a person (the ***investor***) ***makes a financial investment*** if:
  (a) the investor gives money or money's worth (the ***contribution***) to another person and any of the following apply:
    (i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;

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(ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);

(iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor; and

(b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

Note 1: Examples of actions that constitute making a financial investment under this subsection are:

(a) a person paying money to a company for the issue to the person of shares in the company (the company uses the money to generate dividends for the person and the person, as a shareholder, does not have control over the day-to-day affairs of the company); or

(b) a person contributing money to acquire interests in a registered scheme from the responsible entity of the scheme (the scheme uses the money to generate financial or other benefits for the person and the person, as a member of the scheme, does not have day-to-day control over the operation of the scheme).

Note 2: Examples of actions that do not constitute making a financial investment under this subsection are:

(a) a person purchasing real property or bullion (while the property or bullion may generate a return for the person, it is not a return generated by the use of the purchase money by another person); or

(b) a person giving money to a financial services licensee who is to use it to purchase shares for the person (while the purchase of the shares will be a financial investment made by the person, the mere act of giving the money to the licensee will not of itself constitute making a financial investment).

Meaning of ***manages a financial risk***

(5) For the purposes of this section, a person ***manages financial risk*** if they:

(a) manage the financial consequences to them of particular circumstances happening; or

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(b) avoid or limit the financial consequences of fluctuations in, or in the value of, receipts or costs (including prices and interest rates).

Note 1: Examples of actions that constitute managing a financial risk are:
(a) taking out insurance; or
(b) hedging a liability by acquiring a futures contract or entering into a currency swap.

Note 2: An example of an action that does not constitute managing a financial risk is employing a security firm (while that is a way of managing the risk that thefts will happen, it is not a way of managing the financial consequences if thefts do occur).

*Meaning of **makes non-cash payments***

(6) For the purposes of this section, a person ***makes non-cash payments*** if they make payments, or cause payments to be made, otherwise than by the physical delivery of Australian currency in the form of notes and/or coins.

Note: Examples of actions that constitute making non-cash payments are:
(a) making payments by means of a facility for direct debit of a deposit account; or
(b) making payments by means of a facility for the use of cheques; or
(c) making payments by means of a purchased payment facility within the meaning of the *Payment Systems (Regulation) Act 1998*, such as a smart card; or
(d) making payments by means of traveller's cheques in Australian currency.

*Specific things that are **financial products** (subject to subsection (8))*

(7) Subject to subsection (8), the following are ***financial products*** for the purposes of this Division:
(a) a security;
(b) any of the following in relation to a managed investment scheme:

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(i) an interest in the scheme;
(ii) a legal or equitable right or interest in an interest covered by subparagraph (i);
(iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);

(c) a derivative;

(d) a contract of insurance (see subsection (9)) other than:
(i) health insurance provided as part of a health insurance business (as defined by Division 121 of the *Private Health Insurance Act 2007*); or
(ii) insurance provided as part of a health-related business (as defined by section 131-15 of that Act) that is conducted through a health benefits fund (as defined by section 131-10 of that Act);

(e) a life policy, or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, that is not a contract of insurance (see subsection (9));

(f) a beneficial interest in a superannuation fund (as defined by section 10 of the *Superannuation Industry (Supervision) Act 1993*);

(g) an RSA (retirement savings account) within the meaning of the *Retirement Savings Accounts Act 1997*;

(h) any deposit-taking facility made available by an ADI (within the meaning of the *Banking Act 1959*) in the course of its banking business (within the meaning of that Act), other than an RSA (RSAs are covered by paragraph (g));

(i) a debenture, stock or bond issued or proposed to be issued by a government;

(j) a foreign exchange contract;

(k) a credit facility (within the meaning of the regulations);

(l) an Australian carbon credit unit;

(la) an eligible international emissions unit;

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(m) anything declared by the regulations to be a financial product for the purposes of this subsection.

Note 1: Even though something is expressly excluded from one of these paragraphs, it may still be a financial product (subject to subsection (8)) either because:
(a) it is covered by another of these paragraphs; or
(b) it is covered by the general definition in subsection (1).

Note 2: A notified foreign passport fund is a managed investment scheme for the purposes of this Act and the Corporations Act, see subsection 5(2) of this Act and section 1213E of the Corporations Act.

*Specific things that are not **financial products***

(8) Despite anything else in this section, the following are not ***financial products*** for the purposes of this Division:
(a) an excluded security;
(b) health insurance provided as part of a health insurance business (as defined in Division 121 of the *Private Health Insurance Act 2007*);
(ba) insurance provided as part of a health-related business (as defined by section 131-15 of that Act) that is conducted through a health benefits fund (as defined by section 131-10 of that Act);
(c) State insurance or Northern Territory insurance, including insurance entered into by:
(i) a State or the Northern Territory; and
(ii) some other insurer;
as joint insurers;
(d) a facility:
(i) that is an approved RTGS system for the purposes of the *Payment Systems and Netting Act 1998*; or
(ii) for the transmission and reconciliation of non-cash payments (see subsection (6)), and the establishment of final positions, for settlement through an approved

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RTGS system within the meaning of the *Payment Systems and Netting Act 1998*;

(e) a facility that is:
  (i) a designated payment system or special designated payment system (or both) for the purposes of the *Payment Systems (Regulation) Act 1998*; and
  (ii) declared by regulations made for the purposes of this paragraph not to be a financial product;

(f) a facility for the exchange and settlement of non-cash payments (see subsection (6)) between providers of non-cash payment facilities;

(g) a facility that is:
  (i) a financial market; or
  (ii) a clearing and settlement facility; or
  (iii) a payment system operated as part of a clearing and settlement facility; or
  (iv) a derivative trade repository;

(h) so much of an arrangement as is not a derivative because of paragraph 761D(3)(a) of the Corporations Act;

(i) an arrangement that is not a derivative because of paragraph 761D(3)(b) of the Corporations Act;

(j) an arrangement that is not a derivative because of subsection 761D(4) of the Corporations Act;

(k) any of the following:
  (i) an interest in something that is not a managed investment scheme because of paragraph (c), (e), (f), (k), (l) or (m) of the definition of ***managed investment scheme*** in section 9 of the Corporations Act;
  (ii) a legal or equitable right or interest in an interest covered by subparagraph (i);
  (iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i);

(m) a deposit-taking facility that is used for State banking;

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(n) equipment or infrastructure by which something else that is a financial product is provided;
(o) a funeral benefit;
(p) a facility, interest or other thing declared by regulations made for the purposes of this subsection not to be a financial product.

(9) For the purpose of paragraphs (7)(d) and (e), ***contract of insurance*** includes:
(a) a contract that would ordinarily be regarded as a contract of insurance even if some of its provisions are not by way of insurance; and
(b) a contract that includes provisions of insurance in so far as those provisions are concerned, even if the contract would not ordinarily be regarded as a contract of insurance.

(10) To avoid doubt, a ***funeral expenses facility*** is not a ***funeral benefit*** for the purposes of this Act.

12BAB Meaning of *financial service*

*When does a person provide a **financial service**?*

(1) For the purposes of this Division, subject to paragraph (2)(b), a person provides a ***financial service*** if they:
(a) provide financial product advice (see subsection (5)); or
(b) deal in a financial product (see subsection (7)); or
(c) make a market for a financial product (see subsection (11)); or
(d) operate a registered scheme; or
(e) provide a custodial or depository service (see subsection (12)); or
(ea) provide a superannuation trustee service; or
(eb) provide a claims handling and settling service; or

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(f) operate a financial market (see subsection (15)) or clearing and settlement facility (see subsection (17)); or

(g) provide a service (not being the operation of a derivative trade repository) that is otherwise supplied in relation to a financial product (other than an Australian carbon credit unit or an eligible international emissions unit); or

(ga) operate the business and conduct the affairs of a CCIV, and the person is the corporate director of the CCIV; or

(h) engage in conduct of a kind prescribed in regulations made for the purposes of this paragraph.

Note: Paragraph (ga) means persons other than the corporate director will not be treated as providing that financial service if they operate the business and conduct the affairs of the CCIV while:

(a) acting as an agent of the CCIV, or as an agent or employee of the corporate director; or

(b) taking steps to wind up a sub-fund of the CCIV.

(1AA) Without limiting subsection (1), for the purposes of this Division, a financial product is a ***financial service***.

(1A) Subject to paragraph (2)(b), the provision by a trustee company of a traditional trustee company service constitutes the provision, by the company, of a ***financial service*** for the purposes of this Division.

Note: Trustee companies may also provide other kinds of financial service mentioned in subsection (1).

(1B) The regulations may, in relation to a traditional trustee company service of a particular class, prescribe the person or persons to whom a service of that class is taken to be provided or supplied for the purposes of this Division. This subsection does not limit (and is not limited by) subsection (2).

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*Meaning of provides a **crowd-funding service***

(1C) Subject to paragraph (2)(b), the provision by a person of a crowd-funding service constitutes the provision, by the person, of a financial service for the purposes of this Division.

(1D) For the purposes of this Division, the persons to whom, and time when, a crowd-funding service is provided are as specified in subsections 766F(3) and (4) of the *Corporations Act 2001*.

(2) The regulations may set out:

(a) the circumstances in which persons facilitating the provision of a financial service (for example, by publishing information) are taken also to provide that service; or

(b) the circumstances in which persons are taken to provide, or are taken not to provide, a financial service.

(4) For the purposes of this section, a person is not ***operating a registered scheme*** merely because:

(a) they are acting as an agent or employee of another person; or

(b) they are taking steps to wind up the scheme.

*Meaning of **financial product advice***

(5) For the purposes of this section, ***financial product advice*** means a recommendation or a statement of opinion, or a report of either of those things, that:

(a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or

(b) could reasonably be regarded as being intended to have such an influence;

but does not include anything in:

(c) a document prepared in accordance with requirements of Chapter 7 of the Corporations Act, other than a document of

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a kind prescribed by regulations made for the purposes of this paragraph; or

(d) any other document of a kind prescribed by regulations made for the purposes of this paragraph.

(6) Advice given by a lawyer in his or her professional capacity about matters of law, legal interpretation or the application of the law to any facts is not ***financial product advice***.

Meaning of ***dealing***

(7) For the purposes of this section, the following conduct constitutes ***dealing*** in a financial product:

(a) applying for or acquiring a financial product;

(b) issuing a financial product;

(c) in relation to securities or interests in managed investment schemes—underwriting the securities or interests;

(d) varying a financial product;

(e) disposing of a financial product.

Note: A notified foreign passport fund is a managed investment scheme for the purposes of this Act and the Corporations Act, see subsection 5(2) of this Act and section 1213E of the Corporations Act.

(8) Arranging for a person to engage in conduct referred to in subsection (7) is also ***dealing*** in a financial product, unless the actions concerned amount to providing financial product advice.

(9) A person is taken not to ***deal*** in a financial product if the person deals in the product on their own behalf, unless:

(a) the person is an issuer of financial products; and

(b) the dealing is in relation to one or more of those products.

(10) The regulations may prescribe conduct that is taken to be, or not to be, ***dealing*** in a financial product. Regulations made for the purposes of this subsection have effect despite anything else in this section.

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*Meaning of **makes a market** for a financial product*

(11) For the purposes of this section, a person ***makes a market*** for a financial product if:

(a) either through a facility, at a place or otherwise, the person regularly states the prices at which they propose to acquire or dispose of financial products on their own behalf; and

(b) other persons have a reasonable expectation that they will be able to regularly effect transactions at the stated prices; and

(c) the actions of the person do not, or would not if they happened through a facility or at a place, constitute operating a financial market because of the effect of paragraph (16)(a).

*Meaning of provide a **custodial or depository service***

(12) For the purposes of this section, a person (the ***provider***) provides a ***custodial or depository service*** to another person (the ***client***) if, under an arrangement between the provider and the client, or between the provider and another person with whom the client has an arrangement, (whether or not there are also other parties to any such arrangement), a financial product, or a beneficial interest in a financial product, is held by the provider in trust for, or on behalf of, the client or another person nominated by the client.

(14) However, the following conduct does not constitute providing a ***custodial or depository service***:

(a) the operation of a clearing and settlement facility;

(b) the operation of a registered scheme, or the holding of the assets of a registered scheme;

(ba) the operation of a notified foreign passport fund;

(bb) the holding of the assets of a notified foreign passport fund;

(c) the operation of:

(i) a regulated superannuation fund; or

(ii) an AFCA regulated superannuation scheme; or

(iii) an approved deposit fund; or

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(iv) a pooled superannuation trust;

(d) the provision of services to a related body corporate;

(da) operating as a CCIV;

(db) operating the business and conducting the affairs of a CCIV;

(dc) holding the money or property of a CCIV;

(e) any other conduct of a kind prescribed by regulations made for the purposes of this paragraph.

Note: Holding the assets of a sub-fund of a CCIV is covered by paragraph (dc) and does not constitute providing a ***custodial or depository service***.

Meaning of ***financial market***

(15) For the purposes of this section, a ***financial market*** is a facility through which:

(a) offers to acquire or dispose of financial products are regularly made or accepted; or

(b) offers or invitations are regularly made to acquire or dispose of financial products that are intended to result or may reasonably be expected to result, directly or indirectly, in:

(i) the making of offers to acquire or dispose of financial products; or

(ii) the acceptance of such offers.

(16) However, the following conduct does not constitute operating a ***financial market*** for the purposes of this section:

(a) a person making or accepting offers or invitations to acquire or dispose of financial products on the person's own behalf, or on behalf of one party to the transaction only;

(b) conducting treasury operations between related bodies corporate;

(c) conducting an auction of forfeited shares;

(d) any other conduct of a kind prescribed by regulations made for the purposes of this paragraph.

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*Meaning of **clearing and settlement facility***

(17) For the purposes of this section, a ***clearing and settlement facility*** is a facility that provides a regular mechanism for the parties to transactions relating to financial products to meet obligations to each other that:

(a) arise from entering into the transactions; and

(b) are of a kind prescribed by regulations made for the purposes of this paragraph.

(18) However, the following conduct does not constitute operating a ***clearing and settlement facility*** for the purposes of this section:

(a) an ADI (within the meaning of the *Banking Act 1959*) acting in the ordinary course of its banking business;

(b) a person acting on their own behalf, or on behalf of one party to a transaction only;

(c) a person who provides financial services to another person dealing with the other person's accounts in the ordinary course of the first person's business activities;

(d) the actions of a participant in a clearing and settlement facility who has taken on the delivery or payment obligations, in relation to a particular financial product, of another person who is a party to a transaction relating to a financial product;

(e) conducting treasury operations between related bodies corporate;

(h) operating a facility for the exchange and settlement of non-cash payments between providers of non-cash payment facilities;

(i) any other conduct of a kind prescribed by regulations made for the purposes of this paragraph.

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12BB Misleading representations with respect to future matters

(1) If:

(a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and

(b) the person does not have reasonable grounds for making the representation;

the representation is taken, for the purposes of Subdivision D (sections 12DA to 12DN), to be ***misleading***.

(2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:

(a) a party to the proceeding; or

(b) any other person;

the party or other person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.

(3) To avoid doubt, subsection (2) does not:

(a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making the representation; or

(b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.

(4) Subsection (1) does not by implication limit 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;

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and, in particular, does not imply that a representation that a person makes with respect to any future matter is not misleading merely because the person has reasonable grounds for making the representation.

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 consumption; or

(c) if the services were acquired for use or consumption in connection with a small business (see subsection (2)) and the price of the services exceeded the prescribed amount—the services were of a kind ordinarily acquired for business use or consumption.

(2) For the purposes of subsection (1):

small business means a business employing less than:

(a) if the business is or includes the manufacture of goods—100 people; or

(b) otherwise—20 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

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(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,

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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 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

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(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.

12BEA Asserting a right to payment

(1) For the purposes of this Division, a person is taken to ***assert a right to payment*** from another person if the person:

(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 other 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 that:

(i) states the amount of the payment; or

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(ii) sets out the price of unsolicited financial services; or

(iii) sets out the charge for an advertisement, for financial services, that has been published;

and does not contain a statement, to the effect that the document is not an assertion of a right to a payment, that complies with any requirements prescribed by the regulations.

(2) For the purposes of this section, an invoice or other document purporting to have been sent by or on behalf of a person is taken to have been sent by that person unless the contrary is established.

Subdivision BA—Unfair contract terms

12BF Unfair terms of consumer contracts and small business contracts

(1) A term of a consumer contract or small business contract is void if:

(a) the term is unfair; and

(b) the contract is a standard form contract; and

(c) the contract is:

(i) a financial product; or

(ii) a contract for the supply, or possible supply, of services that are financial services.

(2) The contract continues to bind the parties if it is capable of operating without the unfair term.

(2A) A person contravenes this subsection if:

(a) the person makes a contract; and

(b) the contract is a consumer contract or small business contract; and

(c) the contract is a standard form contract; and

(d) the contract is either a financial product or a contract for the supply, or possible supply, of financial services; and

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(e) a term of the contract is unfair; and
(f) the person proposed the unfair term.

(2B) A person who contravenes subsection (2A) commits a separate contravention of that subsection in respect of each term that is unfair and that the person proposed.

(2C) A person contravenes this subsection if:
(a) the person applies or relies on, or purports to apply or rely on, a term of a contract; and
(b) the contract is a consumer contract or small business contract; and
(c) the contract is a standard form contract; and
(d) the contract is either a financial product or a contract for the supply, or possible supply, of financial services; and
(e) the term is unfair.

(3) A ***consumer contract*** is a contract at least one of the parties to which is an individual whose acquisition of what is supplied under the contract is wholly or predominantly an acquisition for personal, domestic or household use or consumption.

(4) A contract is a ***small business contract*** if:
(a) the upfront price payable under the contract does not exceed $5,000,000; and
(b) at least one party to the contract satisfies either or both of the following conditions:
(i) the party makes the contract in the course of carrying on a business and at a time when the party employs fewer than 100 persons;
(ii) the party's turnover, worked out under subsection (7) for the party's last income year (within the meaning of the *Income Tax Assessment Act 1997*) that ended at or before the time when the contract is made, is less than $10,000,000.

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(5) For the purposes of paragraph (4)(a), in working out the upfront price payable under a contract under which credit is provided or is to be provided, disregard any interest payable under the contract.

(6) In counting for the purposes of subparagraph (4)(b)(i) the number of persons that a person employs:
   (a) a casual employee is not to be counted unless employed on a regular and systematic basis; and
   (b) a part-time employee (including a part-time casual employee counted under paragraph (a) of this subsection) is to be counted as an appropriate fraction of a full-time equivalent.

(7) For the purposes subparagraph (4)(b)(ii), a party's turnover for a period is the sum of the values of all supplies the party made during the period, other than the following:
   (a) supplies that are input taxed;
   (b) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*);
   (c) supplies that are not made in connection with an enterprise that the party carries on;
   (d) supplies that are not connected with the indirect tax zone.

(8) Expressions used in subsection (7) that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning as in that Act.

Note: This section applies to Insurance Contracts Act insurance contracts in addition to the *Insurance Contracts Act 1984* (see paragraph 15(2)(d) of that Act).

12BG Meaning of *unfair*

(1) A term of a contract referred to in section 12BF is ***unfair*** if:
   (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

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(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

(2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:

(b) the extent to which the term is transparent;

(c) the contract as a whole.

(3) A term is ***transparent*** if the term is:

(a) expressed in reasonably plain language; and

(b) legible; and

(c) presented clearly; and

(d) readily available to any party affected by the term.

(4) For the purposes of paragraph (1)(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

12BH Examples of unfair terms

(1) Without limiting section 12BG, the following are examples of the kinds of terms of a contract referred to in section 12BF that may be unfair:

(a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;

(b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;

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(c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;

(d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;

(e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;

(f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;

(g) a term that permits, or has the effect of permitting, one party unilaterally to vary financial services to be supplied under the contract;

(h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;

(i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;

(j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;

(k) a term that limits, or has the effect of limiting, one party's right to sue another party;

(l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;

(m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;

(n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

(2) Before the Governor-General makes a regulation for the purposes of paragraph (1)(n) prescribing a kind of term, or a kind of effect that a term has, the Minister must take into consideration:

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(a) the detriment that a term of that kind would cause to consumers; and

(aa) the detriment that a term of that kind would cause to persons who carry on a business and employ fewer than 100 persons; and

(b) the impact on business generally of prescribing that kind of term or effect; and

(c) the public interest.

12BI Terms that define main subject matter of consumer contracts or small business contracts etc. are unaffected

(1) Section 12BF does not apply to a term of a contract to the extent, but only to the extent, that:

(a) the term defines the main subject matter of the contract; or

(b) the term sets the upfront price payable under the contract; or

(c) the term is required, or expressly permitted, by a law of the Commonwealth or of a State or Territory; or

(d) the term is included in the contract, or is taken to be so included, by operation of a law of the Commonwealth, or of a State or Territory, that regulates the contract; or

(e) inclusion of the term has either or both of the following results:

(i) one or more other terms are included in the contract, or are taken to be so included, by operation of a law of the Commonwealth, or of a State or Territory, that regulates the contract;

(ii) such a law requires one or more other terms to be included in the contract; or

(f) if the contract is an Insurance Contracts Act insurance contract—the term is a transparent term and:

(i) is disclosed at or before the time when the contract is made; and

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(ii) sets an amount of excess or deductible under the contract.

(2) The ***upfront price*** payable under a contract is the consideration that:

(a) is provided, or is to be provided, for the supply under the contract; and

(b) is disclosed at or before the time the contract is entered into;

but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

(3) To avoid doubt, if a contract is a contract under which credit is provided or is to be provided, the consideration referred to in subsection (2) of this section includes the total amount of principal that is owed under the contract.

(4) For the purposes of applying paragraph (1)(a) to an Insurance Contracts Act insurance contract, have regard to the main subject matter of the contract only to the extent that it describes what is being insured.

12BK Standard form contracts

(1) If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

(2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) whether one of the parties has all or most of the bargaining power relating to the transaction;

(ba) whether one of the parties has made another contract, in the same or substantially similar terms, prepared by that party, and, if so, how many such contracts that party has made;

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(b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;

(c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in subsection 12BI(1)) in the form in which they were presented;

(d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in subsection 12BI(1);

(e) whether the terms of the contract (other than the terms referred to in subsection 12BI(1)) take into account the specific characteristics of another party or the particular transaction;

(f) any other matter prescribed by the regulations.

(3) A contract may be determined to be a standard form contract despite the existence of one or more of following:

(a) an opportunity for a party to negotiate changes, to terms of the contract, that are minor or insubstantial in effect;

(b) an opportunity for a party to select a term from a range of options determined by another party;

(c) an opportunity for a party to another contract or proposed contract to negotiate terms of the other contract or proposed contract.

12BL Contracts to which this Subdivision does not apply

(1) This Subdivision does not apply to a contract that is the constitution of a company, managed investment scheme or other kind of body.

(1A) This Subdivision does not apply to a contract of insurance:

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(a) under which a person provides medical indemnity cover (within the meaning of the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*) for:
(i) a medical practitioner (within the meaning of that Act); or
(ii) a registered health professional (within the meaning of that Act) prescribed by regulations made under that Act for the purposes of a provision of Part 3 of that Act; and
(b) to which that Act applies.

(2) This Subdivision does not apply to a small business contract to which a prescribed law of the Commonwealth, a State or a Territory applies.

(3) Before the Governor-General makes a regulation prescribing a law for the purposes of subsection (2):
(a) the Minister must be satisfied that the law provides enforceable protections for persons who carry on a business and employ fewer than 100 persons that are equivalent to the protections provided by this Subdivision together with Subdivision G; and
(b) the Minister must take into consideration:
(i) any detriment to businesses of that kind resulting from prescribing the law; and
(ii) the impact on business generally resulting from prescribing the law; and
(iii) the public interest.

Note: A notified foreign passport fund is a managed investment scheme for the purposes of this Act and the Corporations Act, see subsection 5(2) of this Act and section 1213E of the Corporations Act.

(4) This Subdivision does not apply to a contract:
(a) that establishes, contains or incorporates rules governing the operation of a payment or settlement system approved under section 9 of the *Payment Systems and Netting Act 1998*; or

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(b) that is made in the course of, or for the purposes of, operating such a system.

12BLA Replacement life insurance contracts to which this Subdivision does not apply

(1) This Subdivision does not apply, and is taken never to have applied, to a contract made on or after 5 April 2021 that constitutes a life policy within the meaning of the *Life Insurance Act 1995* and:

(a) replaces as mentioned in subsection (2) of this section:

(i) a contract that constitutes a life policy within the meaning of that Act and was made before 5 April 2021; or

(ii) a contract to which this Subdivision does not apply because of one or more previous applications of this section; or

(b) links, as mentioned in subsection (3) of this section, 2 or more contracts, each of which is a contract of a kind referred to in subparagraph (a)(i) or (ii) of this subsection; or

(c) is one of 2 or more contracts that unlink, as mentioned in subsection (4) of this section, a contract of a kind referred to in subparagraph (a)(i) or (ii) of this subsection.

Note: 5 April 2021 is the day on which Schedule 1 to the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* commenced.

(2) For the purposes of paragraph (1)(a), a contract (the ***replacement policy***) ***replaces*** another contract (the ***previous policy***) if:

(a) the replacement policy reinstates the previous policy and is issued at the request of the owner of the previous policy after the previous policy lapses; or

(b) the replacement policy is a reissue of the previous policy to correct an administrative error in the previous policy; or

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(c) the replacement policy is issued, at the request of the owner of the previous policy, for one or more of the following reasons:

(i) to change the ownership of the policy;

(ii) to extend or vary, in accordance with a term of the previous policy, the cover provided under the policy;

(iii) to change the terms relating to premiums paid under the policy.

(3) For the purposes of paragraph (1)(b), a contract (the ***replacement policy***) ***links*** 2 or more contracts (the ***previous policies***) if the only differences between the terms and effect of the replacement policy and those of the previous policies taken together are attributable to linking the cover under the respective previous policies to form the cover under the replacement policy.

(4) For the purposes of paragraph (1)(c), 2 or more contracts (the ***replacement policies***) ***unlink*** a contract (the ***previous policy***) if the only differences between the terms and effect of the replacement policies taken together and those of the previous policy are attributable to unlinking elements of the cover under the previous policy to form the cover under the respective replacement policies.

12BLB Renewed life insurance contracts to which this Subdivision does not apply

(1) If a contract covered by subsection (2) or (3) is renewed, or was renewed on or after 5 April 2021, this Subdivision does not apply, and is taken never to have applied, to the contract as renewed.

Note: 5 April 2021 is the day on which Schedule 1 to the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* commenced.

(2) This subsection covers a contract that:

(a) constitutes a life policy within the meaning of the *Life Insurance Act 1995*; and

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(b) was made before 5 April 2021; and
(c) either:
(i) is guaranteed renewable; or
(ii) the insurer guarantees not to cancel in response to a change in the risk.

(3) This subsection covers a contract to which this Subdivision does not apply because of one or more previous applications of this section.

12BLC This Subdivision does not apply to certain contracts connected with financial markets

(1) This Subdivision does not apply to a contract:
(a) that exists because of:
(i) section 793B of the Corporations Act (legal effect of operating rules of a licensed market); or
(ii) section 822B of that Act (legal effect of operating rules of a licensed CS facility); or
(b) that is made under, or in accordance with:
(i) the operating rules of a licensed market; or
(ii) the operating rules of a licensed CS facility.

Note: A licensed CS facility is a clearing and settlement facility whose operation is authorised by an Australian CS facility licence.

(2) This Subdivision does not apply to a contract between:
(a) the operator of a licensed market; and
(b) any of the following:
(i) an entity included in the market's official list;
(ii) the responsible entity for a registered scheme that is so included;
(iii) the operator of a foreign passport fund that is so included;

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to the extent that the contract consists of, or includes, listing rules of the licensed market.

12BM Contraventions of this Subdivision etc.

Conduct is not taken, for the purposes of this Act, to contravene this Subdivision (or this Division) merely because of subsection 12BF(1).

Subdivision C—Unconscionable conduct

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

(1) A person 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 in connection with financial services

(1) A person must not, in trade or commerce, in connection with:
   (a) the supply or possible supply of financial services to a person; or
   (b) the acquisition or possible acquisition of financial services from a person;

engage in conduct that is, in all the circumstances, unconscionable.

(2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:
   (a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or

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(b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.

(3) For the purpose of determining whether a person has contravened subsection (1):

(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.

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law of the States and Territories relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

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12CC Matters the court may have regard to for the purposes of section 12CB

(1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the ***supplier***) has contravened section 12CB in connection with the supply or possible supply of financial services to a person (the ***service recipient***), the court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the service recipient; and

(b) whether, as a result of conduct engaged in by the supplier, the service recipient was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the service recipient was able to understand any documents relating to the supply or possible supply of the financial services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the service recipient or a person acting on behalf of the service recipient by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the financial services; and

(e) the amount for which, and the circumstances under which, the service recipient could have acquired identical or equivalent financial services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the service recipient was consistent with the supplier's conduct in similar transactions between the supplier and other like service recipients; and

(g) if the supplier is a corporation—the requirements of any applicable industry code (see subsection (3)); and

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(h) the requirements of any other industry code (see subsection (3)), if the service recipient acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the service recipient:

(i) any intended conduct of the supplier that might affect the interests of the service recipient; and

(ii) any risks to the service recipient arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the service recipient); and

(j) if there is a contract between the supplier and the service recipient for the supply of the financial services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the service recipient; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the service recipient in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the service recipient engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the service recipient for the supply of the financial services; and

(l) the extent to which the supplier and the service recipient acted in good faith.

(2) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the ***acquirer***) has contravened section 12CB in connection with the acquisition or

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possible acquisition of financial services from a person (the ***supplier***), the court may have regard to:

(a) the relative strengths of the bargaining positions of the acquirer and the supplier; and

(b) whether, as a result of conduct engaged in by the acquirer, the supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and

(c) whether the supplier was able to understand any documents relating to the acquisition or possible acquisition of the financial services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the supplier or a person acting on behalf of the supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the financial services; and

(e) the amount for which, and the circumstances in which, the supplier could have supplied identical or equivalent financial services to a person other than the acquirer; and

(f) the extent to which the acquirer's conduct towards the supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like suppliers; and

(g) the requirements of any applicable industry code (see subsection (3)); and

(h) the requirements of any other industry code (see subsection (3)), if the supplier acted on the reasonable belief that the acquirer would comply with that code; and

(i) the extent to which the acquirer unreasonably failed to disclose to the supplier:

(i) any intended conduct of the acquirer that might affect the interests of the supplier; and

(ii) any risks to the supplier arising from the acquirer's intended conduct (being risks that the acquirer should

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have foreseen would not be apparent to the supplier); and

(j) if there is a contract between the acquirer and the supplier for the acquisition of the financial services:

(i) the extent to which the acquirer was willing to negotiate the terms and conditions of the contract with the supplier; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the acquirer and the supplier in complying with the terms and conditions of the contract; and

(iv) any conduct that the acquirer or the supplier engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the supplier for the acquisition of the financial services; and

(l) the extent to which the acquirer and the supplier acted in good faith.

(3) In this section:

applicable industry code, in relation to a corporation, has the same meaning as it has in subsection 51ACA(1) of the *Competition and Consumer Act 2010*.

industry code has the same meaning as it has in subsection 51ACA(1) of the *Competition and Consumer Act 2010*.

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Subdivision D—Consumer protection

12DA Misleading or deceptive conduct

(1) A person 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.

(1A) Conduct:

(a) that contravenes:

(i) section 670A of the Corporations Act (misleading or deceptive takeover document); or

(ii) section 728 of the Corporations Act (misleading or deceptive fundraising document); or

(iii) section 738Y of the Corporations Act (other liabilities relating to CSF offer documents); or

(b) in relation to a disclosure document or statement within the meaning of section 953A of the Corporations Act; or

(c) in relation to a disclosure document or statement within the meaning of section 1022A of the Corporations Act;

does not contravene subsection (1). For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.

(2) Nothing in sections 12DB to 12DN limits by implication the generality of subsection (1).

(3) If a person engages in conduct that:

(a) does not contravene subsection 674A(2) of the Corporations Act, but would contravene that subsection if paragraph 674A(2)(d) of the Corporations Act contained the same text as paragraph 674(2)(d) of the Corporations Act; or

(b) does not contravene subsection 675A(2) of the Corporations Act, but would contravene that subsection if

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paragraph 675A(2)(b) of the Corporations Act contained the same text as paragraph 675(2)(b) of the Corporations Act;

the person's engaging in that conduct does not contravene subsection (1) of this section.

Note: The subsections mentioned in paragraphs (a) and (b) deal with continuous disclosure of information by disclosing entities.

(4) For the purposes of subsection (3), a person engages in conduct that contravenes a provision even if engaging in the conduct does not constitute an offence, or lead to a liability, because of the availability of a defence.

12DB False or misleading representations

(1) A person 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) make a false or misleading representation that services are of a particular standard, quality, value or grade; or

(b) make a false or misleading representation that a particular person has agreed to acquire services; or

(c) make a false or misleading representation that purports to be a testimonial by any person relating to services; or

(d) make a false or misleading representation concerning:

(i) a testimonial by any person; or

(ii) a representation that purports to be such a testimonial;

relating to services; or

(e) make a false or misleading representation that services have sponsorship, approval, performance characteristics, uses or benefits; or

(f) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or

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(g) make a false or misleading representation with respect to the price of services; or

(h) make a false or misleading representation concerning the need for any services; or

(i) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including an implied warranty under section 12ED); or

(j) make a false or misleading representation concerning a requirement to pay for a contractual right that:

(i) is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including an implied warranty under section 12ED); and

(ii) a person has under a law of the Commonwealth, a State or a Territory (other than an unwritten law).

Note: Failure to comply with this subsection is an offence (see section 12GB).

(1A) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation of a kind referred to in paragraph (1)(c) or (d), the representation is taken to be misleading unless evidence is adduced to the contrary.

(1B) To avoid doubt, subsection (1A) does not:

(a) have the effect that, merely because such evidence to the contrary is adduced, the representation is not misleading; or

(b) have the effect of placing on any person an onus of proving that the representation is not misleading.

(2) Conduct:

(a) that contravenes:

(i) section 670A of the Corporations Act (misleading or deceptive takeover document); or

(ii) section 728 of the Corporations Act (misleading or deceptive fundraising document); or

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(iii) section 738Y of the Corporations Act (other liabilities relating to CSF offer documents); or

(b) in relation to a disclosure document or statement within the meaning of section 953A of the Corporations Act; or

(c) in relation to a disclosure document or statement within the meaning of section 1022A of the Corporations Act;

does not contravene subsection (1). For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.

(3) An offence under subsection 12GB(1) relating to subsection (1) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

12DC False or misleading representations in relation to financial products that involve interests in land

(1) A person must not, in trade or commerce, in connection with the supply, or the possible supply, of a financial product that consists of, or includes, an interest in land, or in connection with the promotion by any means of a financial product that consists of, or includes, an interest in land:

(a) represent that the person 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 financial product, 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.

Note: Failure to comply with this subsection is an offence (see section 12GB).

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(1AA) Subsection (1) applies whether or not a representation is made before or after the financial product consists of, or includes, an interest in land.

(1A) An offence under subsection 12GB(1) relating to subsection (1) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(2A) A person contravenes this subsection if:

(a) a person uses physical force or undue harassment or coercion; and

(b) the person uses such force, harassment or coercion in connection with the supply, or the possible supply, of a financial product mentioned in subsection (1), or the payment for such a financial product.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(2B) Subsection (2A) applies whether or not a person uses physical force, undue harassment or coercion before or after the financial product consists of, or includes, an interest in land.

(2C) For the purposes of the application of the *Criminal Code* in relation to an offence under subsection 12GB(1), strict liability applies to paragraph (2A)(b) of this section.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(2D) Nothing in this section is to be taken as implying that other provisions in this Subdivision do not apply in relation to the supply or acquisition, or the possible supply or acquisition, of a financial product mentioned in subsection (1).

(3) In this section:

interest, in relation to land, means:

(a) a legal or equitable estate or interest in the land; or

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(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

(1) A person 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 person also specifies the cash price for the services.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(2) This section does not apply to dealings in securities (within the meaning of Chapter 6 of the Corporations Act).

(3) An offence under subsection 12GB(1) relating to subsection (1) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

12DE Offering rebates, gifts, prizes etc.

(1) A person contravenes this subsection if:

(a) the person offers any rebate, gift, prize or other free item; and

(b) the person offers the rebate, gift, prize or other free item in trade or commerce, in connection with:

(i) the supply or possible supply of financial services; or

(ii) the promotion by any means of the supply or use of financial services; or

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(iii) the supply or possible supply of a financial product that consists of, or includes, an interest in land; or

(iv) the promotion by any means of a financial product that consists of, or includes, an interest in land; and

(c) when the person so offers it, the person intends not to provide it, or not to provide it as offered.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(2) For the purposes of the application of the *Criminal Code* in relation to subsection (1), paragraphs (1)(b) and (c) are taken to be circumstances in which the conduct described in paragraph (1)(a) occurs.

(2A) A person contravenes this subsection if:

(a) the person offers any rebate, gift, prize or other free item; and

(b) the person offers the rebate, gift, prize or other free item in trade or commerce, in connection with:

(i) the supply or possible supply of financial services; or

(ii) the promotion by any means of the supply or use of financial services; or

(iii) the supply or possible supply of a financial product that consists of, or includes, an interest in land; or

(iv) the promotion by any means of a financial product that consists of, or includes, an interest in land; and

(c) the person fails, within the time specified in the offer or (if no such time is specified) within a reasonable time after making the offer, to provide the rebate, gift, prize or other free item in accordance with the offer.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(2B) Subsection (2A) does not apply if:

(a) the person's failure to provide the rebate, gift, prize or other free item in accordance with the offer was due to the act or

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omission of another person, or to some other cause beyond the person's control; and

(b) the person took reasonable precautions and exercised due diligence to avoid the failure.

(2C) Subsection (2A) does not apply to an offer that the person makes to another person if:

(a) the person offers to the other person a different rebate, gift, prize or other free item as a replacement; and

(b) the other person agrees to receive the different rebate, gift, prize or other free item.

(2D) For the purposes of the application of the *Criminal Code* in relation to subsection (2A), paragraph (2A)(b) is taken to be a circumstance in which the conduct described in paragraph (2A)(a) occurs.

(3) For the purposes of the application of the *Criminal Code* in relation to an offence under subsection 12GB(1), strict liability applies in relation to paragraphs (1)(b) and (2A)(b) and (c) of this section.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(3A) Subparagraph (1)(b)(iii) or (2A)(b)(iii) applies whether or not an offer is made before or after the financial product consists of, or includes, an interest in land.

(4) In this section:

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

12DF Certain misleading conduct in relation to financial services

(1) A person 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.

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Note: Failure to comply with this subsection is an offence (see section 12GB).

(2) An offence under subsection 12GB(1) relating to subsection (1) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

12DG Bait advertising

(1) A person must not, in trade or commerce, advertise financial services for supply at a specified price, if there are reasonable grounds, of which the person is aware or ought reasonably to be aware, for believing that the person 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 person carries on business and the nature of the advertisement.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(2) A person 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 person carries on business and the nature of the advertisement.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(2A) An offence under subsection 12GB(1) relating to subsection (1) or (2) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

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(3) In a prosecution of a person 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 person establishes that:

(a) it offered to supply, or to procure an alternative supplier 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 an alternative supplier 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 person has so supplied, or procured an alternative supplier to supply, services.

Note: A defendant bears a legal burden in relation to the matters in subsection (3), see section 13.4 of the *Criminal Code*.

12DH Referral selling

(1) A person must not, in trade or commerce, induce a consumer to acquire financial services by representing that the consumer will, after the contract to acquire the services is made, receive a rebate, commission or other benefit in return for:

(a) giving the person the names of prospective customers; or

(b) otherwise assisting the person 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.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(2) An offence under subsection 12GB(1) relating to subsection (1) of this section is an offence of strict liability.

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Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

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

(1) A person contravenes this subsection if:

(a) the person, in trade or commerce, accepts payment or other consideration for financial services; and

(b) at the time of acceptance, the person intends:

(i) not to supply the financial services; or

(ii) to supply financial services materially different from the financial services in respect of which the payment or other consideration is accepted.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(2) For the purposes of the application of the *Criminal Code* in relation to an offence under subsection 12GB(1), strict liability applies to paragraph (1)(a) of this section.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(3) A person contravenes this subsection if:

(a) the person, in trade or commerce, accepts payment or other consideration for financial services; and

(b) at the time of acceptance, there are reasonable grounds for believing that the person will not be able to supply the financial services within the period specified by the person or, if no period is specified, within a reasonable time.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(4) An offence under subsection 12GB(1) relating to subsection (3) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

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12DJ Harassment and coercion

(1) A person contravenes this subsection if:

(a) the person uses physical force or undue harassment or coercion; and

(b) the person uses such force, harassment or coercion in connection with the supply or possible supply of financial services to a consumer, or the payment for financial services by a consumer.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(2) Strict liability applies to paragraph (1)(b).

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

12DK Pyramid selling of financial products

(1) A person contravenes this section if:

(a) the person 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) another person (the ***targeted 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 person; and

(c) the targeted 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.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(2) A person also contravenes this section if:

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(a) the person 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 person, by holding out to another person (the ***targeted person***) the prospect of receiving payments or other benefits in respect of the introduction (whether by the targeted person or by another person) of other persons who become participants in that trading scheme, attempts to induce the targeted person:

(i) if the targeted person 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 the targeted person 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).

Note: Failure to comply with this subsection is an offence (see section 12GB).

(3) A person (the ***promoter***) also contravenes this section if the promoter promotes, or takes part in the promotion of, a scheme under which:

(a) a payment is to be made by another person (the ***targeted person***) who participates, or who has applied or been invited to participate, in the scheme to or for the benefit of the promoter or another person who takes part in the promotion of the scheme or to or for the benefit of any person other than the targeted person who participates in the scheme; and

(b) the inducement for making the payment is the holding out to the targeted person the prospect of receiving payments from other persons who may participate in the scheme.

Note: Failure to comply with this subsection is an offence (see section 12GB).

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(3A) An offence under subsection 12GB(1) relating to subsection (1), (2) or (3) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(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) financial products 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 financial products 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 is taken to include the element referred to in paragraph (5)(b) whether a participant who is not a promoter

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acts in relation to a transaction referred to in that paragraph in the capacity of an employee 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 financial product by a person includes a reference to the provision of a financial product under arrangements to which that person is a party.

12DL Unsolicited credit cards and debit cards

(1) A person must not send another person (the ***targeted person***) a credit card or a debit card except in accordance with subsection (2).

Note: Failure to comply with this subsection is an offence (see section 12GB).

(2) A person may send the targeted person the card:

(a) in pursuance of a request in writing by the person (the ***liable person***) who will be under a liability to the issuer of 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 targeted person in pursuance of a request in writing by the liable person to the issuer of the previous card; or

(ii) a card of the same kind previously sent to the targeted person and used for a purpose for which it was intended to be used.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3) of the *Criminal Code*.

(3) Subsection (1) applies only in relation to the sending of a card by or on behalf of the issuer of the card.

(4) A person must not take any action that enables:

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(a) another person who has a credit card to use the card as a debit card; or

(b) another person who has a debit card to use the card as a credit card;

except in accordance with a request in writing by the other person.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(4A) An offence under subsection 12GB(1) relating to subsection (1) or (4) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(5) In this section:

article includes a token, card or document.

credit card means an article that:

(a) is of a kind described in one or more of the following subparagraphs:

(i) an article of a kind commonly known as a credit card;

(ii) a similar article intended for use in obtaining cash, goods or services on credit;

(iii) an 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; and

(b) is part of, or provides access to, a credit facility that is a financial product;

or an article that may be used as an article referred to in paragraphs (a) and (b).

debit card means:

(a) an article intended for use by a person in obtaining access to an account that is:

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(i) held by the person for the purpose of withdrawing or depositing cash or obtaining goods or services; and

(ii) a financial product; or

(b) an article that may be used as an article referred to in paragraph (a).

12DM Assertion of right to payment for unsolicited financial services etc.

(1) A person must not, in trade or commerce, assert a right to payment from another person for unsolicited financial services.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(1A) Subsection (1) does not apply if the person had reasonable cause to believe that there was a right to payment.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A), see subsection 13.3(3) of the *Criminal Code*.

(1AA) A person must not, in trade or commerce, send to another person an invoice or other document that:

(a) states the amount of a payment, or sets out the charge, for supplying unsolicited financial services; and

(b) does not contain a warning statement that complies with the requirements set out in the regulations.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(1AB) Subsection (1AA) does not apply if the person had reasonable cause to believe that there was a right to the payment or charge.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1AB), see subsection 13.3(3) of the *Criminal Code*.

(1B) An offence under subsection 12GB(1) relating to subsection (1) or (1AA) of this section is an offence of strict liability.

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Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(4) In a proceeding against a person in respect of a contravention of this section, the burden lies on the person of proving that the person had reasonable cause to believe that there was a right to payment.

12DMA Liability of recipient for unsolicited financial services etc.

If a person, in trade or commerce, supplies unsolicited financial services to another person, the other person:

(a) is not liable to make any payment for the services or products; and

(b) is not liable for loss or damage as a result of the supply of the services or products.

12DMB Assertion of right to payment for unauthorised advertisements

(1) A person must not assert a right to payment from another person of a charge for placing, in a publication, an advertisement, for financial services, relating to:

(a) the other person; or

(b) the other person's profession, business, trade or occupation;

unless the person knows, or has reasonable cause to believe, that the other person authorised the placing of the advertisement.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(2) A person must not send to another person an invoice or other document that:

(a) states the amount of a payment, or sets out the charge for placing, in a publication, an advertisement, for financial services, relating to:

(i) the other person; or

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(ii) the other person's profession, business, trade or occupation; and

(b) does not contain a warning statement that complies with the requirements set out in the regulations;

unless the person knows, or has reasonable cause to believe, that the other person authorised the placing of the advertisement.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(3) Subsections (1) and (2) do not apply to an advertisement that is placed in a publication published by a person who is:

(a) the publisher of a publication that has an audited circulation of 10,000 copies or more per week, as confirmed by the most recent audit of the publication by a body specified in the regulations; or

(b) a body corporate related to such a publisher; or

(c) the Commonwealth, a State or a Territory, or an authority of the Commonwealth, a State or a Territory; or

(d) a person specified in the regulations.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3): see subsection 13.3(3) of the Criminal Code.

(4) A person:

(a) is not liable to make any payment to another person; and

(b) is entitled to recover by action in a court of competent jurisdiction against another person any payment made by the person to the other person;

in full or part satisfaction of a charge for placing, in a publication, an advertisement for financial services, unless the person has authorised the publishing of the advertisement.

(5) A person is not taken for the purposes of this section to have authorised the placing, in a publication, of an advertisement, unless:

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(a) a document authorising the placing of the advertisement has been signed by the person or by another person authorised by him or her; and

(b) a copy of the document has been given to the person before the right to payment of a charge for the placing of the advertisement is asserted; and

(c) the document specifies:

(i) the name and address of the person placing the advertisement; and

(ii) particulars of the advertisement; and

(iii) the amount of the charge for the placing of the advertisement, or the basis on which the charge is, or is to be, calculated.

(6) In a proceeding against a person in relation to a contravention of this section, the person bears the onus of proving that the person knew or had reasonable cause to believe that the person against whom a right to payment was asserted had authorised the placing of the advertisement.

12DMC Caps on commissions for add-on risk products supplied in connection with motor vehicles

Commissions not to exceed determined caps

(1) A person contravenes this subsection if:

(a) the person provides a commission to another person, or receives a commission from another person, in connection with the supply (by any person to any person) of a financial service; and

(b) the financial service is the provision of an add-on risk product to a person (the ***product recipient***) in connection with:

(i) the sale or long-term lease of a motor vehicle to the product recipient; or

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(ii) the provision of credit connected with the sale or long-term lease of a motor vehicle to the product recipient; or

(iii) the provision of a warranty by the product recipient in connection with the sale or long-term lease of a motor vehicle to another person by the product recipient; and

(c) the person acquiring the motor vehicle does so as a consumer (within the meaning of the Australian Consumer Law); and

(d) providing the add-on risk product is covered by a determination under subsection (3); and

(e) the value of the commission exceeds the cap that applies, under that determination, to providing the add-on risk product.

Note: For the value of the commission, see subsections (5) to (7).

*Meaning of **add-on risk product***

(2) An ***add-on risk product*** is a financial product that is a facility through which, or through the acquisition of which, a person manages financial risk (within the meaning of subsection 12BAA(5)).

ASIC may determine caps

(3) ASIC may, by legislative instrument, determine a cap on the value of commissions provided in connection with an add-on risk product of a kind specified in the instrument.

(4) Without limiting subsection (5), the determination may do either or both of the following:

(a) limit the circumstances in which provision of an add-on risk product of that kind is covered by the determination;

(b) provide for the way in which the value of commissions is to be ascertained for the purposes of the determination.

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Valuing commissions

(5) The value of a commission provided in connection with an add-on risk product is:
  (a) the value ascertained in accordance with the determination under subsection (3) that covers the provision of the add-on risk product; or
  (b) if the determination does not provide for the way in which the value is to be ascertained—the sum of:
    (i) to the extent that the commission is expressed as an amount of money—that amount; and
    (ii) otherwise—the market value of so much of the commission as is not expressed as an amount of money.

(6) In working out the market value of something for the purposes of subparagraph (5)(b)(ii) disregard anything that would prevent or restrict its conversion to money.

(7) If a commission is provided in connection with 2 or more add-on risk products, apportion the value of the commission between the add-on risk products:
  (a) in accordance with the determination under subsection (3) that covers the provision of the add-on risk products; or
  (b) if the determination does not provide for such apportionment—on a reasonable basis.

Multiple commissions

(8) For the purposes of this Act, if more than one commission is provided (by one or more persons to one or more persons) in connection with the add-on risk product, subsection (1) applies as if:
  (a) one single commission is provided that comprises all of those commissions; and

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(b) if those commissions are provided by more than one person—that single commission is jointly provided by all of those persons; and

(c) the value of that single commission is the sum of the values of all of those commissions.

Commissions for consumer credit insurance

(9) This section does not affect the application of section 145 of the National Credit Code to a commission paid in connection with consumer credit insurance (within the meaning of the National Credit Code) unless the insurance:

(a) is an add-on risk product of a kind covered by a determination under subsection (3); and

(b) is provided in connection with:

(i) the sale or long-term lease of a motor vehicle; or

(ii) the provision of credit connected with the sale or long-term lease of a motor vehicle.

Note: In the absence of an applicable determination under subsection (3), section 145 of the National Credit Code imposes a 20% cap on commissions provided in connection with consumer credit insurance.

12DN Application of provisions of this Division to information providers

General rule

(1) Sections 12DA, 12DB, 12DC and 12DF do not apply to a publication of matter by an information provider if:

(a) in any case—the information provider made the publication in the course of carrying on a business of providing information; or

(b) if the information provider is the Australian Broadcasting Corporation, the Special Broadcasting Service Corporation or the holder of a licence granted under the *Broadcasting*

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Services Act 1992—the publication was by way of a radio or television broadcast by the information provider.

Exception—advertisements

(2) Subsection (1) does not apply to a publication of an advertisement.

Exception—information provider connected with supply of financial services

(3) Subsection (1) does not apply to a publication of matter in connection with the supply or possible supply of, or the promotion by any means of the supply or use of, financial services (the ***publicised financial services***), if:

(a) the publicised financial services were services of a kind supplied by the information provider or, if the information provider is a body corporate, by a body corporate that is related to the information provider; or

(b) the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with, a person who supplies financial services of the same kind as the publicised financial services; or

(c) the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with, a body corporate that is related to a body corporate that supplies financial services of the same kind as the publicised financial services.

Exception—information provider connected with supply etc. of financial products consisting of etc. interests in land

(4) Subsection (1) does not apply to a publication of matter in connection with the supply, or the possible supply, of financial products that consist of, or include, interests in land, or the promotion by any means of the supply of financial products that

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consist of, or include, interests in land (the ***publicised financial products***), if:

(a) the publicised financial products were interests of a kind supplied by the information provider or, if the information provider is a body corporate, by a body corporate that is related to the information provider; or

(b) the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with, a person who supplies financial products of the same kind as the publicised financial products; or

(c) the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with, a body corporate that is related to a body corporate that supplies financial products of the same kind as the publicised financial products.

(4A) Subsection (4) applies whether or not a matter is published before or after the financial product consists of, or includes, an interest in land.

Definitions

(5) In this section:

information provider means a person who carries on a business of providing information.

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

(6) Without limiting subsection (5), each of the following is an ***information provider***:

(a) the holder of a licence granted under the *Broadcasting Services Act 1992*;

(b) a person who is the provider of a broadcasting service under a class licence under that Act;

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(c) the holder of a licence continued in force by section 5(1) of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*;
(d) the Australian Broadcasting Corporation;
(e) the Special Broadcasting Service Corporation.

Subdivision DA—Deferred sales for add-on insurance products

12DO Meaning of *add-on insurance product*

(1) An ***add-on insurance product***, in relation to another product or service (the ***principal product or service***), is a financial product that:
(a) is offered or sold to a consumer (the ***customer***) in connection with the customer acquiring, or entering into a commitment to acquire, the principal product or service; and
(b) is offered or sold by:
(i) the provider of the principal product or service; or
(ii) another person, in accordance with an arrangement to which the provider of the principal product or service is a party; and
(c) manages financial risk (within the meaning of section 12BAA) relating to the principal product or service; and
(d) either:
(i) is a contract of insurance; or
(ii) provides for the customer to benefit from a contract of insurance to which the provider of the financial product is a party.

(2) For the purposes of subsection (1), ***contract of insurance*** includes:
(a) a contract that would ordinarily be regarded as a contract of insurance even if some of its provisions are not by way of insurance; and

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(b) a contract that includes provisions of insurance in so far as those provisions are concerned, even if the contract would not ordinarily be regarded as a contract of insurance.

(3) The regulations may provide that a customer is, for the purposes of this Subdivision, taken to have entered into a commitment to acquire a product or service of a specified class at a time specified in the regulations.

12DP Meaning of *add-on insurance deferral period* and *add-on insurance pre-deferral period*

(1) If a person (the ***customer***) who acquires, or enters into a commitment to acquire, a product or service (the ***principal product or service***) is given the information determined under paragraph (4)(a), in the form and manner determined under paragraph (4)(b), in connection with the acquisition or proposed acquisition, then:

(a) there is an ***add-on insurance deferral period*** in relation to the customer acquiring, or entering into a commitment to acquire, the principal product or service; and

(b) the add-on insurance deferral period is the period beginning at the later of:

(i) the time the customer enters into the commitment (or, if the customer acquires the principal product or service without previously entering into a commitment to do so, the time the customer acquires the principal product or service); and

(ii) the time the customer is given the information;

and ending at the end of 4 days after the day on which the period begins.

(2) If the information determined under paragraph (4)(a) is not given in the form and manner determined under paragraph (4)(b) in connection with the acquisition or proposed acquisition, there is no

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add-on insurance deferral period in relation to the customer acquiring, or entering into a commitment to acquire, the principal product or service.

Note: There is no obligation for a person who provides a product or service to give the information to a customer. However, if the information is not given and there is no add-on insurance deferral period, certain conduct relating to the sale or offer of add-on insurance products may be prohibited (see sections 12DQ to 12DR).

(3) The ***add-on insurance pre-deferral period*** in relation to the principal product or service is a period that:

(a) begins when the customer indicates an intention to acquire the principal product or service; and

(b) if there is an add-on insurance deferral period in relation to the customer acquiring, or entering into a commitment to acquire, the principal product or service—ends immediately before the start of that period; and

(c) if there is no such add-on insurance deferral period—does not end.

(4) ASIC may, by legislative instrument, determine the following:

(a) information to be given for the purposes of subsection (1);

(b) the form and manner in which the information is to be given (which may require the information to be given to a particular customer each time the customer enters into a commitment to acquire, or acquires, the products or services).

(5) Information determined under paragraph (4)(a):

(a) must include information that relates to a customer giving notice that the customer does not want to receive:

(i) offers of add-on insurance products; or

(ii) requests or invitations for the customer to ask or apply for add-on insurance products;

in relation to the principal product or service; and

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(b) may include information relating to any other matter that ASIC thinks appropriate.

12DQ Prohibition on selling add-on insurance products before end of add-on insurance deferral period etc.

Contraventions by provider of principal product or service

(1) A person (the ***first person***) contravenes this subsection if:
   (a) another person (the ***customer***) acquires, or enters into a commitment to acquire, a product or service (the ***principal product or service***) from the first person; and
   (b) the first person also sells a financial product to the customer; and
   (c) the financial product is an add-on insurance product in relation to the principal product or service.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(2) A person (the ***first person***) contravenes this subsection if:
   (a) another person (the ***customer***) acquires, or enters into a commitment to acquire, a product or service (the ***principal product or service***) from the first person; and
   (b) a third person sells the customer a financial product that is an add-on insurance product in relation to the principal product or service.

Note: Failure to comply with this subsection is an offence (see section 12GB).

Exception for sale after add-on insurance deferral period

(3) Subsections (1) and (2) do not apply if:
   (a) there is an add-on insurance deferral period in relation to the customer acquiring, or entering into a commitment to acquire, the principal product or service; and

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(b) the add-on insurance product is sold to the customer after the end of the add-on insurance deferral period.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3): see subsection 13.3(3) of the *Criminal Code*.

Contravention by third party provider

(4) A person (the ***third party provider***) contravenes this subsection if:

(a) the third party provider sells a financial product to a consumer (the ***customer***); and

(b) the financial product is an add-on insurance product in relation to a product or service (the ***principal product or service***) offered or provided by another person; and

(c) either:

(i) there is no add-on insurance deferral period in relation to the customer acquiring, or entering into a commitment to acquire, the principal product or service; or

(ii) there is such an add-on insurance deferral period, and the third party provider sells the add-on insurance product to the customer before the end of the period.

Note: Failure to comply with this subsection is an offence (see section 12GB).

Timing of sale

(5) For the purposes of this section, an add-on insurance product is taken to be sold to a customer no later than the first time at which no further action from the customer is required for the sale to occur (even if the sale does not occur until a later time).

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12DR Prohibition on offering add-on insurance product during add-on insurance deferral period

Offer by provider of principal product or service

(1) A person (the ***principal provider***) contravenes this subsection if:

(a) another person (the ***customer***) acquires, or enters into a commitment to acquire, a product or service (the ***principal product or service***) from the principal provider; and

(b) the principal provider offers a financial product for issue or sale to the customer, or requests or invites the customer to ask or apply for a financial product or to purchase a financial product; and

(c) the financial product is an add-on insurance product in relation to the principal product or service; and

(d) the offer, request or invitation is made otherwise than in writing.

Note: Failure to comply with this subsection is an offence (see section 12GB).

Exceptions for subsection (1)—offer made outside add-on insurance deferral period

(2) Subsection (1) does not apply if the offer, request or invitation is made:

(a) during the add-on insurance pre-deferral period in relation to the principal product or service; or

(b) if there is an add-on insurance deferral period in relation to the customer acquiring, or entering into a commitment to acquire, the principal product or service—after the end of the period of 6 weeks beginning on the first day of the add-on insurance deferral period.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

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Offer by third party provider

(3) A person (the ***third party provider***) contravenes this subsection if:

(a) another person (the ***customer***) acquires, or enters into a commitment to acquire, a product or service (the ***principal product or service***); and

(b) the third party provider offers a financial product for issue or sale to the customer, or requests or invites the customer to ask or apply for a financial product or to purchase a financial product; and

(c) the financial product is an add-on insurance product in relation to the principal product or service; and

(d) the offer, request or invitation is made otherwise than in writing; and

(e) there is an add-on insurance deferral period in relation to the customer acquiring, or entering into a commitment to acquire, the principal product or service; and

(f) the offer, request or invitation is made during the period of 6 weeks beginning on the first day of the add-on insurance deferral period.

Note: Failure to comply with this subsection is an offence (see section 12GB).

Exception for subsections (1) and (3)—contact initiated by customer

(4) Subsections (1) and (3) do not apply if:

(a) the offer, request or invitation is made in response to contact initiated by the customer; and

(b) either:

(i) the offer, request or invitation is made after the end of the add-on insurance deferral period; or

(ii) the offer, request or invitation relates only to the purpose for which the customer initiated the contact.

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Note: A defendant bears an evidential burden in relation to the matter in subsection (4): see subsection 13.3(3) of the *Criminal Code*.

12DS Prohibition on offering add-on insurance product—customer opt-out

(1) A person (the ***first person***) contravenes this subsection if:

(a) another person (the ***customer***) acquires, or enters into a commitment to acquire, a product or service (the ***principal product or service***); and

(b) the first person offers a financial product for issue or sale to the customer, or requests or invites the customer to ask or apply for a financial product or to purchase a financial product; and

(c) the financial product is an add-on insurance product in relation to the principal product or service; and

(d) before the offer, request or invitation is made, the customer informs the first person that the customer does not want to receive such offers, requests or invitations.

Note: Failure to comply with this subsection is an offence (see section 12GB).

(2) A person (the ***first person***) contravenes this subsection if:

(a) another person (the ***customer***) acquires, or enters into a commitment to acquire, a product or service (the ***principal product or service***); and

(b) the first person offers a financial product for issue or sale to the customer, or requests or invites the customer to ask or apply for a financial product or to purchase a financial product; and

(c) the financial product is an add-on insurance product in relation to the principal product or service; and

(d) before the offer, request or invitation is made, the customer informs any of the following that the customer does not want to receive such offers, requests or invitations:

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(i) the person who provided the principal product or service (if that person is not the first person);

(ii) any person (other than the first person) with whom the person mentioned in subparagraph (i) has an arrangement of a kind mentioned in subparagraph 12DO(1)(b)(ii).

12DT Right of return and refund for add-on insurance product sold in contravention of section 12DQ

(1) If a person (the ***first person***) contravenes a subsection of section 12DQ in relation to an add-on insurance product sold (whether by the first person or by any other person) to another person (the ***customer***), the customer has a right of return and refund exercisable at any time during the period starting when the product was sold and ending:

(a) if, under section 1019B of the *Corporations Act 2001*, the customer has a right to return the product within a particular period—1 month after the end of that period; or

(b) otherwise—1 month and 14 days after the product was sold.

(2) If the add-on insurance product is returned under subsection (1):

(a) if the product is constituted by a legal relationship between the customer and any other person—by force of this section, that relationship is terminated, with effect from the time of the return, without penalty to the customer; and

(b) by force of this section, any contract for the acquisition of the product by the customer is terminated, with effect from the time of the return, without penalty to the customer.

(3) The amount of a refund paid under subsection (1) in relation to an add-on insurance product:

(a) must be the entire amount paid for the product; but

(b) may be reduced by any amount paid as a result of a claim under the product.

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(4) This section applies in addition to any other penalties for or in relation to contraventions of section 12DQ.

12DU Exception for financial advisers

Section 12DQ does not apply in relation to the sale of an add-on insurance product, and sections 12DR and 12DS do not apply in relation to an offer to issue or sell an add-on insurance product, or a request or invitation to ask or apply for an add-on insurance product, by a person if:

(a) the person sells the add-on insurance product, or makes the offer, request or invitation, in the course of providing personal advice in circumstances where Division 2 (best interests obligations) of Part 7.7A of that Act applies; and

(b) the add-on insurance product relates to a principal product or service that is provided by the person, and that the person recommends in the course of providing the advice.

Note: A defendant bears an evidential burden in relation to the matter in this section: see subsection 13.3(3) of the *Criminal Code*.

12DV Exception for product covered by product intervention order

(1) Section 12DQ does not apply in relation to the sale of an add-on insurance product by a person if a product intervention order in force under Part 7.9A of the *Corporations Act 2001*:

(a) covers that sale; and

(b) provides for a period during which the product must not be sold.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1): see subsection 13.3(3) of the *Criminal Code*.

(2) Sections 12DR and 12DS do not apply in relation to:

(a) an offer to issue or sell; or

(b) a request or invitation to ask or apply for;

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an add-on insurance product that would, if offered to a consumer, be covered by a product intervention order in force under Part 7.9A of the *Corporations Act 2001* that provides for a period during which the product must not be sold to the consumer.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

12DW Exception for comprehensive motor vehicle insurance

(1) Section 12DQ does not apply in relation to the sale of an add-on insurance product by a person if the add-on insurance product provides insurance cover:

(a) to an individual who:

(i) wholly or partly owns a motor vehicle; or

(ii) has the use of a motor vehicle under a lease of at least 4 months' duration; and

(b) in respect of all of the following (whether or not the product also provides insurance cover in respect of other matters):

(i) loss of, or damage to, the motor vehicle resulting from an accident;

(ii) loss of, or damage to, property of another person resulting from an accident in which the motor vehicle is involved;

(iii) loss of, or damage to, the motor vehicle caused by fire, theft or malicious acts.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1): see subsection 13.3(3) of the *Criminal Code*.

(2) Sections 12DR and 12DS do not apply in relation to an offer to issue or sell an add-on insurance product described in subsection (1) of this section, or a request or invitation to ask or apply for such an add-on insurance product.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

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(3) In this section:

motor vehicle means a motor-powered vehicle that:

(a) is designed to travel by road; and

(b) is designed to carry passengers, or is a motorcycle; and

(c) does not have a carrying capacity that exceeds 2 tonnes.

12DX Exemption by regulations

Regulations may exempt a class of products

(1) The regulations may exempt a class of add-on insurance products from sections 12DQ, 12DR and 12DS.

Conditions on exemptions

(2) An exemption under subsection (1) may be subject to conditions specified in the regulations.

Note: A person who contravenes a condition may commit an offence (see section 12DZA).

12DY Exemption by ASIC

(1) ASIC may, by notifiable instrument, exempt from sections 12DQ, 12DR and 12DS:

(a) an add-on insurance product sold by a specified person; or

(b) a class of add-on insurance products sold by a specified person.

Note: For review of a decision to refuse to make an exemption under subsection (1), or to vary or revoke such an exemption, see section 244.

(2) In considering whether to make an exemption under subsection (1), ASIC must have regard to the following:

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(a) any evidence as to whether the add-on insurance product, or the class of add-on insurance products, has historically been good value for money;
(b) whether, without an exemption, there is a high risk of underinsurance or non-insurance;
(c) any evidence as to whether the add-on insurance product, or the class of add-on insurance products, is well understood by consumers;
(d) any differences between the add-on insurance product, or add-on insurance products in the class, and financial products of a similar kind that are not sold as add-on insurance products;
(e) any other matters that ASIC considers relevant.

Conditions on exemptions

(3) An exemption under subsection (1) may be subject to conditions specified in the exemption.

Note 1: A person who contravenes a condition may commit an offence (see section 12DZA).

Note 2: For review of a decision to impose or vary a condition on an exemption under subsection (1), see section 244.

12DZ Effect of exemption

(1) Section 12DQ does not apply in relation to the sale of an add-on insurance product by a person if an exemption under subsection 12DX(1) or 12DY(1) applies to the add-on insurance product.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1): see subsection 13.3(3) of the *Criminal Code*.

(2) Sections 12DR and 12DS do not apply in relation to an offer to issue or sell an add-on insurance product, or a request or invitation to ask or apply for an add-on insurance product, if an exemption

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under subsection 12DX(1) or 12DY(1) applies to the add-on insurance product.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

Product intervention orders

(3) Subsections (1) and (2) do not apply to an add-on insurance product if:

(a) a product intervention order is in force under Part 7.9A of the *Corporations Act 2001* in relation to the product; and

(b) the product intervention order provides for a period during which the product must not be sold.

12DZA Contravention of conditions on exemption

(1) A person who:

(a) sells or offers to sell an add-on insurance product, if an exemption under section 12DX or 12DY applies to the product; or

(b) sells a product or service, if:

(i) there is an arrangement between the person and another person that relates to the provision by the other person of add-on insurance products in relation to that kind of product or service; and

(ii) an exemption under section 12DX or 12DY applies to any of those add-on insurance products; or

(c) offers an add-on insurance product for issue or sale to a consumer, or requests or invites a consumer to ask or apply for an add-on insurance product or to purchase an add-on insurance product, where an exemption under section 12DX or 12DY applies to the add-on insurance product;

must not contravene a condition of the exemption.

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Note: Failure to comply with this subsection is an offence (see section 12GB).

Product intervention orders

(2) Subsection (1) does not apply to an add-on insurance product if:
  (a) a product intervention order is in force under Part 7.9A of the *Corporations Act 2001* in relation to the product; and
  (b) the product intervention order provides for a period during which the product must not be sold.

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 person 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 person 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:

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(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 person 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 person (the ***supplier***) of financial services other than services of a kind ordinarily acquired for personal, domestic or household use is not void under section 12EB merely because the term limits the liability of the supplier 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 supplier 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 supplier 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;

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(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 person 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 person supplies financial services to a consumer in the course of a business; and

(b) the consumer, expressly or by implication, makes known to the person:

(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

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rely, or that it is unreasonable for him or her to rely, on the person's skill or judgment.

(2A) If:

(a) there is a breach of an implied warranty that exists because of this section in a contract made after the commencement of this subsection; and

(b) the law of a State or Territory is the proper law of the contract;

the law of the State or Territory applies to limit or preclude liability for the breach, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of a liability, for breach of another term of the contract.

(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 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 DA

(1) A person commits an offence if the person:

(a) contravenes; or

(b) attempts to contravene; or

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(c) is involved in a contravention of;

a provision of Subdivision D (sections 12DA to 12DN), other than section 12DA, or a provision of Subdivision DA.

Penalty: 2,000 penalty units.

(1AA) A person commits an offence if the person contravenes section 12DMC.

Penalty: 60 penalty units.

(1AB) Subsection (1AA) is an offence of strict liability.

(1A) Subsections 11.2(2) to (5) of the *Criminal Code* apply in relation to paragraph (1)(c) of this section, to the extent that the paragraph relates to aiding, abetting, counselling or procuring a person to contravene Subdivision D (sections 12DA to 12DN), other than section 12DA, or a provision of Subdivision DA, in the same way as they apply in relation to subsection 11.2(1) of the *Criminal Code*.

(1B) Subsections 11.5(2) to (5) of the *Criminal Code* apply in relation to paragraph (1)(c) of this section, to the extent that the paragraph relates to conspiring with others to contravene Subdivision D (sections 12DA to 12DN), other than section 12DA, or a provision of Subdivision DA, in the same way as they apply in relation to subsection 11.5(1) of the *Criminal Code*.

(2) If:

(a) a person is convicted of 2 or more offences against subsection (1) constituted by, or relating to, contraventions of the same provision of Subdivision D (sections 12DA to 12DN) or Subdivision DA (sections 12DO to 12DZA); 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;

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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 subsection (1) in relation to that provision.

(2A) If:

(a) a person is convicted of 2 or more offences against subsection (1AA) constituted by contraventions of section 12DMC; 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 subsection (1AA).

(2B) Subsection (2) or (2A) 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 the provision in question 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 (sections 12DA to 12DN) or Subdivision DA (sections 12DO to 12DZA); 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);

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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) or (1AA)) 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 (sections 12DA to 12DN) or Subdivision DA (sections 12DO to 12DZA), 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 12GLA (non-punitive orders) in relation to the contravention; or

(c) make an order under section 12GLB (punitive orders requiring adverse publicity) in relation to the contravention.

(5) Sections 11.1, 11.2, 11.3, and 11.4 of the *Criminal Code* and section 11.6 of the *Criminal Code* to the extent that it applies in relation to those sections, do not apply in relation to an offence against subsection (1) or (1AA).

(6) A prosecution for an offence against subsection (1) or (1AA) may be commenced within 3 years after the commission of the offence.

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12GBA Declaration of contravention of civil penalty provision

Application for declaration of contravention

(1) ASIC may apply to a Court for a declaration that a person has contravened a civil penalty provision.

(2) ASIC must make the application within 6 years of the alleged contravention.

Declaration of contravention

(3) The Court must make the declaration if it is satisfied that the person has contravened the provision.

(4) The declaration must specify the following:
  (a) the Court that made the declaration;
  (b) the civil penalty provision that was contravened;
  (c) the person who contravened the provision;
  (d) the conduct that constituted the contravention.

Declaration of contravention conclusive evidence

(5) The declaration is conclusive evidence of the matters referred to in subsection (4).

*Meaning of **civil penalty provision***

(6) The following provisions are ***civil penalty provisions***:
  (aa) a provision of Subdivision BA;
  (a) a provision of Subdivision C;
  (b) a provision of Subdivision D (other than section 12DA);
  (ba) a provision of Subdivision DA;
  (c) a provision of Subdivision GC.

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12GBB Pecuniary penalty orders

Application for order

(1) ASIC may apply to a Court for an order that a person, who is alleged to have contravened a civil penalty provision, pay the Commonwealth a pecuniary penalty.

(2) ASIC must make the application within 6 years of the alleged contravention.

Court may order person to pay pecuniary penalty

(3) If a declaration has been made under section 12GBA that the person has contravened the provision, the Court may order the person to pay to the Commonwealth a pecuniary penalty that the Court considers is appropriate (but not more than the amount specified in section 12GBC).

(4) An order under subsection (3) is a ***pecuniary penalty order***.

Determining pecuniary penalty

(5) In determining the pecuniary penalty, the Court must take into account all relevant matters, including:
  (a) the nature and extent of the contravention; and
  (b) the nature and extent of any loss or damage suffered because of the contravention; and
  (c) the circumstances in which the contravention took place; and
  (d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct; and
  (e) in the case of a contravention by the trustee of a registrable superannuation entity—the impact that the penalty under consideration would have on the beneficiaries of the entity.

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12GBC Maximum pecuniary penalty

The pecuniary penalty must not be more than the pecuniary penalty applicable to the contravention of the civil penalty provision.

12GBCA Pecuniary penalty applicable

Pecuniary penalty applicable to the contravention of a civil penalty provision—by an individual

(1) The ***pecuniary penalty applicable*** to the contravention of a civil penalty provision by an individual is the greater of:
  (a) 5,000 penalty units; and
  (b) if the Court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3.

Pecuniary penalty applicable to the contravention of a civil penalty provision—by a body corporate

(2) The ***pecuniary penalty applicable*** to the contravention of a civil penalty provision by a body corporate is the greatest of:
  (a) 50,000 penalty units; and
  (b) if the Court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3; and
  (c) either:
    (i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or
    (ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units—2.5 million penalty units.

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Contrary intention

(3) This section applies in relation to a contravention of a civil penalty provision by an individual or a body corporate unless there is a contrary intention under this Act in relation to the penalty applicable to the contravention. In that case, the ***penalty applicable*** is the penalty specified for the civil penalty provision.

12GBCB Civil enforcement of pecuniary penalty order

(1) A pecuniary penalty is a debt payable to the Commonwealth.

(2) The Commonwealth may enforce a pecuniary penalty order as if it were an order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgment debt.

12GBCC Relinquishing the benefit derived from engaging in conduct resulting in a pecuniary penalty order

Relinquishment order

(1) A Court may order a person to pay the Commonwealth an amount equal to the benefit derived and detriment avoided because of a contravention of a civil penalty provision. The order is a ***relinquishment order***.

(2) The Court may make a relinquishment order:
  (a) on its own initiative, during proceedings before the Court; or
  (b) on application by ASIC, made within 6 years after the alleged contravention.

Relationship between relinquishment orders and pecuniary penalty orders

(3) To avoid doubt, the Court may make a relinquishment order in relation to the contravention of a civil penalty provision even if a

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pecuniary penalty order could be, or has been, made in relation to the contravention of the civil penalty provision.

Note: The relationship between relinquishment orders and proceedings for an offence are dealt with in sections 12GBCG, 12GBCH, 12GBCJ and 12GBCK.

12GBCD Civil enforcement of relinquishment order

(1) The amount payable under a relinquishment order is a debt payable to ASIC on behalf of the Commonwealth.

(2) ASIC or the Commonwealth may enforce a relinquishment order as if it were an order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgment debt.

12GBCE Meaning of *benefit derived and detriment avoided* because of a contravention of a civil penalty provision

The ***benefit derived and detriment avoided*** because of a contravention of a civil penalty provision is the sum of:

(a) the total value of all benefits obtained by one or more persons that are reasonably attributable to the contravention; and

(b) the total value of all detriments avoided by one or more persons that are reasonably attributable to the contravention.

12GBCF Civil evidence and procedure rules for declarations of contravention, pecuniary penalty orders and relinquishment orders

A Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for a declaration of contravention, a pecuniary penalty order or a relinquishment order.

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12GBCG Civil proceedings after criminal proceedings

A Court must not make a declaration of contravention, a pecuniary penalty order or a relinquishment order against a person for a contravention of a civil penalty provision if the person has been convicted of an offence constituted by conduct that is the same, or substantially the same, as the conduct constituting the contravention.

12GBCH Criminal proceedings during civil proceedings

(1) Proceedings for a declaration of contravention, a pecuniary penalty order or a relinquishment order against a person for a contravention of a civil penalty provision are stayed if:
  (a) criminal proceedings are commenced or have already been commenced against the person for an offence; and
  (b) the offence is constituted by conduct that is the same, or substantially the same, as the conduct alleged to constitute the contravention.

(2) The proceedings for the declaration or order (the ***civil proceedings***) may be resumed if the person is not convicted of the offence. Otherwise:
  (a) the civil proceedings are dismissed; and
  (b) costs must not be awarded in relation to the civil proceedings.

12GBCJ Criminal proceedings after civil proceedings

Criminal proceedings may be commenced against a person for conduct that is the same, or substantially the same, as conduct that would constitute a contravention of a civil penalty provision regardless of whether a declaration of contravention, a pecuniary penalty order, a relinquishment order or any other order has been made against the person in relation to the contravention.

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12GBCK Evidence given in civil proceedings not admissible in criminal proceedings

(1) Evidence of information given, or evidence of production of documents, by an individual is not admissible in criminal proceedings against the individual if:

(a) the individual previously gave the information or produced the documents in proceedings for a declaration of contravention, a pecuniary penalty order or a relinquishment order against the individual for an alleged contravention of a civil penalty provision (whether or not the order was made); and

(b) the conduct alleged to constitute the offence is the same, or substantially the same, as the conduct alleged to constitute the contravention.

(2) However, subsection (1) does not apply to criminal proceedings in relation to the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order.

12GBCL Attempt and involvement in contravention treated in same way as actual contravention

A person who:

(a) attempts to contravene a civil penalty provision; or

(b) is involved in a contravention of a civil penalty provision;

is taken to have ***contravened*** the provision.

12GBCM Continuing contraventions of civil penalty provisions

(1) If an act or thing is required under a civil penalty provision to be done:

(a) within a particular period; or

(b) before a particular time;

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then the obligation to do that act or thing continues until the act or thing is done (even if the period has expired or the time has passed).

(2) A person who contravenes a civil penalty provision that requires an act or thing to be done:

(a) within a particular period; or

(b) before a particular time;

commits a separate contravention of that provision in respect of each day during which the contravention occurs (including the day the relevant pecuniary penalty order is made or any later day).

12GBCN State of mind

(1) In proceedings for a declaration of contravention, a pecuniary penalty order, a relinquishment order or any other order against a person for a contravention of a civil penalty provision, it is not necessary to prove:

(a) the person's intention; or

(b) the person's knowledge; or

(c) the person's recklessness; or

(d) the person's negligence; or

(e) any other state of mind of the person.

(2) Subsection (1) does not apply to the extent that the proceedings relate to attempting to contravene a civil penalty provision, or being involved in a contravention of a civil penalty provision.

(3) Subsection (1) does not affect the operation of section 12GI (which is about mistake of fact and other matters).

(3A) Despite subsection (1), in proceedings referred to in that subsection:

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(a) in relation to a contravention by a person of subsection 12DQ(4), it is necessary to prove that the person was reckless as to the matters in paragraph 12DQ(4)(c); and

(b) in relation to a contravention by a person of subsection 12DR(3), it is necessary to prove that the person was reckless as to the matters in paragraphs 12DR(3)(e) and (f); and

(c) in relation to a contravention by a person of subsection 12DS(2), it is necessary to prove that the person was reckless as to the matters in paragraph 12DS(2)(d).

(3B) For the purposes of subsection (3A), a person is reckless as to a fact if:

(a) the person is aware of a substantial risk that the fact exists; and

(b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

(4) Subsection (1) does not apply to the extent that the civil penalty provision, or a provision that relates to the civil penalty provision, expressly provides otherwise.

12GBCP Exceptions etc. to civil penalty provisions—burden of proof

(1) If, in proceedings for a declaration of contravention, a pecuniary penalty order, a relinquishment order or any other order against a person for a contravention of a civil penalty provision, the person wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating the civil penalty provision, then the person bears an evidential burden in relation to that matter.

(2) In subsection (1), ***evidential burden***, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

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12GBD Indemnification of officers

Officers not to be indemnified

(1) A body corporate (the ***first body***), or a body corporate related to the first body, must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against any of the following liabilities incurred as an officer of the first body:

(a) a liability to pay an amount under:

(i) a pecuniary penalty order made under section 12GBB; or

(ii) a relinquishment order made under section 12GBCC;

(b) legal costs incurred in defending or resisting proceedings in which the person is found to have such a liability.

Penalty: 300 penalty units.

(2) For the purposes of subsection (1), the outcome of proceedings is the outcome of the proceedings and any appeal in relation to the proceedings.

(3) Subsection (1) does not authorise anything that would otherwise be unlawful.

Indemnities are void

(4) Anything that purports to indemnify a person against a liability is void to the extent that it contravenes subsection (1).

Application of this section to a person other than a body corporate

(5) If, as a result of the operation of Part 2.4 of the *Criminal Code*, a person other than a body corporate is:

(a) convicted of an offence (the ***relevant offence***) against subsection (1) of this section; or

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(b) convicted of an offence (the ***relevant offence***) against section 11.4 of the *Criminal Code* in relation to an offence referred to in subsection (1) of this section;

the relevant offence is taken to be punishable on conviction by a fine not exceeding 30 penalty units.

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 ASIC, 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.

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(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,

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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).

12GCA Preference must be given to compensate persons who suffer damage as a result of contravention

(1) This section applies if a court considers that it is appropriate to:
  (a) make a pecuniary penalty order against a person in relation to the contravention of a civil penalty provision; or
  (b) make a relinquishment order against a person in relation to the contravention of a civil penalty provision; or
  (c) impose a fine against a person in relation to a commission of an offence constituted by the same conduct as the conduct constituting a contravention mentioned in paragraph (a) or (b).

(2) In making the pecuniary penalty order or relinquishment order or imposing the fine, the court:
  (a) must consider the effect that making the order or imposing the fine would have on the amount available to pay compensation to persons who might reasonably be expected to be entitled to recover compensation for loss or damage suffered as a result of the contravention; and
  (b) give preference to making an appropriate amount available for compensation.

(3) If the court gives preference to making an appropriate amount available for compensation under paragraph (2)(b), the court may also make such orders as the court thinks fit for the purpose of

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ensuring that the amount remains available for the payment of compensation.

12GD Injunctions

(1) If, on the application of the Minister, ASIC 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).

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(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 ASIC 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.

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12GF Actions for damages

(1) A person who suffers loss or damage by conduct of another person that contravenes a provision of Subdivision BA (sections 12BF to 12BM), Subdivision C (sections 12CA to 12CC), Subdivision D (sections 12DA to 12DN) or Subdivision DA (sections 12DO to 12DZA) may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

(1A) Subsection (1) has effect subject to section 12GNA.

Note: Section 12GNA may limit the amount that the person may recover for a contravention of section 12DA (Misleading or deceptive conduct) from the other person or from another person involved in the contravention.

(1B) Despite subsection (1), if:

(a) a person (the ***claimant***) makes a claim under subsection (1) in relation to:

(i) economic loss; or

(ii) damage to property;

caused by conduct of another person (the ***defendant***) that was done in contravention of section 12DA; and

(b) the claimant suffered the loss or damage:

(i) as a result partly of the claimant's failure to take reasonable care; and

(ii) as a result partly of the conduct referred to in paragraph (a); and

(c) the defendant:

(i) did not intend to cause the loss or damage; and

(ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

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Note: Subdivision GA also applies proportionate liability to a claim for damages under this section for a contravention of section 12DA.

(2) An action under subsection (1) may be commenced within 6 years after the day on which the cause of action that relates to the conduct accrued.

12GFA Recovering commissions that exceed a cap under section 12DMC

(1) If:

(a) a person provides a commission to another person in connection with the supply (by any person to any person) of a financial service; and

(b) the financial service is the provision of an add-on risk product to another person (the ***consumer***) in connection with:

(i) the sale or long-term lease of a motor vehicle to the consumer; or

(ii) the provision of credit connected with the sale or long-term lease of a motor vehicle to the consumer; and

(c) providing the commission contravenes section 12DMC;

the consumer is entitled to recover the value of the commission from the person.

Note: For the value of the commission, see subsections 12DMC(5) to (7).

(2) If:

(a) a person (the ***motor vehicle dealer***) receives a commission in connection with the supply (by any person to any person) of a financial service; and

(b) the financial service is the provision of an add-on risk product to the motor vehicle dealer in connection with the giving of a warranty by the motor vehicle dealer in connection with the sale or long-term lease of a motor vehicle to another person (the ***consumer***); and

(c) providing the commission contravenes section 12DMC;

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the consumer is entitled to recover the value of the commission from the motor vehicle dealer.

Note: For the value of the commission, see subsections 12DMC(5) to (7).

(3) This section does not affect the other person's right to recover loss or damage under section 12GF.

12GG Finding in proceedings to be evidence

(1) In:

(a) a proceeding against a person under section 12GF or 12GFA; or

(b) an application under subsection 12GM(2), 12GNB(1), 12GNE(1) or 12GNF(1) for an order against a person;

a finding of any fact by a court is prima facie evidence of that fact if the finding was made in proceedings:

(c) under section 12GBA, 12GBB, 12GBCC, 12GD, 12GLA or 12GLB; or

(d) for an offence against section 12GB;

in which that person was found to have contravened, or to have been involved in a contravention of, a provision of this Division.

(2) 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, employees 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, employee or agent of the body corporate, being a director, employee 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.

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(2) Any conduct engaged in on behalf of a body corporate:

(a) by a director, employee 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, employee 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, employee 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 an employee or agent of the person, being an employee or agent by whom the conduct was engaged in within the scope of the employee'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 an employee or agent of the person within the scope of the actual or apparent authority of the employee or agent; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of an employee 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 employee 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

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of the person and the person's reasons for the person's intention, opinion, belief or purpose.

(6) Part 2.5 of the *Criminal Code* does not apply in relation to an offence against a provision of this Subdivision.

12GI Defences

(1) Subject to subsection (3), in a prosecution under this Subdivision in relation to a contravention of a provision of Subdivision D (sections 12DA to 12DN) or Subdivision DA (sections 12DO to 12DZA), 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.

Note: A defendant bears a legal burden in relation to the matters in subsection (1) (see section 13.4 of the *Criminal Code*).

(1A) Paragraph (1)(a) is to be interpreted as having the same effect in relation to a contravention of a provision of this Subdivision as section 9.2 of the *Criminal Code* has in relation to offences of strict liability.

(2) In paragraphs (1)(b) and (c), ***another person*** does not include a person who was:

(a) an employee or agent of the defendant; or

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(b) in the case of a defendant being a body corporate (other than a CCIV), a director, employee or agent of the defendant; or

(c) in the case of a defendant being a CCIV:

(i) an agent, or the corporate director, of the defendant; or

(ii) a director, employee or agent of the corporate director 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 (sections 12DA to 12DN) or Subdivision DA (sections 12DO to 12DZA) 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 DA.

Note: A defendant bears a legal burden in relation to the matters in subsection (4) (see section 13.4 of the *Criminal Code*).

(5) If, in proceedings under section 12GBA or 12GBB against a person other than a body corporate, it appears to the Court that the person has, or may have, engaged in conduct in contravention of a civil penalty provision but that the person acted honestly and

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reasonably and, having regard to all the circumstances of the case, ought fairly to be excused, the Court may relieve the person either wholly or partly from liability to pay a pecuniary penalty under that section.

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:

(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 is instituted under this Subdivision or under Part 3 as so applying:

(c) 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

(d) 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

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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 is pending in the Federal Court; and

(b) a matter for determination in the proceeding arose under:

(i) this Division; or

(ii) Part 3 in its application in relation to an investigation of a contravention of 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.

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(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:

(i) this Division; or

(ii) Part 3 in its application in relation to an investigation of a contravention of 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:

(i) this Division; or

(ii) Part 3 in its application in relation to an investigation of a contravention of 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.

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(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 Federal Circuit and Family Court of Australia (Division 1)

(1) 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 Federal Circuit and Family Court of Australia (Division 1).

(3) Subject to subsection (4), if a proceeding is transferred to the Federal Circuit and Family Court of Australia (Division 1):

(a) the Federal Circuit and Family Court of Australia (Division 1) has jurisdiction to hear and determine the proceeding; and

(b) the Federal Circuit and Family Court of Australia (Division 1) 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 Federal Circuit and Family Court of Australia (Division 1) 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;

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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 Federal Circuit and Family Court of Australia (Division 1) in and in relation to the proceeding have effect, and may be enforced by the Federal Circuit and Family Court of Australia (Division 1), as if they had been granted, made or issued by the Federal Court; and

(e) appeals lie from judgments of the Federal Circuit and Family Court of Australia (Division 1) 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 Federal Circuit and Family Court of Australia (Division 1); 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 Judge of the Federal Circuit and Family Court of Australia (Division 1); 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 Judge of the Federal Circuit and Family Court of Australia (Division 1) sitting in Chambers; and

(iv) a reference to a Registrar of the Federal Court included a reference to a Registrar of the Federal Circuit and Family Court of Australia (Division 1); and

(v) any other necessary changes were made.

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(4) If any difficulty arises in the application of paragraphs (3)(c), (d) and (f) in or in relation to a particular proceeding, the Federal Circuit and Family Court of Australia (Division 1) 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 Federal Circuit and Family Court of Australia (Division 1).

12GLA Non-punitive orders

(1) The Court may, on application by ASIC, make one or more of the orders mentioned in subsection (2) in relation to a person who has engaged in contravening conduct.

(2) The orders that the Court may make in relation to the person are:
  (a) a community service order; and
  (b) a probation order for a period of no longer than 3 years; and
  (c) an order requiring the person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession of or access to; and
  (d) an order requiring the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.

(3) This section does not limit the Court's powers under any other provision of this Act.

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(4) In this section:

community service order, in relation to a person who has engaged in contravening conduct, means an order directing the person to perform a service that:

(a) is specified in the order; and

(b) relates to the conduct;

for the benefit of the community or a section of the community.

Example: The following are examples of community service orders:

(a) an order requiring a person who has made false representations to make available a training video which explains advertising obligations under this Act; and

(b) an order requiring a person who has engaged in misleading or deceptive conduct in relation to a financial product to carry out a community awareness program to address the needs of consumers when purchasing the financial product.

contravening conduct means conduct that:

(aa) contravenes a provision of Subdivision BA (sections 12BF to 12BM); or

(a) contravenes a provision of Subdivision C (sections 12CA to 12CC); or

(b) contravenes a provision of Subdivision D (sections 12DA to 12DN); or

(ba) contravenes a provision of Subdivision DA (sections 12DO to 12DZA); or

(c) contravenes a provision of Subdivision E (sections 12EA to 12ED); or

(d) constitutes an involvement in a contravention of any of those provisions.

probation order, in relation to a person who has engaged in contravening conduct, means an order that is made by the Court for the purpose of ensuring that the person does not engage in the contravening conduct, similar conduct or related conduct during the period of the order, and includes:

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(a) an order directing the person to establish a compliance program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and

(b) an order directing the person to establish an education and training program for employees or other persons involved in the person's business, being a program designed to ensure their awareness of the responsibilities and obligations in relation to the contravening conduct, similar conduct or related conduct; and

(c) an order directing the person to revise the internal operations of the person's business which lead to the person engaging in the contravening conduct.

12GLB Punitive orders requiring adverse publicity

(1) The Court may, on application by ASIC, make an adverse publicity order in relation to a person who:

(a) has been ordered to pay a pecuniary penalty under section 12GBB; or

(b) is guilty of an offence under section 12GB.

(2) In this section, an ***adverse publicity order***, in relation to a person, means an order that:

(a) requires the person to disclose, in the way and to third parties specified in the order, such information as is so specified, being information that the person has possession of or access to; and

(b) requires the person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.

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(3) This section does not limit the Court's powers under any other provision of this Act.

12GLC ASIC may issue a public warning notice

Contraventions

(1) ASIC may issue to the public a written notice containing a warning about the conduct of a person if:
   (a) ASIC has reasonable grounds to suspect that the conduct may constitute a contravention of a provision of Subdivision BA, C or D; and
   (b) ASIC is satisfied that one or more other persons has suffered, or is likely to suffer, detriment as a result of the conduct; and
   (c) ASIC is satisfied that it is in the public interest to issue the notice.

Substantiation notices

(2) Without limiting subsection (1), if:
   (a) a person refuses to respond to a substantiation notice given to the person, or fails to respond to the notice before the end of the substantiation notice compliance period for the notice; and
   (b) ASIC is satisfied that it is in the public interest to issue a notice under this subsection;

ASIC may issue to the public a written notice containing a warning that the person has refused or failed to respond to the substantiation notice within that period, and specifying the matter to which the substantiation notice related.

Notice is not a legislative instrument

(3) A notice issued under subsection (1) or (2) is not a legislative instrument.

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12GLD Order disqualifying a person from managing corporations

(1) On application by ASIC, the Court may make an order disqualifying a person from managing corporations for a period that the Court considers appropriate if:

(a) the Court is satisfied that the person has committed, has attempted to commit or has been involved in a contravention of a provision of Subdivision BA, C or D (other than section 12DA); and

(b) the Court is satisfied that the disqualification is justified.

Note 1: Section 206EB of the *Corporations Act 2001* provides that a person is disqualified from managing corporations if a court order is in force under this section. That Act contains various consequences for persons so disqualified.

Note 2: ASIC must keep a register of persons who have been disqualified from managing corporations (see section 1274AA of the *Corporations Act 2001*).

(2) In determining under subsection (1) whether the disqualification is justified, the Court may have regard to:

(a) the person's conduct in relation to the management, business or property of any corporation; and

(b) any other matters that the Court considers appropriate.

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 12GF, 12GFA, 12GLA or 12GLB, 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

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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 or 12GNB, 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) ASIC 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) ASIC may only make an application under paragraph (2)(b) on behalf of one or more persons identified in the application who:

(a) have suffered, or are likely to suffer, loss or damage by the conduct of another person that was engaged in in contravention of a provision of this Division; and

(b) have consented in writing to the application being made before it 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 made at any time within 6 years after the day on which the cause of action that relates to the conduct 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 to 12CC), 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;

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(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.

(7A) Subsections (1) and (2) have effect subject to section 12GNA.

Note: Section 12GNA may limit the liability, under an order under subsection (1) or (2) of this section, of a person for his or her contravention of section 12DA (Misleading or deceptive conduct) or involvement in such a contravention.

(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).

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12GN Power of Court to prohibit payment or transfer of money 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) or 12GFA(1) or (2) against a person in relation to a contravention of a provision of Subdivision BA (sections 12BF to 12BM), Subdivision D (sections 12DA to 12DN) or Subdivision DA (sections 12DO to 12DZA); or

(d) an application for an order under subsection 12GM(2) or (3) or 12GNB(1) has been or may be made against a person in relation to a contravention of a provision of this Division;

the Court may, on the application of the Minister or ASIC, 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 money 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

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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.

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(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.

Penalty: 200 penalty units.

(5A) Subsection (5) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(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.

12GNA Limit on liability for misleading or deceptive conduct

State or Territory professional standards law limits liability

(1) A professional standards law of a State or Territory applies to limit occupational liability relating to an action for contravention of section 12DA in the same way as it limits occupational liability arising under a law of the State or Territory.

Note: Section 12DA prohibits misleading or deceptive conduct by a person in relation to financial services.

(2) However, the professional standards law applies for that purpose:

(a) only in relation to a scheme that was prescribed by the regulations at the time (the ***contravention time***) of the contravention; and

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(b) as if the scheme were in force under that law at the contravention time in the form the scheme would have been in if:

(i) the scheme had not been amended or revoked under that law since the scheme was first prescribed; and

(ii) the modifications (if any) prescribed by the regulations at the contravention time had been made to the scheme.

Which State's or Territory's professional standards law applies?

(3) For the purposes of working out whether a professional standards law of a particular State or Territory applies under subsection (1) in relation to a particular contravention of section 12DA, choice of law rules operate in relation to the contravention in the same way as they operate in relation to a tort.

Definitions

(4) In this section:

occupation includes profession and trade.

occupational association means a body:

(a) that represents the interests of persons who have the same occupation; and

(b) whose membership is limited principally to such persons.

occupational liability means civil liability arising directly or vicariously from anything done or omitted by a member of an occupational association in the course of his or her occupation.

professional standards law means a law providing for the limitation of occupational liability by reference to schemes for limiting that liability that were formulated and published in accordance with that law.

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12GNB Orders to redress loss or damage suffered by non-parties etc.

Orders

(1) Without limiting the generality of section 12GD, if:

(a) a person:

(i) engaged in conduct (the ***contravening conduct***) in contravention of a provision of Subdivision BA, C or D; or

(ii) is a party to a contract who is advantaged by a term (the ***declared term***) of the contract in relation to which the Court has made a declaration under section 12GND; and

(b) the contravening conduct or declared term caused, or is likely to cause, a class of persons to suffer loss or damage; and

(c) the class includes persons who are non-parties in relation to the contravening conduct or declared term;

the Court may, on the application of ASIC, make such order or orders (other than an award of damages) as the Court thinks appropriate against a person referred to in subsection (2) of this section.

Note: The orders that the Court may make include all or any of the orders set out in section 12GNC.

(2) An order under subsection (1) may be made against:

(a) if subparagraph (1)(a)(i) applies—the person who engaged in the contravening conduct, or a person involved in that conduct; or

(b) if subparagraph (1)(a)(ii) applies—a party to the contract who is advantaged by the declared term.

(3) The Court must not make an order under subsection (1) unless the Court considers that the order will:

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(a) redress, in whole or in part, the loss or damage suffered by the non-parties in relation to the contravening conduct or declared term; or

(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-parties in relation to the contravening conduct or declared term.

Application for orders

(4) An application may be made under subsection (1) even if an enforcement proceeding in relation to the contravening conduct or declared term has not been instituted.

(5) An application under subsection (1) may be made at any time within 6 years after the day on which:

(a) if subparagraph (1)(a)(i) applies—the cause of action that relates to the contravening conduct accrues; or

(b) if subparagraph (1)(a)(ii) applies—the declaration is made.

Determining whether to make an order

(6) In determining whether to make an order under subsection (1) against a person referred to in paragraph (2)(a), the Court may have regard to the conduct of the person, and of the non-parties in relation to the contravening conduct, since the contravention occurred.

(7) In determining whether to make an order under subsection (1) against a person referred to in paragraph (2)(b), the Court may have regard to the conduct of the person, and of the non-parties in relation to the declared term, since the declaration was made.

(8) In determining whether to make an order under subsection (1), the Court need not make a finding about either of the following matters:

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(a) which persons are non-parties in relation to the contravening conduct or declared term;
(b) the nature of the loss or damage suffered, or likely to be suffered, by such persons.

When a non-party is bound by an order etc.

(9) If:
(a) an order is made under subsection (1) against a person; and
(b) the loss or damage suffered, or likely to be suffered, by a non-party in relation to the contravening conduct, or declared term, to which the order relates has been redressed, prevented or reduced in accordance with the order; and
(c) the non-party has accepted the redress, prevention or reduction;

then:
(d) the non-party is bound by the order; and
(e) any other order made under subsection (1) that relates to that loss or damage has no effect in relation to the non-party; and
(f) despite any other provision of this Act or any other law of the Commonwealth, or a State or Territory, no claim, action or demand may be made or taken against the person by the non-party in relation to that loss or damage.

Other

(10) Subsection (1) has effect subject to section 12GNA.

Note: Section 12GNA may limit the liability, under an order made under subsection (1) of this section, of a person for his or her contravention of section 12DA (which is about misleading or deceptive conduct) or involvement in such a contravention.

(11) This section does not apply in relation to contravening conduct that occurred before the commencement of this section.

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12GNC Kinds of orders that may be made to redress loss or damage suffered by non-parties etc.

Without limiting subsection 12GNB(1), the orders that the Court may make under that subsection against a person (the ***respondent***) include all or any of the following:

(a) an order declaring the whole or any part of a contract made between the respondent and a non-party referred to in that subsection, or a collateral arrangement relating to such a contract:
  (i) to be void; and
  (ii) if the Court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

(b) an order:
  (i) varying such a contract or arrangement in such manner as is specified in the order; and
  (ii) if the Court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is 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 or arrangement;

(d) an order directing the respondent to refund money or return property to a non-party referred to in that subsection;

(e) an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that have been supplied under the contract or arrangement to a non-party referred to in that subsection;

(f) an order directing the respondent, at his or her own expense, to supply specified services to a non-party referred to in that subsection;

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(g) an order, in relation to an instrument creating or transferring an interest in land (within the meaning of section 12DC), directing the respondent 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.

12GND Declarations

(1) The Court may declare that a term of a consumer contract is an unfair term, on application by:
  (a) a party to the contract; or
  (b) ASIC; or
  (c) if the contract is an Insurance Contracts Act insurance contract—a person who is a third party beneficiary (within the meaning of the *Insurance Contracts Act 1984*) under the contract.

(2) The Court may declare that a term of a small business contract is an unfair term, on application by:
  (a) a party to the contract, if the party was covered by paragraph 12BF(4)(b) at the time the contract was entered into; or
  (b) ASIC; or
  (c) if the contract is an Insurance Contracts Act insurance contract—a person who is a third party beneficiary (within the meaning of the *Insurance Contracts Act 1984*) under the contract.

(3) Subsections (1) and (2) do not apply unless the contract is a standard form contract that is:
  (a) a financial product; or

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(b) a contract for the supply, or possible supply, of services that are financial services.

(4) Subsections (1) and (2) do not apply if Subdivision BA does not apply to the contract.

(5) Subsections (1) and (2) do not limit any other power of the Court to make declarations.

12GNE Orders made in favour of party to contract containing unfair term

(1) If a declaration has been made under section 12GND in relation to a term (the ***declared term***) of a contract, the Court may:

(a) on the application of a party to the contract; or

(b) on the application of ASIC made on behalf of, and with the consent in writing of, one or more parties to the contract;

make against a party (the ***respondent***) to the contract who is advantaged by the declared term such order or orders (other than an award of damages) as the Court thinks appropriate:

(c) to redress, in whole or in part, loss or damage that has been caused to any person by the declared term; or

(d) to prevent or reduce loss or damage that is likely to be so caused.

(2) Without limiting subsection (1), the orders that the Court may make against the respondent include all or any of the following:

(a) an order declaring the whole or any part of the contract, or of a collateral arrangement relating to the contract:

(i) to be void; and

(ii) if the Court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

(b) an order:

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(i) varying the contract, or such a collateral arrangement, as specified in the order; and

(ii) if the Court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

(c) an order refusing to enforce any or all of the provisions of the contract, or of such a collateral arrangement.

(3) An application under subsection (1) may be made at any time before the end of 6 years from the day on which the declaration under section 12GND was made.

12GNF Orders made on application of ASIC to prevent and remedy unfair contract terms

(1) If a declaration has been made under section 12GND in relation to a term (the ***declared term***) of a contract, the Court may, on the application of ASIC, make against a party (the ***respondent***) to the contract who is advantaged by the declared term such order or orders (other than an award of damages) as the Court thinks appropriate:

(a) to prevent a term (a ***similar term***) that is the same, or substantially similar, in effect to the declared term from being included in any future contract:

(i) to which the respondent is a party; and

(ii) that is a consumer contract or small business contract; and

(iii) that is a standard form contract; or

(b) to redress, in whole or in part, loss or damage that has been caused, or to prevent or reduce loss or damage that is likely to be caused, to any person by a similar term that is included in any existing contract:

(i) to which the respondent is a party; and

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(ii) that is a consumer contract or small business contract; and

(iii) that is a standard form contract;

whether or not the future or existing contract is identifiable when the Court makes the order or orders.

(2) Without limiting subsection (1), the orders that the Court may make against the respondent include all or any of the following:

(a) an injunction restraining the respondent from making any future contract that is of the kind referred to in paragraph (1)(a) and includes a similar term;

(b) an injunction restraining the respondent from applying or relying on a similar term of any existing contract that is of the kind referred to in paragraph (1)(b);

(c) an order declaring the whole or any part of any existing contract of the kind referred to in paragraph (1)(b), or of a collateral arrangement relating to such a contract:

(i) to be void; and

(ii) if the Court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

(d) an order:

(i) varying such an existing contract, or such a collateral arrangement, as specified in the order; and

(ii) if the Court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

(e) an order refusing to enforce any or all of the provisions of such an existing contract, or of such a collateral arrangement.

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(3) An application under subsection (1) may be made at any time before the end of 6 years from the day on which the declaration under section 12GND was made.

(4) An order made under this section against the respondent binds a person affected by the order, even if the person is not a party to the proceedings in which the order is made.

12GNG Interaction with other provisions

(1) An application may be made under subsection 12GNE(1) or 12GNF(1) even if an enforcement proceeding in relation to the declared term referred to in that subsection has not been instituted.

(2) The Court may make an order under section 12GNE or 12GNF whether or not the Court:
   (a) grants an injunction under section 12GD; or
   (b) makes an order under any other provision of this Division (other than section 12GND).

(3) Nothing in this Division limits the generality of section 12GD.

12GO Intervention by ASIC

(1) ASIC may, with the leave of the Court and subject to any conditions imposed by the Court, intervene in any proceeding instituted under this Division.

(2) If ASIC intervenes in a proceeding, it is taken to be a party to the proceeding and has all the rights, duties and liabilities of such a party.

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Subdivision GA—Proportionate liability for misleading and deceptive conduct

12GP Application of Subdivision

(1) This Subdivision applies to a claim (an ***apportionable claim***) if the claim is a claim for damages made under section 12GF for:

(a) economic loss; or

(b) damage to property;

caused by conduct that was done in a contravention of section 12DA.

(2) For the purposes of this Subdivision, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

(3) In this Subdivision, a ***concurrent wrongdoer***, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

(4) For the purposes of this Subdivision, apportionable claims are limited to those claims specified in subsection (1).

(5) For the purposes of this Subdivision, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

12GQ Certain concurrent wrongdoers not to have benefit of apportionment

(1) Nothing in this Subdivision operates to exclude the liability of a concurrent wrongdoer (an ***excluded concurrent wrongdoer***) in proceedings involving an apportionable claim if:

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(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or

(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.

(2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Subdivision) are relevant.

(3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Subdivision.

12GR Proportionate liability for apportionable claims

(1) In any proceedings involving an apportionable claim:

(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and

(b) the court may give judgment against the defendant for not more than that amount.

(2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:

(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Subdivision; and

(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Subdivision) are relevant.

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(3) In apportioning responsibility between defendants in the proceedings:
  (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and
  (b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

(4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.

(5) A reference in this Subdivision to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Subdivision, under rules of court or otherwise.

12GS Defendant to notify plaintiff of concurrent wrongdoer of whom defendant is aware

(1) If:
  (a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the ***other person***) may be a concurrent wrongdoer in relation to the claim; and
  (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:
    (i) the identity of the other person; and
    (ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and
  (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim;

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the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.

(2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

12GT Contribution not recoverable from defendant

A defendant against whom judgment is given under this Subdivision as a concurrent wrongdoer in relation to an apportionable claim:

(a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and

(b) cannot be required to indemnify any such wrongdoer.

12GU Subsequent actions

(1) In relation to an apportionable claim, nothing in this Subdivision or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.

(2) However, in any proceedings in respect of any such action, the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

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12GV Joining non-party concurrent wrongdoer in the action

(1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.

(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

12GW Application of Subdivision

Nothing in this Subdivision:

(a) prevents a person being held vicariously liable for a proportion of an apportionable claim for which another person is liable; or

(b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or

(c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

Subdivision GB—Infringement notices

12GX When an infringement notice may be given

(1) If ASIC believes on reasonable grounds that a person has contravened a provision subject to an infringement notice under this Subdivision, ASIC may give the person an infringement notice for the alleged contravention.

(2) The infringement notice must be given within 12 months after the day on which the contravention is alleged to have taken place.

(3) A single infringement notice must relate only to a single contravention of a single provision unless subsection (4) applies.

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(4) ASIC may give a person a single infringement notice relating to multiple contraventions of a single provision if:
  (a) the provision requires the person to do a thing within a particular period or before a particular time; and
  (b) the person fails or refuses to do that thing within that period or before that time; and
  (c) the failure or refusal occurs on more than 1 day; and
  (d) each contravention is constituted by the failure or refusal on one of those days.

(5) If an alleged contravention would, if proved, constitute both a contravention of a civil penalty provision and of an offence provision, the infringement notice must relate to the alleged contravention of the offence provision.

12GXA Provisions subject to an infringement notice

The following provisions are ***subject to an infringement notice*** under this Subdivision:
  (a) a provision of Subdivision C;
  (b) a provision of Subdivision D, other than section 12DA or 12DE, subsection 12DG(1) or section 12DI or 12DM;
  (ba) a provision of Subdivision DA;
  (c) a provision of Subdivision GC.

12GXB Matters to be included in an infringement notice

(1) An infringement notice must:
  (a) be identified by a unique number; and
  (b) state the day on which it is given; and
  (c) state the name of the person to whom the notice is given; and
  (d) state the name and contact details of the person who gave the notice; and

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(e) give brief details of the alleged contravention, or each alleged contravention, to which the notice relates, including:
  (i) the provision that was allegedly contravened; and
  (ii) the maximum penalty that a court could impose for each contravention, if the provision were contravened; and
  (iii) the time (if known) and day of, and the place of, each alleged contravention; and
(f) state the amount that is payable under the notice; and
(g) give an explanation of how payment of the amount is to be made; and
(h) state that the payment period for the notice will be 28 days, beginning on the day after the notice is given, unless the period is extended, an arrangement is made for payment by instalments or the notice is withdrawn; and
(i) state that, if the person to whom the notice is given pays the amount within the payment period, then (unless the notice is withdrawn):
  (i) if the alleged contravention is of an offence provision and would not also constitute a contravention of a civil penalty provision—the person will not be liable to be prosecuted in a court for the alleged contravention; or
  (ii) if the alleged contravention is of an offence provision and would also constitute a contravention of a civil penalty provision—the person is not liable to be prosecuted in a court, and proceedings seeking a pecuniary penalty order will not be brought, in relation to the alleged contravention; or
  (iii) if the alleged contravention is of a civil penalty provision—proceedings seeking a pecuniary penalty order will not be brought in relation to the alleged contravention; and
(j) state that payment of the amount is not an admission of guilt or liability; and

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(k) state that the person may apply to ASIC to have the period in which to pay the amount extended or for an arrangement to pay the amount by instalments; and

(l) state that the person may choose not to pay the amount and, if the person does so:

(i) if the alleged contravention is of an offence provision and would not also constitute a contravention of a civil penalty provision—the person may be prosecuted in a court for the alleged contravention; or

(ii) if the alleged contravention is of an offence provision and would also constitute a contravention of a civil penalty provision—the person may be prosecuted in a court, or proceedings seeking a pecuniary penalty order may be brought, in relation to the alleged contravention; or

(iii) if the alleged contravention is of a civil penalty provision—proceedings seeking a pecuniary penalty order may be brought in relation to the alleged contravention; and

(m) set out how the notice can be withdrawn; and

(n) state that if the notice is withdrawn:

(i) if the alleged contravention is of an offence provision and would not also constitute a contravention of a civil penalty provision—the person may be prosecuted in a court for the alleged contravention; or

(ii) if the alleged contravention is of an offence provision and would also constitute a contravention of a civil penalty provision—the person may be prosecuted in a court, or proceedings seeking a pecuniary penalty order may be brought, in relation to the alleged contravention; or

(iii) if the alleged contravention is of a civil penalty provision—proceedings seeking a pecuniary penalty

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order may be brought in relation to the alleged contravention; and

(o) state that the person may make written representations to ASIC seeking the withdrawal of the notice.

(2) The amount to be stated in the notice for the purposes of paragraph (1)(f) must be equal to the number of penalty units worked out using the following table:

Number of penalty units		
Item	**If the infringement notice is for an alleged contravention of ...**	**the number of penalty units is ...**
1	a provision of Subdivision C, D (other than section 12DA or 12DE, subsection 12DG(1) or section 12DI or 12DM) or DA	(a) if the person is a body corporate—60; or (b) if the person is not a body corporate—12.
2	section 12GYB	(a) if the person is a body corporate—30; or (b) if the person is not a body corporate—6.
3	section 12GYC	(a) if the person is a body corporate—50; or (b) if the person is not a body corporate—10.

12GXC Payment period

Usual payment period

(1) The ***payment period*** for an infringement notice begins on the day after the notice is given and, unless otherwise specified in this section, continues for 28 days.

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Payment period extended under section 12GXD

(2) If, under section 12GXD, ASIC extends the payment period for the notice, the ***payment period*** is as extended.

(3) If, under section 12GXD, ASIC refuses to extend the payment period for the notice, the ***payment period*** ends on the latest of the following days:
  (a) the last day of the period that, without the extension that has been refused, would be the payment period for the notice;
  (b) the day that is 7 days after the day the applicant was given notice of ASIC's decision not to extend;
  (c) the day that is 7 days after the day the application is taken to have been refused under subsection 12GXD(4).

Instalments

(4) If, under section 12GXE, ASIC makes an arrangement for the amount payable under the notice to be paid by instalments, the ***payment period*** ends on the earlier of the following days:
  (a) the last day on which an instalment is to be paid under the arrangement;
  (b) if the person fails to pay an instalment in accordance with the arrangement, the last day on which the missed instalment was to be paid.

(5) If, under section 12GXE, ASIC refuses to make an arrangement for the amount payable under the notice to be paid by instalments, the ***payment period*** ends on the latest of the following days:
  (a) the last day of the period that, without the instalment arrangement, would be the payment period for the notice;
  (b) the day that is 7 days after the day the applicant was given notice of ASIC's decision not to make the arrangement;
  (c) the day that is 7 days after the day the application is taken to have been refused under subsection 12GXE(4).

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Payment period if ASIC refuses to withdraw infringement notice

(6) If ASIC refuses a representation made under section 12GXF for the notice to be withdrawn, the ***payment period*** ends on the latest of the following days:

(a) the last day of the period that, without the withdrawal, would be the payment period for the notice;

(b) the day that is 7 days after the day the person was given notice of ASIC's decision not to withdraw the notice;

(c) the day that is 7 days after the day on which, under subsection 12GXF(5), ASIC is taken to have refused to withdraw the infringement notice.

12GXD Extension of time to pay amount

(1) A person to whom an infringement notice has been given may, during the payment period for the notice, apply to ASIC for an extension of the payment period for the notice.

(2) ASIC may, in writing, extend the payment period for an infringement notice:

(a) if a person makes an application in accordance with subsection (1); or

(b) on ASIC's own initiative.

ASIC may do so before or after the end of the payment period.

(3) ASIC must do each of the following within 14 days after an application in accordance with subsection (1) is made:

(a) grant or refuse to grant an extension of the payment period for the infringement notice;

(b) give the applicant notice in writing of ASIC's decision.

(4) If ASIC does not comply with subsection (3):

(a) ASIC is taken to have refused to grant an extension of the payment period for the infringement notice; and

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(b) the refusal is taken to have occurred on the last day of the 14 day period.

(5) ASIC may extend the payment period more than once under subsection (2).

12GXE Payment by instalments

(1) A person to whom an infringement notice has been given may, within 28 days after the infringement notice is given, apply to ASIC to make an arrangement to pay the amount payable under the infringement notice by instalments.

(2) ASIC may, in writing, make an arrangement for a person to pay the amount payable under an infringement notice by instalments:
(a) if a person makes an application in accordance with subsection (1); or
(b) on ASIC's own initiative.
ASIC may do so before or after the end of the payment period.

(3) ASIC must do each of the following within 14 days after an application in accordance with subsection (1) is made:
(a) decide to make, or refuse to make, an arrangement for the applicant to pay the amount payable under the infringement notice by instalments;
(b) give the applicant notice in writing of ASIC's decision;
(c) if ASIC decides to make the arrangement, specify in the notice:
(i) the day by which each instalment is to be paid; and
(ii) the amount of each instalment.

(4) If ASIC does not comply with subsection (3):
(a) ASIC is taken to have refused to make an arrangement for the applicant to pay the amount payable under the infringement notice by instalments; and

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(b) the refusal is taken to have occurred on the last day of the 14 day period.

(5) ASIC may vary an arrangement for a person to pay the amount payable under an infringement notice by instalments.

(6) If:
(a) a person does not pay all of the instalments in accordance with an arrangement made under this section; and
(b) the person is prosecuted, or proceedings seeking a pecuniary penalty order are brought, for the alleged contravention;
ASIC must refund to the person the amount of any instalments paid.

12GXF Withdrawal of an infringement notice

Representations seeking withdrawal of notice

(1) A person to whom an infringement notice has been given may, within 28 days after the infringement notice is given, make written representations to ASIC seeking the withdrawal of the notice.

Withdrawal of notice

(2) ASIC may withdraw an infringement notice given to a person:
(a) if the person makes representations to ASIC in accordance with subsection (1); or
(b) on ASIC's own initiative.
ASIC may do so before or after the end of the payment period.

(3) ASIC must, within 14 days after a representation is made in accordance with subsection (1):
(a) decide to withdraw, or refuse to withdraw, the infringement notice; and
(b) if ASIC decides to withdraw the notice—give the applicant a withdrawal notice in accordance with subsection (6); and

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(c) if ASIC decides to refuse to withdraw the notice—give the applicant notice of that fact.

(4) When deciding whether to withdraw, or refuse to withdraw, an infringement notice, ASIC:
(a) must take into account any written representations seeking the withdrawal that were given by the person to ASIC; and
(b) may take into account the following:
(i) whether a court has previously imposed a penalty on the person for a contravention of a provision of this Act;
(ii) the circumstances of the alleged contravention;
(iii) whether the person has paid an amount, stated in an earlier infringement notice, for a contravention of a provision of this Act;
(iv) any other matter ASIC considers relevant.

(5) If ASIC does not comply with subsection (3):
(a) ASIC is taken to have refused to withdraw the infringement notice; and
(b) the refusal is taken to have occurred on the last day of the 14 day period.

Notice of withdrawal

(6) The withdrawal notice must state:
(a) the person's name and address; and
(b) the day the infringement notice was given; and
(c) the identifying number of the infringement notice; and
(d) that the infringement notice is withdrawn; and
(e) that:
(i) if the alleged contravention is of an offence provision and would not also constitute a contravention of a civil penalty provision—the person may be prosecuted in a court for the alleged contravention; or

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(ii) if the alleged contravention is of an offence provision and would also constitute a contravention of a civil penalty provision—the person may be prosecuted in a court, or proceedings seeking a pecuniary penalty order may be brought, in relation to the alleged contravention; or

(iii) if the alleged contravention is of a civil penalty provision—proceedings seeking a pecuniary penalty order may be brought in relation to the alleged contravention.

Refund of amount if infringement notice withdrawn

(7) If:

(a) ASIC withdraws the infringement notice; and

(b) the person has already paid the amount stated in the notice;

ASIC must refund to the person an amount equal to the amount paid.

12GXG Effect of payment of amount

(1) If the person to whom an infringement notice for an alleged contravention of a provision is given pays the amount stated in the notice before the end of the payment period for the notice:

(a) any liability of the person for the alleged contravention is discharged; and

(b) if the alleged contravention is of an offence provision and would not also constitute a contravention of a civil penalty provision—the person may not be prosecuted in a court for the alleged contravention; and

(c) if the alleged contravention is of an offence provision and would also constitute a contravention of a civil penalty provision—the person may not be prosecuted in a court, and proceedings seeking a pecuniary penalty order may not be brought, in relation to the alleged contravention; and

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(d) if the alleged contravention is of a civil penalty provision—proceedings seeking a pecuniary penalty order may not be brought in relation to the alleged contravention; and

(e) the person is not regarded as having admitted guilt or liability for the alleged contravention; and

(f) if the provision is an offence provision—the person is not regarded as having been convicted of the alleged offence.

(2) Subsection (1) does not apply if the notice has been withdrawn.

12GXH Effect of this Subdivision

This Subdivision does not:

(a) require an infringement notice to be given to a person for an alleged contravention of a provision subject to an infringement notice under this Subdivision; or

(b) affect the liability of a person for an alleged contravention of a provision subject to an infringement notice under this Subdivision if:

(i) the person does not comply with an infringement notice given to the person for the contravention; or

(ii) an infringement notice is not given to the person for the contravention; or

(iii) an infringement notice is given to the person for the contravention and is subsequently withdrawn; or

(c) prevent the giving of 2 or more infringement notices to a person for an alleged contravention of a provision subject to an infringement notice under this Subdivision; or

(d) limit a court's discretion to determine the amount of a penalty to be imposed on a person who is found to have contravened a provision subject to an infringement notice under this Subdivision.

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Subdivision GC—Substantiation notices

12GY ASIC may require claims to be substantiated etc.

(1) This section applies if a person has made a claim or representation promoting, or apparently intended to promote, a supply, or possible supply, of financial services by that or any other person.

(2) ASIC may give the person who has made the claim or representation a written notice that requires the person to do one or more of the following:

(a) give information and/or produce documents to ASIC that could be capable of substantiating or supporting the claim or representation;

(b) give information and/or produce documents to ASIC that could be capable of substantiating:

(i) the quantities in which; and

(ii) the period for which;

the person is or will be able to make a supply to which the claim or representation relates (whether or not the claim or representation relates to those quantities or that period);

(c) give information and/or produce documents to ASIC that are of a kind specified in the notice;

within 21 days after the notice is given to the person.

(3) Any kind of information or documents that ASIC specifies under paragraph (2)(c) must be a kind that ASIC is satisfied is relevant to:

(a) substantiating or supporting the claim or representation; or

(b) substantiating the quantities in which, or the period for which, the person is or will be able to make such a supply.

(4) The notice must:

(a) name the person to whom it is given; and

(b) specify the claim or representation to which it relates; and

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(c) explain the effect of sections 12GYA, 12GYB and 12GYC.

(5) The notice may relate to more than one claim or representation that the person has made.

(6) This section does not apply to a person in relation to a claim or representation made by the person if the person:

(a) is a prescribed information provider within the meaning of section 12DN; and

(b) made the claim or representation by publishing it on behalf of another person in the course of carrying on a business of providing information; and

(c) does not have a commercial relationship with the other person other than for the purpose of:

(i) publishing claims or representations promoting, or apparently intended to promote, the other person's business or other activities; or

(ii) the other person supplying financial services to the person.

12GYA Extending periods for complying with substantiation notices

(1) A person who has been given a substantiation notice may, at any time within 21 days after the notice was given to the person, apply in writing to ASIC for an extension of the period for complying with the notice.

(2) ASIC may, by written notice given to the person, extend the period within which the person must comply with the notice.

12GYB Compliance with substantiation notices

(1) A person who is given a substantiation notice must comply with it within the substantiation notice compliance period for the notice.

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(2) The ***substantiation notice compliance period*** for a substantiation notice is:
  (a) the period of 21 days specified in the notice; or
  (b) if the period for complying with the notice has been extended under section 12GYA—the period as so extended.

(3) Despite subsection (1), an individual may refuse or fail to give particular information or produce a particular document in compliance with a substantiation notice on the ground that the information or production of the document might tend to incriminate the individual or to expose the individual to a penalty.

12GYC False or misleading information etc.

(1) A person must not, in compliance or purported compliance with a substantiation notice:
  (a) give to ASIC false or misleading information; or
  (b) produce to ASIC documents that contain false or misleading information.

(2) This section does not apply to:
  (a) information that the person could not have known was false or misleading; or
  (b) the production to ASIC of a document containing false or misleading information if the document is accompanied by a statement of the person that the information is false or misleading.

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 ASIC has under Part 3 when investigating a contravention, or suspected contravention, of a

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provision of this Division. The powers may be used only when ASIC 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 ASIC

(1) If:

(a) a proceeding is instituted against a person under section 12GD; or

(b) an application is made under section 12GLA or 12GLB or subsection 12GM(2), 12GN(1), 12GNB(1), 12GNE(1) or 12GNF(1) for an order against a person;

ASIC must, at the request of the person and upon payment of the prescribed fee (if any), give to the person:

(c) a copy of every document that has been given to, or obtained by, ASIC in connection with the matter to which the application, notice or proceeding relates and tends to establish the case of the person; and

(d) a copy of any other document in ASIC's possession that comes to ASIC's attention in connection with the matter to which the application, notice or proceeding relates and tends to establish the case of the person;

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

(2) If ASIC does not comply with a request under subsection (1), the Court must, subject to subsection (3), upon application by the person who made the request, make an order directing ASIC 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

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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 for offences against this Division etc.

(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) ASIC; or
   (b) a person authorised in writing by ASIC;
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.

(4) Nothing in subsection (3) affects the operation of the *Director of Public Prosecutions Act 1983*.

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

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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.

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Part 3—Investigations and information-gathering

Division 1—Investigations

13 General powers of investigation

(1) ASIC may make such investigation as it thinks expedient for the due administration of the corporations legislation (other than the excluded provisions) where it has reason to suspect that there may have been committed:

(a) a contravention of the corporations legislation (other than the excluded provisions); or

(b) a contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, being a contravention that:

(i) concerns the management or affairs of a body corporate or managed investment scheme; or

(ii) involves fraud or dishonesty and relates to a body corporate or managed investment scheme or to financial products.

(2) Where ASIC has reason to suspect that unacceptable circumstances within the meaning of Subdivision B of Division 2 of Part 6.10 of the Corporations Act have, or may have, occurred, ASIC may make such investigation as it thinks expedient:

(a) for the purposes of determining whether or not to make an application under section 657C of that Act; or

(b) otherwise for the due administration of the corporations legislation (other than the excluded provisions).

(3) If ASIC has reason to suspect that a registered liquidator:

(a) has not, or may not have, faithfully performed his or her duties; or

(b) is not, or may not be, faithfully performing his or her duties;

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ASIC may make such investigation as it thinks expedient for the due administration of the corporations legislation (other than the excluded provisions).

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

(7) If a consumer contract or a small business contract is:
   (a) a financial product; or
   (b) a contract for the supply, or possible supply, of services that are financial services;

ASIC may make such investigations as it thinks expedient into the terms of the contract for the purposes of determining whether or not to make an application to the Court under section 12GND.

(8) Expressions used in subsection (7) that are defined in Division 2 of Part 2 have the same meaning as in that Division.

14 Minister may direct investigations

(1) Where, in the Minister's opinion, it is in the public interest in respect of this jurisdiction for a particular matter to which subsection (2) applies to be investigated, the Minister may, by writing, direct ASIC to investigate that matter.

(2) This subsection applies to a matter relating to any of the following:
   (a) an alleged or suspected contravention of the corporations legislation (other than the excluded provisions);
   (b) an alleged or suspected contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, being a contravention that:
      (i) concerns the management or affairs of a body corporate; or
      (ii) involves fraud or dishonesty and relates to a body corporate or financial products;
   (c) the affairs, or particular affairs, of a corporation;

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(d) dealing in financial products;
(f) the establishment or conducting of a financial market;
(g) the provision of a clearing and settlement facility;
(ga) the provision of a derivative trade repository;
(j) the giving of advice, analyses or reports about financial products;
(k) the provision of compensation arrangements for a financial market.

(3) ASIC must comply with a direction under subsection (1).

(4) A direction under subsection (1) does not prevent ASIC from delegating a function or power.

15 Investigation after report of receiver or liquidator

If a report or return has been lodged under section 422, 422A, 422B or 533 of the Corporations Act or regulation 5.5.05 of the *Corporations Regulations 2001*, ASIC may investigate a matter to which the report or return relates for the purpose of determining whether or not a person ought to be prosecuted for an offence against the corporations legislation (other than the excluded provisions).

16 Interim report on investigation

(1) Where, in the course of an investigation under this Division, ASIC forms the opinion that:
(a) a serious contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, has been committed; or
(b) to prepare an interim report about the investigation would enable or assist the protection, preservation or prompt recovery of property; or
(c) there is an urgent need for the corporations legislation (other than the excluded provisions) to be amended;

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it must prepare an interim report that relates to the investigation and sets out:

(d) if paragraph (a) applies—its findings about the contravention, and the evidence and other material on which those findings are based; or

(e) if paragraph (b) applies—such matters as, in its opinion, will so enable or assist; or

(f) if paragraph (c) applies—its opinion about amendment of that legislation, and its reasons for that opinion;

and such other matters relating to, or arising out of, the investigation as it thinks fit.

(2) ASIC may prepare an interim report about an investigation under this Division and must do so if the Minister so directs.

(3) A report under subsection (2) must set out such matters relating to, or arising out of, the investigation as ASIC thinks fit or the Minister directs.

17 Final report on investigation

(1) At the end of an investigation under section 13 or 15, ASIC may prepare a report about the investigation and must do so if the Minister so directs.

(2) At the end of an investigation under section 14, ASIC must prepare a report about the investigation.

(3) A report under this section must set out:

(a) ASIC's findings about the matters investigated; and

(b) the evidence and other material on which those findings are based; and

(c) such other matters relating to, or arising out of, the investigation as ASIC thinks fit or the Minister directs.

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18 Distribution of report

(1) As soon as practicable after preparing a report under this Division, ASIC must give a copy of the report to the Minister.

(2) Where a report, or part of a report, under this Division relates to a serious contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, ASIC may give a copy of the whole or a part of the report to:

(a) the Australian Federal Police; or

(b) the Chief Executive Officer of the Australian Crime Commission or a member of the staff of the ACC (within the meaning of the *Australian Crime Commission Act 2002*); or

(c) the Director of Public Prosecutions; or

(d) a prescribed agency.

(3) Where a report, or part of a report, under this Division relates to a person's affairs to a material extent, ASIC may, at the person's request or of its own motion, give to the person a copy of the report or of part of the report.

(4) The Minister may cause the whole or a part of a report under this Division to be printed and published.

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Division 2—Examination of persons

19 Notice requiring appearance for examination

(1) This section applies where ASIC, on reasonable grounds, suspects or believes that a person can give information relevant to a matter that it is investigating, or is to investigate, under Division 1.

(2) ASIC may, by written notice in the prescribed form given to the person, require the person:

(a) to give to ASIC all reasonable assistance in connection with the investigation; and

(b) to appear before a specified member or staff member for examination on oath or affirmation and to answer questions.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(3) A notice given under subsection (2) must:

(a) state the general nature of the matter referred to in subsection (1); and

(b) set out the effect of subsection 23(1) and section 68.

20 Proceedings at examination

The remaining provisions of this Division apply where, pursuant to a requirement made under section 19 for the purposes of an investigation under Division 1, a person (in this Division called the ***examinee***) appears before another person (in this Division called the ***inspector***) for examination.

21 Requirements made of examinee

(1) The inspector may examine the examinee on oath or affirmation and may, for that purpose:

(a) require the examinee to either take an oath or make an affirmation; and

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(b) administer an oath or affirmation to the examinee.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(1A) An offence under subsection 63(3) relating to subsection (1) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(2) The oath or affirmation to be taken or made by the examinee for the purposes of the examination is an oath or affirmation that the statements that the examinee will make will be true.

(3) The inspector may require the examinee to answer a question that is put to the examinee at the examination and is relevant to a matter that ASIC is investigating, or is to investigate, under Division 1.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

22 Examination to take place in private

(1) The examination must take place in private and the inspector may give directions about who may be present during it, or during a part of it.

(2) A person must not be present at the examination unless he or she:
(a) is the inspector, the examinee or a member; or
(b) is a staff member approved by ASIC; or
(c) is entitled to be present by virtue of:
(i) a direction under subsection (1); or
(ii) subsection 23(1).

Penalty: 30 penalty units.

(3) Subsection (2) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

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22A Proceedings at examination

(1) The inspector may decide to hold the examination:
  (a) at one or more physical venues; or
  (b) at one or more physical venues and using virtual enquiry technology; or
  (c) using virtual enquiry technology only.

(2) Subsection (3) applies if the examination is held:
  (a) at one or more physical venues and using virtual enquiry technology; or
  (b) using virtual enquiry technology only.

(3) The inspector must ensure that the use of the virtual enquiry technology is reasonable.

(4) If the examination is held:
  (a) at more than one physical venue; or
  (b) at one or more physical venues and using virtual enquiry technology; or
  (c) using virtual enquiry technology only;

the inspector may appoint a single place and time at which the examination is taken to have been held.

(5) This section applies to part of an examination in the same way that it applies to all of an examination.

23 Examinee's lawyer may attend

(1) The examinee's lawyer may be present at the examination and may, at such times during it as the inspector determines:
  (a) address the inspector; and
  (b) examine the examinee;

about matters about which the inspector has examined the examinee.

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(2) If, in the inspector's opinion, a person is trying to obstruct the examination by exercising rights under subsection (1), the inspector may require the person to stop addressing the inspector, or examining the examinee, as the case requires.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(3) An offence under subsection 63(4) relating to subsection (2) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

24 Record of examination

(1) The inspector may, and must if the examinee so requests, cause a record to be made of statements made at the examination.

(2) If a record made under subsection (1) is in writing or is reduced to writing:

(a) the inspector may require the examinee to read it, or to have it read to him or her, and may require him or her to sign it; and

(b) the inspector must, if requested in writing by the examinee to give to the examinee a copy of the written record, comply with the request without charge but subject to such conditions (if any) as the inspector imposes.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(3) An offence under subsection 63(3) relating to paragraph (2)(a) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

25 Giving to other persons copies of record

(1) ASIC may give a copy of a written record of the examination, or such a copy together with a copy of any related book, to a person's lawyer if the lawyer satisfies ASIC that the person is carrying on,

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or is contemplating in good faith, a proceeding in respect of a matter to which the examination related.

(2) If ASIC gives a copy to a person under subsection (1), the person, or any other person who has possession, custody or control of the copy or a copy of it, must not, except in connection with preparing, beginning or carrying on, or in the course of, a proceeding:

(a) use the copy or a copy of it; or

(b) publish, or communicate to a person, the copy, a copy of it, or any part of the copy's contents.

Penalty: 30 penalty units.

(2A) Subsection (2) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(3) ASIC may, subject to such conditions (if any) as it imposes, give to a person a copy of a written record of the examination, or such a copy together with a copy of any related book.

26 Copies given subject to conditions

(1) If a copy is given to a person under subsection 24(2) or 25(3) subject to conditions, the person, and any other person who has possession, custody or control of the copy or a copy of it, must comply with the conditions.

Penalty: 30 penalty units.

(2) Subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

27 Record to accompany report

(1) If a report about the investigation referred to in section 20 is prepared under section 17, each record (if any) of the examination must accompany the report.

(2) If:

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(a) in ASIC's opinion, a statement made at an examination is relevant to any other investigation under Division 1; and

(b) a record of the statement was made under section 24; and

(c) a report about the other investigation is prepared under section 17;

a copy of the record must accompany the report.

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Division 3—Inspection of books and audit information-gathering powers

28 When certain powers may be exercised

A power conferred by this Division (other than sections 29, 30A, 30B and 39A) may only be exercised:

(a) for the purposes of the performance or exercise of any of ASIC's functions and powers under the corporations legislation; or

(b) for the purposes of ensuring compliance with the corporations legislation; or

(c) in relation to:

(i) an alleged or suspected contravention of the corporations legislation; or

(ii) an alleged or suspected contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, being a contravention that concerns the management or affairs of a body corporate, or involves fraud or dishonesty and relates to a body corporate or financial products; or

(d) for the purposes of an investigation under Division 1.

29 ASIC may inspect books without charge

(1) A book that the corporations legislation (other than the excluded provisions) requires a person to keep must be open for inspection (without charge) by a person authorised in writing by ASIC.

(2) A person authorised under this section may require a person in whose possession the book is to make the book available for inspection by the first-mentioned person.

(2A) An offence under subsection 63(3) relating to subsection (2) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

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(3) An authorisation under this section may be of general application or may be limited by reference to the books to be inspected.

30 Notice to produce books about affairs of body corporate or registered scheme

(1) ASIC may give to:

(a) a body corporate that is not an exempt public authority; or

(b) an eligible person in relation to such a body corporate;

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

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(2) ASIC may give to:

(a) the responsible entity of a registered scheme; or

(b) an eligible person in relation to the responsible entity;

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

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

30A Notice to auditors concerning information and books

(1) Subject to subsection (2), ASIC may give an Australian auditor a written notice requiring the auditor:

(a) to give specified information; or

(b) to produce specified books;

to a specified member or staff member at a specified place and time.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(2) The power in subsection (1) may only be exercised:

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(a) for the purposes of the performance or exercise of any of ASIC's functions and powers relating to:

(i) audit-related matters (***Corporations Act audit requirements***) under Chapter 2M or Part 9.2 or 9.2A of the Corporations Act or under other provisions of that Act that relate to that Chapter or that Part; or

(ia) audit-related matters (***ACNC audit requirements***) under the *Australian Charities and Not-for-profits Commission Act 2012*; or

(ii) audit requirements (***overseas audit requirements***) referred to in subsection 11(10); or

(b) for the purposes of:

(i) ascertaining compliance with Corporations Act audit requirements or ACNC audit requirements; or

(ii) assisting in ascertaining compliance with overseas audit requirements; or

(c) in relation to:

(i) an alleged or suspected contravention of Corporations Act audit requirements or ACNC audit requirements; or

(ii) an alleged or suspected contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, being a contravention that relates to an audit matter and that either concerns the management or affairs of a body corporate or involves fraud or dishonesty and relates to a body corporate; or

(d) for the purposes of an investigation under Division 1 relating to a contravention referred to in paragraph (c).

(3) Without limiting subsection (1), a notice under that subsection may specify information or books that relate to any or all of the following:

(a) the policies relating to audit that the auditor has adopted or proposes to adopt, or the procedures relating to audit that the auditor has put in place or proposes to put in place;

(b) audits the auditor has conducted or proposes to conduct or in which the auditor has participated or proposes to participate;

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(c) any other matter pertaining to audit that is prescribed by the regulations for the purposes of this paragraph.

Note: A person responding to a notice under subsection (1) has qualified privilege in respect of the response (see section 1289 of the Corporations Act).

(4) Without limiting subsection (1), a notice under that subsection may require the auditor to give information or produce books even if doing so would involve a breach of an obligation of confidentiality that the auditor owes an audited body.

(5) ASIC may, by written notice to an Australian auditor who has received a notice under subsection (1), extend the period within which the auditor must give the information or produce the books to which the notice under that subsection relates.

30B Notice to registered liquidators concerning information and books

(1) Subject to subsection (2), ASIC may give a registered liquidator a written notice requiring the liquidator:

(a) to give specified information; and

(b) to produce specified books;

to a specified member or staff member at a specified place and time.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(2) The power in subsection (1) may only be exercised:

(a) for the purposes of the performance or exercise of any of ASIC's functions and powers in relation to the liquidator requirements; or

(b) for the purposes of ascertaining compliance with the liquidator requirements; or

(c) in relation to:

(i) an alleged or suspected contravention of the liquidator requirements; or

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(ii) an alleged or suspected contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, being a contravention that relates to the performance or exercise of a registered liquidator's functions, duties or powers and that either concerns the management of the affairs of a body corporate or involves fraud or dishonesty and relates to a body corporate; or

(d) for the purposes of an investigation under Division 1 relating to a contravention referred to in paragraph (c).

(3) The ***liquidator requirements*** are the requirements in relation to registered liquidators, the external administration of companies or the control of the property of corporations under:

(a) Chapter 5 of the Corporations Act; and

(b) Schedule 2 to the Corporations Act; and

(c) other provisions of the Corporations Act that relate to that Chapter or Schedule.

(4) Without limiting subsection (1), a notice under that subsection may specify information or books that relate to any or all of the following:

(a) the policies relating to the external administration of companies and the control of the property of corporations that the registered liquidator has adopted or proposes to adopt;

(b) the procedures relating to the external administration of companies and the control of the property of corporations that the registered liquidator has put in place or proposes to put in place;

(c) the external administration of a company, or companies, that the registered liquidator has conducted, is conducting or is proposing to conduct;

(d) the control of the property of a corporation, or corporations, that the registered liquidator has conducted, is conducting or is proposing to conduct;

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(e) any other matter relating to the external administration of companies or the control of the property of corporations that is prescribed for the purposes of this paragraph.

(5) Without limiting subsection (1), a notice under that subsection may require the registered liquidator to give information or produce books even if doing so would involve a breach of an obligation of confidentiality that the registered liquidator owes to:

(a) a company that is, has been or is likely to be under external administration; or

(b) a corporation the property of which is, has been or is likely to be under control.

(6) ASIC may, by written notice to a registered liquidator who has received a notice under subsection (1), extend the period within which the registered liquidator must give the information or produce the books to which the notice under that subsection relates.

(7) In this section:

control of the property of a corporation means:

(a) the receivership of that property; and

(b) the possession, or control, of that property for the purpose of enforcing a security interest;

and includes any functions or powers in connection with managing the corporation that may be performed or exercised by a receiver or other controller of that property.

external administration of a company has the same meaning as in Schedule 2 to the Corporations Act.

registered liquidator means a person who is registered as a liquidator under Schedule 2 to the Corporations Act.

31 Notice to produce books about financial products

(1) ASIC may give to:

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(a) the operator of a financial market, clearing and settlement facility or derivative trade repository; or

(b) a member of the board of the operator of a financial market, clearing and settlement facility or derivative trade repository; or

(c) a person who either carries on or has carried on (either alone or together with any other person or persons) a financial services business, or who is a representative of such a person; or

(d) a nominee controlled by a person of a kind referred to in paragraph (c) or jointly controlled by 2 or more persons at least one of whom is such a person; or

(e) an eligible person in relation to a person of a kind referred to in paragraph (a), (b), (c) or (d); or

(f) any other person who, in ASIC's opinion, has been a party to a dealing in financial products;

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

(g) the business or affairs of a financial market, clearing and settlement facility or derivative trade repository; or

(h) a dealing in financial products; or

(j) advice given, or an analysis or report issued or published, about financial products; or

(k) the character or financial position of, or a business carried on by, a person of a kind referred to in paragraph (c) or (d); or

(m) an audit of, or a report of an auditor about, a dealing in financial products or accounts or records of a person who either carries on or has carried on (either alone or together with any other person or persons) a financial services business, or who is a representative of such a person.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(2) A reference in subsection (1) to a dealing in financial products, or to a business carried on by a person, includes a reference to a

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dealing in financial products by a person as a trustee, or to a business carried on by a person as a trustee, as the case may be.

32A Notice to produce books about financial services

For the purposes of Division 2 of Part 2, ASIC 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.

Note: Failure to comply with a requirement made under this section is an offence (see section 63).

33 Notice to produce documents in person's possession

(1) ASIC may give to a person a written notice requiring the production to a specified member or staff member, at a specified place and time, of specified books that are in the first-mentioned person's possession and relate to:

(a) affairs of a body corporate; or

(ab) affairs of a registered scheme; or

(b) a matter referred to in any of paragraphs 31(1)(g) to (m), inclusive; or

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

Note: Failure to comply with a requirement made under this section is an offence (see section 63).

(2) ASIC may give to a person a written notice requiring the production to a specified member or staff member, at a specified place and time, of specified books that are in the person's possession and that relate to the question whether an auditor has complied with Corporations Act audit requirements, ACNC audit

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requirements, or overseas audit requirements, within the meaning of subsection 30A(2).

(3) ASIC may give to a person a written notice requiring the production to a specified member or staff member, at a specified place and time, of specified books that:

(a) are in the person's possession or control; and

(b) relate to the question whether a registered liquidator has complied with liquidator requirements, within the meaning of subsection 30B(3).

34 ASIC may authorise persons to require production of books, giving of information etc.

(1) ASIC may by writing authorise a member or staff member to make a requirement of a kind that this Division empowers ASIC to make.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(2) An authorisation under this section may be of general application or may be limited by reference to all or any of the following:

(a) the persons of whom requirements may be made;

(b) the books that may be required to be produced;

(c) the information that may be required to be given.

(3) Where an authorisation of a person is in force under this section, the person may make a requirement in accordance with the authorisation as if, in sections 30, 30A, 30B, 31, 32A and 33:

(a) a reference to ASIC were a reference to the person; and

(b) a reference to specified books were a reference to books that the person specifies, whether in the requirement or not and whether orally or in writing, to the person of whom the requirement is made; and

(c) a reference to specified information were a reference to information that the person specifies, whether in the requirement or not and whether orally or in writing, to the person of whom the requirement is made; and

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(d) a reference to giving or producing to a specified person were a reference to giving or producing to the first-mentioned person.

37 Powers where books produced or seized

(1) This section applies where:

(a) books are produced to a person under a requirement made under this Division; or

(b) under a warrant issued under Division 2 of Part IAA of the *Crimes Act 1914*, as applied under section 39D of this Act, a person:

(i) takes possession of books; or

(ii) secures books against interference; or

(c) by virtue of a previous application of subsection (8) of this section, books are delivered into a person's possession.

(1A) However, if paragraph (1)(b) applies, subsections (4), (5), (6), (7) and (8) do not apply.

(2) If paragraph (1)(a) applies, the person may take possession of any of the books.

(3) The person may inspect, and may make copies of, or take extracts from, any of the books.

(4) The person may use, or permit the use of, any of the books for the purposes of a proceeding.

(5) The person may retain possession of any of the books for so long as is necessary:

(a) for the purposes of exercising a power conferred by this section (other than this subsection and subsection (7)); or

(b) for any of the purposes referred to in paragraphs 28(a), (b) and (d), 30A(2)(a), (b) and (d) or 30B(2)(a), (b) and (d), as the case requires; or

(c) except in the case of books required to be produced for a purpose specified in subparagraph 30A(2)(a)(ii) or

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30A(2)(b)(ii)—for a decision to be made about whether or not a proceeding to which the books concerned would be relevant should be begun; or

(d) for such a proceeding to be begun and carried on.

(6) No-one is entitled, as against the person, to claim a lien on any of the books, but such a lien is not otherwise prejudiced.

(7) While the books are in the person's possession, the person:

(a) must permit another person to inspect at all reasonable times such (if any) of the books as the other person would be entitled to inspect if they were not in the first-mentioned person's possession; and

(b) may permit another person to inspect any of the books.

(8) The person may deliver any of the books into the possession of ASIC or of a person authorised by it to receive them.

(9) If paragraph (1)(a) or (b) applies, the person, or if paragraph (1)(a) applies a person into whose possession the person delivers any of the books under subsection (8), may require:

(a) if paragraph (1)(a) applies—a person who so produced any of the books; or

(b) in any case—a person who was a party to the compilation of any of the books;

to explain any matter about the compilation of any of the books or to which any of the books relate.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(10) In this section:

proceeding includes:

(a) in relation to a contravention of Division 2 of Part 2—a proceeding under a law of the Commonwealth, a State or a Territory; and

(b) otherwise—a proceeding under a law of the Commonwealth, or of a State or Territory in this jurisdiction.

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38 Powers where books not produced

Where a person fails to produce particular books in compliance with a requirement made by another person under this Division, the other person may require the first-mentioned person to state:

(a) where the books may be found; and

(b) who last had possession, custody or control of the books and where that person may be found.

Note: Failure to comply with a requirement made under this section is an offence (see section 63).

39 Power to require person to identify property of body corporate

A person who has power under this Division to require another person to produce books relating to affairs of a body corporate may, whether or not that power is exercised, require the other person:

(a) to identify property of the body; and

(b) to explain how the body has kept account of that property.

Note: Failure to comply with a requirement made under this section is an offence (see section 63).

39A ASIC may give copy of book relating to registered scheme to another person

(1) ASIC may, subject to such conditions (if any) as it imposes, give to a person a copy of any book in its possession that relates to a registered scheme.

(2) If a copy of a book is given to a person under subsection (1) subject to conditions, the person, and any other person who has possession, custody or control of the copy or a copy of it, must comply with the conditions.

Penalty: 3 months imprisonment.

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39B ASIC to notify foreign regulator's access to information or books

(1) This section applies if:

(a) an Australian auditor gives information or produces books because of a requirement made under subsection 30A(1) for purposes referred to in subparagraph 30A(2)(a)(ii) or 30A(2)(b)(ii); or

(b) books specified in such a requirement are obtained from an Australian auditor under a warrant issued under Division 2 of Part IAA of the *Crimes Act 1914*, as applied under section 39D of this Act; or

(c) a person gives information or produces books that relate to the question whether an auditor has complied with overseas audit requirements within the meaning of subsection 30A(2) because of a requirement made under subsection 33(2); or

(d) such books are obtained from a person under a warrant issued under Division 2 of Part IAA of the *Crimes Act 1914*, as applied under section 39D of this Act.

(2) If ASIC gives the information or books, or copies of the books, to a regulatory body with which it has entered into an agreement or arrangement under subsection 11(10), ASIC must, within 14 days of doing so, notify the Australian auditor or person in writing of the details of the information or books, or copies, given.

39C ASIC may give information and books in relation to Chapter 5 bodies corporate

Application of this section

(1) This section applies if ASIC obtains or generates information or books in the exercise of its powers or the performance of its functions in relation to:

(a) a person in that person's capacity as a registered liquidator; or

(b) the external administration of a company; or

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(c) the control of property of a corporation.

ASIC may give administration information to certain persons

(2) ASIC may give the information, all or part of the books or copies of all or part of the books (***administration information***) to one or more of the following:

(a) if the administration information relates to a corporation—the corporation;

(b) if the administration information relates to a company that is or has been under external administration—a person who is or has at any time been:

(i) the external administrator of the company; or

(ii) a related entity of the company; or

(iii) an officer of the company; or

(iv) a creditor of the company; or

(v) a member of a committee of inspection in the external administration of the company;

(c) if the administration information relates to property of a corporation that is or has been under control—a person who is or has at any time been:

(i) the controller of the property; or

(ii) a related entity of the corporation; or

(iii) an officer of the corporation; or

(iv) a creditor of the corporation;

(d) if the administration information relates to a company that is or has been under external administration—a person who is carrying out, or has at any time carried out, a review of the external administration of the company under Subdivision C of Division 90 of Schedule 2 to the Corporations Act.

ASIC may only give administration information in certain circumstances

(3) ASIC must not give administration information to a person under this section unless ASIC is satisfied that:

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(a) the administration information is relevant to the person; or

(b) the administration information is relevant to the exercise of a power or performance of a function under the Corporations Act by the person in relation to:

(i) a registered liquidator; or

(ii) the external administration of a company; or

(iii) the control of property of a corporation; or

(c) it is otherwise reasonable to give the administration information to the person.

Process to be observed before administration information given

(4) Before giving administration information to a person under this section, ASIC must give the external administrator of the company or the controller of the property of the corporation (as the case requires) notice in writing:

(a) identifying:

(i) the administration information that ASIC proposes to give; and

(ii) the person to whom ASIC proposes to give the information; and

(b) inviting the external administrator or controller (as the case requires) to make a written submission to ASIC within 10 business days after the notice is given, stating:

(i) whether he or she has any objection to the administration information being given to the person; and

(ii) if he or she has such an objection, the reasons for that objection.

(5) If the external administrator or controller (as the case requires) objects to the administration information being given to a person, ASIC must take into account the reasons for that objection when deciding whether to give the information to the person.

(6) If the external administrator or controller (as the case requires) has made a submission objecting to the administration information

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being given to a person and ASIC decides to give the information to the person, ASIC must give the external administrator or controller (as the case requires) 5 business days' notice of its decision before giving the information to the person.

Conditions

(7) ASIC may, by notice in writing to the person to whom ASIC gives the administration information, impose conditions on the use and disclosure of the administration information by the person.

Offence

(8) A person commits an offence if:
  (a) ASIC gives administration information to the person subject to a condition in relation to the use or disclosure of that information by the person; and
  (b) ASIC has given the person notice of the condition under subsection (7); and
  (c) the person does not comply with the condition.

Penalty: 3 months imprisonment.

Notices are not legislative instruments

(9) Notices under subsections (4) and (7) are not legislative instruments.

Definitions

(10) In this section:

control of the property of a corporation means:
  (a) the receivership of that property; and
  (b) the possession, or control, of that property for the purpose of enforcing a security interest;

and includes any functions or powers in connection with managing the corporation that may be performed or exercised by a receiver or other controller of that property.

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external administration of a company has the same meaning as in Schedule 2 to the Corporations Act.

external administrator of a company has the same meaning as in Schedule 2 to the Corporations Act.

registered liquidator means a person who is registered as a liquidator under Schedule 2 to the Corporations Act.

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Division 3A—Extra application of Crimes Act search warrant provisions

Subdivision A—Basic extra application

39D Extra application of Crimes Act search warrant provisions

(1) In addition to the application that the applied provisions have (disregarding this subsection) in relation to offences mentioned in subsection (3), the applied provisions also apply under this subsection in relation to those offences, with the modifications set out in Subdivision B.

(2) To avoid doubt, subsection (1) does not limit the application that the applied provisions have (disregarding that subsection).

(3) For the purposes of subsection (1), the offences are indictable offences under any of the following:
  (a) the corporations legislation;
  (b) a provision of a law of the Commonwealth, or of a State or Territory in this jurisdiction, a contravention of which:
    (i) concerns the management or affairs of a body corporate or managed investment scheme; or
    (ii) involves fraud or dishonesty and relates to a body corporate or managed investment scheme or to financial products;
  (c) the *Retirement Savings Accounts Act 1997*;
  (d) the *Superannuation Industry (Supervision) Act 1993*.

(4) For the purposes of this Division, the ***applied provisions*** are as follows:
  (a) Divisions 1, 2, 4C and 5 of Part IAA of the *Crimes Act 1914*;
  (b) any other provisions of that Act, to the extent that those other provisions relate to the operation of the provisions mentioned in paragraph (a).

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39E Interpretation of modifications

To avoid doubt, a term used in Subdivision B in a modification of an applied provision has the same meaning as in the *Crimes Act 1914* unless specified otherwise.

Subdivision B—Modifications

39F Major modifications—evidential material

For the purposes of subsection 39D(1), in the definition of ***evidential material*** in subsection 3C(1) of the *Crimes Act 1914*, omit the words "or a thing relevant to a summary offence".

39G Major modifications—who may apply for a warrant etc.

(1) For the purposes of subsection 39D(1), in subsection 3E(1) of the *Crimes Act 1914*, after the words "by information on oath or affirmation", insert "given by a constable, or by a member of ASIC or an ASIC staff member authorised in writing by ASIC for the purposes of this subsection".

(2) For the purposes of subsection 39D(1), in subsection 3E(2) of the *Crimes Act 1914*, after the words "by information on oath or affirmation", insert "given by a constable, or by a member of ASIC or an ASIC staff member authorised in writing by ASIC for the purposes of this subsection".

(3) For the purposes of subsection 39D(1), in subsection 3LA(1) of the *Crimes Act 1914*, after the words "A constable", insert ", or a member of ASIC or an ASIC staff member authorised in writing by ASIC for the purposes of this subsection,".

(4) For the purposes of subsection 39D(1), in subsection 3R(1) of the *Crimes Act 1914*, after the words "A constable", insert ", or a member of ASIC or an ASIC staff member authorised in writing by ASIC for the purposes of this subsection,".

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39H Major modifications—purposes for which things may be used and shared

For the purposes of subsection 39D(1), replace section 3ZQU of the *Crimes Act 1914* with the following 2 sections.

3ZQU Purposes for which things may be used and shared

(1) A constable or Commonwealth officer may use, or make available to a member of ASIC or an ASIC staff member to use, a thing seized under this Part for the purpose of the performance of ASIC's functions or duties or the exercise of its powers.

(2) Without limiting the scope of subsection (1), a constable or Commonwealth officer may use, or make available to a person covered under subsection (3) to use, a thing seized under this Part for the purpose of any or all of the following if it is necessary to do so for that purpose:

(a) preventing or investigating any of the following:

(i) a breach of an offence provision;

(ii) a breach of a civil penalty provision;

(iii) a breach of an obligation (whether under statute or otherwise), other than an obligation of a private nature (such as an obligation under a contract, deed, trust or similar arrangement);

(b) prosecuting a breach of an offence provision;

(c) prosecuting a breach of a civil penalty provision;

(d) taking administrative action, or seeking an order of a court or tribunal (within the meaning of the *Australian Securities and Investments Commission Act 2001*), in response to a breach of an obligation (whether under statute or otherwise), other than an obligation of a private nature (such as an obligation under a contract, deed, trust or similar arrangement).

(3) A person is covered under this subsection if the person is any of the following:

(a) a constable;

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(b) a Commonwealth officer.

(4) Without limiting the scope of subsections (1) and (2), a constable or Commonwealth officer may use, or make available to a person covered under subsection (3) to use, a thing seized under this Part for the purpose of any or all of the following if it is necessary to do so for that purpose:

(a) proceedings under the *Proceeds of Crime Act 1987* or the *Proceeds of Crime Act 2002*;

(b) proceedings under a corresponding law (within the meaning of either of the Acts mentioned in paragraph (a)) that relate to a State offence that has a federal aspect;

(c) proceedings for the forfeiture of the thing under a law of the Commonwealth, a State or a Territory;

(d) the performance of a function or duty, or the exercise of a power, by a person, court or other body under, or in relation to a matter arising under, Division 104, 105 or 105A of the *Criminal Code*;

(e) investigating or resolving a complaint or an allegation of misconduct relating to an exercise of a power or the performance of a function or duty under this Part;

(f) investigating or resolving an AFP conduct or practices issue (within the meaning of the *Australian Federal Police Act 1979*) under Part V of that Act;

(g) investigating or resolving a complaint under the *Ombudsman Act 1976* or the *Privacy Act 1988*;

(h) conducting a NACC Act process (within the meaning of the *National Anti-Corruption Commission Act 2022*);

(i) proceedings in relation to a complaint, allegation or issue mentioned in paragraph (e), (f), (g) or (h);

(j) deciding whether to institute proceedings, to make an application or request, or to take any other action, mentioned in:

(i) any of the preceding paragraphs of this subsection; or

(ii) subsection (1) or (2);

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(k) the performance of the functions of the Australian Federal Police under section 8 of the *Australian Federal Police Act 1979*.

(5) A constable or Commonwealth officer may use a thing seized under this Part for any other use that is required or authorised by or under a law of a State or a Territory.

(6) A constable or Commonwealth officer may make available to another constable or Commonwealth officer to use a thing seized under this Part for any purpose for which the making available of the thing is required or authorised by a law of a State or Territory.

(7) To avoid doubt, this section does not limit any other law of the Commonwealth that:

(a) requires or authorises the use of a document or other thing; or

(b) requires or authorises the making available (however described) of a document or other thing.

(8) A constable or Commonwealth officer may make available to an agency that has responsibility for:

(a) law enforcement in a foreign country; or

(b) intelligence gathering for a foreign country; or

(c) the security of a foreign country;

a thing seized under this Part to be used by that agency for:

(d) a purpose mentioned in subsection (1), (2), (4), (5) or (6); or

(e) the purpose of performing a function, or exercising a power, conferred by a law in force in that foreign country.

Ministerial arrangements for sharing

(9) This Division does not prevent the Minister from making an arrangement with a Minister of a State or Territory for:

(a) the making available to a State or Territory law enforcement agency of that State or Territory, for purposes mentioned in subsections (1), (2), (4), (6) and (8), of things seized under this Part; and

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(b) the disposal by the agency of such things, originals and copies when they are no longer of use to that agency for those purposes.

Note: This subsection does not empower the Minister to make such an arrangement.

Definition

(10) In this section:

State or Territory law enforcement agency means:

(a) the police force or police service of a State or Territory; or

(b) the New South Wales Crime Commission; or

(c) the Independent Commission Against Corruption of New South Wales; or

(d) the Law Enforcement Conduct Commission of New South Wales; or

(e) the Independent Broad-based Anti-corruption Commission of Victoria; or

(f) the Crime and Corruption Commission of Queensland; or

(g) the Corruption and Crime Commission of Western Australia; or

(h) the Independent Commissioner Against Corruption of South Australia.

3ZQUA Commonwealth law permitting access to things seized under this Part does not apply

(1) This section applies if, disregarding this section, a law of the Commonwealth (other than this Part) requires or permits any of the following to be made available to a person covered under subsection (3):

(a) a thing seized under this Part;

(b) if a thing contains data that ASIC or the Australian Federal Police came into possession of as a result of exercising powers under this Part—the thing.

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(2) Subject to subsection (4), that law does not require or permit the thing to be made available to the person.

(3) A person is covered under this subsection if the person is not, and is not representing, the Commonwealth, a State or a Territory.

(4) This section does not affect any of the following:
  (a) the power of a court, or of a tribunal (within the meaning of the *Australian Securities and Investments Commission Act 2001*), to make an order;
  (b) the effect of an order of a court, or of a tribunal (within the meaning of that Act).

(5) This section does not affect the operation of the *Freedom of Information Act 1982*.

39I Minor modifications

(1) For the purposes of subsection 39D(1), the applied provisions apply with the modifications set out in this section.

(2) To avoid doubt, those modifications have no effect other than for the purposes mentioned in subsection (1).

(3) In subsection 3C(1) of the *Crimes Act 1914*, insert the following definitions:

ASIC means the Australian Securities and Investments Commission.

ASIC senior staff member means a senior staff member (within the meaning of the *Australian Securities and Investments Commission Act 2001*).

ASIC staff member means a staff member (within the meaning of the *Australian Securities and Investments Commission Act 2001*).

responsible agency, in relation to data or a thing, means:

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(a) if the data, or a device containing the data, or the thing, is in the control of the Australian Federal Police—the Australian Federal Police; or

(b) if the data, or a device containing the data, or the thing, is in the control of ASIC—ASIC.

responsible Commissioner, in relation to data or a thing, means:

(a) if the data, or a device containing the data, or the thing, is in the control of the Australian Federal Police—the Commissioner of the Australian Federal Police; or

(b) if the data, or a device containing the data, or the thing, is in the control of ASIC—the Chairperson of ASIC.

(4) In section 3E of the *Crimes Act 1914*:

(a) omit the note to subsection (1) of that section; and

(b) omit the words "is a member or special member of the Australian Federal Police and" in subsection (4) of that section.

(5) In subsections 3L(1B) and 3LAA(3) and sections 3ZQX and 3ZQZB of the *Crimes Act 1914*:

(a) treat the references to the Commissioner as being references to the responsible Commissioner; and

(b) treat the references to the Australian Federal Police as being references to the responsible agency.

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Division 4—Requirements to disclose information

40 When certain powers may be exercised

A power conferred by section 41 or 42 may only be exercised:

(a) for the purposes of the performance or exercise of any of ASIC's functions and powers under the corporations legislation (other than the excluded provisions); or

(b) for the purposes of ensuring compliance with the corporations legislation (other than the excluded provisions); or

(c) in relation to:

(i) an alleged or suspected contravention of the corporations legislation (other than the excluded provisions); or

(ii) an alleged or suspected contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, being a contravention that concerns the management or affairs of a body corporate, or involves fraud or dishonesty and relates to a body corporate or financial products; or

(iii) an alleged or suspected contravention, by a trustee company, of a law of the Commonwealth, or of a State or Territory, being a contravention that involves fraud or dishonesty and that relates to trust property; or

(d) for the purposes of an investigation under Division 1.

41 Acquisitions and disposals of financial products

(1) ASIC may require a person who carries on a financial services business to disclose to it, in relation to an acquisition or disposal of financial products:

(aa) whether the acquisition or disposal was effected on another person's behalf and, if so:

(i) the name of the other person; and

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(ii) the nature of the instructions given to the person who carries on a financial services business in relation to the dealing; or

(a) the name of the person from or through whom the financial products were acquired; or

(b) the name of the person to or through whom the financial products were disposed;

as the case may be, and the nature of the instructions given to the person who carries on a financial services business in relation to the acquisition or disposal.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(2) ASIC may require a person to disclose to it, in relation to an acquisition or disposal of financial products by the person, whether or not the person acquired or disposed of the financial products as trustee for, or for or on behalf of, another person, and, if so:

(a) the name of the other person; and

(b) the nature of any instructions given to the first-mentioned person in relation to the acquisition or disposal.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(3) ASIC may require a person who operates a financial market to disclose to ASIC, in relation to an acquisition or disposal of financial products on that financial market, the names of the persons who acted in the acquisition or disposal.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(4) ASIC may require an operator of a clearing and settlement facility to disclose to ASIC, in relation to a dealing in financial products, the names of any participants in the clearing and settlement facility who were concerned in any act or omission in relation to the dealing.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

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(5) Information required to be disclosed under this section need only be disclosed to the extent to which it is known to the person required to make the disclosure.

Note: In criminal proceedings, a defendant bears an evidential burden in relation to the matters in subsection (5).

(6) An offence under subsection 63(2) relating to subsection (1), (2), (3) or (4) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

42 Acquisitions and disposals of trust property by trustee companies

(1) ASIC may require a trustee company to disclose to it, in relation to an acquisition or disposal of trust property by the trustee company, all or any of the following:

(a) the name of:

(i) the person from or through whom the trust property was acquired; or

(ii) the person to or through whom the trust property was disposed;

(b) whether the acquisition or disposal was effected on the instructions of another person, and the nature of any such instructions;

(c) the names of the beneficiaries of the trust.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(2) Information required to be disclosed under this section need only be disclosed to the extent to which it is known to the person required to make the disclosure.

Note: In criminal proceedings, a defendant bears an evidential burden in relation to the matters in subsection (2).

(3) An offence under subsection 63(2) relating to subsection (1) of this section is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

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43 Exercise of certain powers of ASIC in relation to financial products

(1) This section applies where ASIC considers that:

(a) it may be necessary to exercise, in relation to a financial product issued by a body corporate, a power under section 794D of the Corporations Act; or

(b) a contravention of section 991F, or Division 2 of Part 7.10, of the Corporations Act may have been committed in relation to financial products issued by a body corporate; or

(c) a contravention of Chapter 6C of the Corporations Act may have been committed in relation to shares in a body corporate; or

(d) a contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, may have been committed, being a contravention that involves fraud or dishonesty and relates to financial products issued by a body corporate; or

(e) unacceptable circumstances within the meaning of Subdivision B of Division 2 of Part 6.10 of the Corporations Act have, or may have, occurred:

(i) in relation to an acquisition of shares in a body corporate; or

(ii) as a result of conduct engaged in by a person in relation to shares in, or the affairs of, a body corporate; or

(f) a person has, or may have, contravened section 657F of the Corporations Act.

(2) ASIC may require a director, secretary or senior manager of the body to disclose to ASIC information of which he or she is aware and that:

(a) may have affected a dealing that has taken place; or

(b) may affect a dealing that may take place;

in financial products issued by the body.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

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(3) If ASIC believes on reasonable grounds that a person can give information about particular matters, being any or all of the following:

(a) a dealing in financial products issued by the body;

(b) advice, or an analysis or report, that a person who carries on or has carried on (either alone or together with any other person or persons) a financial services business, or a representative of such a person, has given, issued or published about such financial products;

(c) the financial position of a business carried on by a person who:

(i) is or has been (either alone or together with any other person or persons) a person who carries on or has carried on a financial services business, or a representative of such a person; and

(ii) has dealt in, has given advice about, or has issued or published an analysis or report about, such financial products;

(d) the financial position of a business carried on by a nominee controlled by a person of a kind referred to in paragraph (c) or jointly controlled by 2 or more persons at least one of whom is such a person;

(e) an audit of, or a report of an auditor about, accounts or records of a person who carries on or has carried on (either alone or together with any other person or persons) a financial services business, or a representative of such a person, being accounts or records relating to dealings in such financial products;

ASIC may require the person to disclose to it the information that the person has about those particular matters.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(3A) An offence under subsection 63(2) relating to subsection (2) or (3) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

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(4) ASIC must not exercise a power conferred by subsection (2) or (3) except:

(a) if paragraph (1)(a) applies—for the purpose of determining whether or not to exercise a power as mentioned in that paragraph; or

(b) if paragraph (1)(b), (c) or (d) applies—for the purpose of investigating the possible contravention; or

(c) if paragraph (1)(e) or (f) applies—for the purpose of determining whether or not to make an application under section 657C or 657G of the Corporations Act.

44 Exercise of certain powers of ASIC in relation to trust property acquired or disposed of by trustee company

(1) This section applies if ASIC considers that a contravention of a law of the Commonwealth, or of a State or Territory, may have been committed by a trustee company, being a contravention that involves fraud or dishonesty and that relates to trust property.

(2) ASIC may require a director, secretary or senior manager of the trustee company to disclose to ASIC information of which he or she is aware and that may have affected an acquisition or disposal of trust property by the trustee company.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(3) If ASIC believes on reasonable grounds that a person can give information about particular matters, being any or all of the following:

(a) an acquisition or disposal of trust property by the trustee company;

(b) the financial position of the trustee company;

(c) an audit of, or a report of an auditor about, accounts or records of the trustee company;

ASIC may require the person to disclose to it the information that the person has about those particular matters.

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Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(4) An offence under subsection 63(2) relating to subsection (2) or (3) of this section is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

(5) ASIC must not exercise a power conferred by subsection (2) or (3) except for the purpose of investigating the possible contravention referred to in subsection (1).

47 Disclosures to take place in private

(1) A disclosure to ASIC pursuant to a requirement made under this Division must take place in private and ASIC may give directions about who may be present during it, or during a part of it.

(2) A person must not be present during a disclosure unless he or she:
(a) is a member; or
(b) is a staff member approved by ASIC; or
(c) is entitled to be present by virtue of:
(i) a direction under subsection (1); or
(ii) subsection 48(1).

Penalty: 30 penalty units.

(3) Subsection (2) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

48 Lawyer of person making disclosure may attend

(1) The lawyer of a person making a disclosure to ASIC pursuant to a requirement made under this Division may be present during the disclosure and may, at such times during it as the representative of ASIC presiding at the meeting during which the disclosure is made determines, address the representatives of ASIC about the disclosure.

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(2) If, in the presiding representative's opinion, a person is trying to obstruct the disclosure by exercising rights under subsection (1), the presiding representative may require the person to stop addressing the representatives of ASIC.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(3) An offence under subsection 63(4) relating to subsection (2) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

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Division 5—Proceedings after an investigation

49 ASIC may cause prosecution to be begun

(1) This section applies where:

(a) as a result of an investigation; or

(b) from a record of an examination;

conducted under this Part, it appears to ASIC that a person:

(c) may have committed an offence against the corporations legislation; and

(d) ought to be prosecuted for the offence.

(2) ASIC may cause a prosecution of the person for the offence to be begun and carried on.

(3) If:

(a) ASIC, on reasonable grounds, suspects or believes that a person can give information relevant to a prosecution for the offence; or

(b) the offence relates to matters being, or connected with, affairs of a body corporate, or to matters including such matters;

ASIC may, whether before or after a prosecution for the offence is begun, by writing given to the person, or to an eligible person in relation to the body, as the case may be, require the person or eligible person to give all reasonable assistance in connection with such a prosecution.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(3A) An offence under subsection 63(3) relating to subsection (3) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(4) Subsection (3) does not apply in relation to:

(a) the person referred to in subsection (1); or

(b) a person who is or has been that person's lawyer.

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Note: A defendant bears an evidential burden in relation to the matter in subsection (4), see subsection 13.3(3) of the *Criminal Code*.

(5) Nothing in this section affects the operation of the *Director of Public Prosecutions Act 1983*.

50 ASIC may cause civil proceeding to be begun

Where, as a result of an investigation or from a record of an examination (being an investigation or examination conducted under this Part), it appears to ASIC to be in the public interest for a person to begin and carry on a proceeding for:

(a) the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed in connection with a matter to which the investigation or examination related; or

(b) recovery of property of the person;

ASIC:

(c) if the person is a company—may cause; or

(d) otherwise—may, with the person's written consent, cause;

such a proceeding to be begun and carried on in the person's name.

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Division 5A—Audit deficiency notifications and reports

50A Application

(1) This Division applies to an audit deficiency (the ***identified audit deficiency***) that:

(a) is identified by ASIC in circumstances described in subsection (2) in relation to an audit conducted by an Australian auditor; and

(b) consists of any of the following:

(i) a failure by the auditor to comply with the auditing standards;

(ii) a failure by the auditor to comply with the auditor independence requirements in the Corporations Act;

(iii) a failure by the auditor to comply with any applicable code of professional conduct;

(iv) a failure by the auditor to comply with the provisions of the Corporations Act dealing with the conduct of audits; and

(c) ASIC reasonably believes:

(i) indicates a significant weakness in the Australian auditor's quality control system; or

(ii) indicates a significant weakness in the conduct of the audit and may be detrimental to the overall quality of the audit.

(2) For the purposes of paragraph (1)(a), the circumstances are that the identified audit deficiency is identified by ASIC while exercising its powers or functions:

(a) in relation to audit-related matters (***Corporations Act audit requirements***) under Chapter 2M, Chapter 5C, Part 7.8, Part 9.2 or Part 9.2A of the Corporations Act or under other provisions of that Act that relate to that Chapter or that Part; or

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(b) for the purposes of ascertaining compliance with Corporations Act audit requirements; or

(c) in relation to:

(i) an alleged or suspected contravention of Corporations Act audit requirements; or

(ii) an alleged or suspected contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, being a contravention that relates to an audit matter and that either concerns the management or affairs of a body corporate or involves fraud or dishonesty and relates to a body corporate; or

(d) for the purposes of an investigation under Division 1 of this Part relating to a contravention referred to in paragraph (c).

50B Notice of audit deficiency

(1) ASIC may, in writing, notify the Australian auditor of the identified audit deficiency.

(2) The notice must:

(a) set out:

(i) the identified audit deficiency; and

(ii) any remedial action that ASIC thinks necessary to remedy the deficiency; and

(iii) such other matters in relation to the deficiency as ASIC thinks fit; and

(b) invite the auditor to make written submissions to ASIC, within 6 months, about the deficiency and any remedial action taken, or proposed to be taken, to remedy the deficiency.

50C Audit deficiency report

(1) At any time after the end of the 6 month period, ASIC may prepare an ***audit deficiency report*** if ASIC is satisfied that the Australian auditor has not taken appropriate remedial action to remedy the identified audit deficiency.

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(2) The report must set out:
  (a) the identified audit deficiency; and
  (b) the remedial action that ASIC thinks necessary to remedy the deficiency; and
  (c) if the auditor has taken remedial action to remedy the deficiency—details of the remedial action; and
  (d) if the auditor has not taken any remedial action—that fact; and
  (e) such other matters in relation to the deficiency as ASIC thinks fit.

(3) Before preparing the report, ASIC must take into account:
  (a) any submissions received from the auditor in response to an invitation under paragraph 50B(2)(b); and
  (b) whether or not the auditor has taken any remedial action to remedy the deficiency.

(4) The report is not a legislative instrument.

50D Publication of report

(1) Subject to subsection (2) and section 50E, ASIC may, if it considers it appropriate to do so, publish the report on its website.

(2) If ASIC publishes the report on its website, the report:
  (a) if the audit to which the report relates was conducted by an audit firm or audit company:
    (i) may disclose identifying particulars of the audit firm or audit company; but
    (ii) must not disclose identifying particulars of any professional member of the audit team involved in the audit; and
  (b) if the audit to which the report relates was conducted by an individual auditor who did not act on behalf of an audit firm or audit company:
    (i) may disclose identifying particulars of the auditor; but

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(ii) must not disclose identifying particulars of any other professional member of the audit team involved in the audit; and

(c) must not disclose identifying particulars of the audited body.

(3) In this section:

identifying particulars:

(a) in relation to an audit firm, an audit company, an individual auditor referred to in paragraph (2)(b) or an audited body, means:

(i) the name, or a business name, of the firm, company, auditor or body; or

(ii) any other particulars that would enable the firm, company, auditor or body to be identified; or

(b) in relation to a professional member of an audit team (other than an individual auditor referred to in paragraph (2)(b)), means:

(i) the name of the member; or

(ii) any other particulars that would enable the member to be identified.

50E Consultation before publication

(1) Before publishing the report on its website, ASIC must:

(a) give a copy of the report to the Australian auditor to which the report relates; and

(b) invite the Australian auditor to give ASIC comments on the report within 21 days.

(2) The report as published must include any comments received in response to the invitation in a separate part of the report.

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Division 6—Hearings

51 Power to hold hearings

ASIC may hold hearings for the purposes of the performance or exercise of any of its functions and powers under the corporations legislation (other than the excluded provisions), other than a function or power conferred on it by Division 1 of this Part or by section 657C or 657G of the Corporations Act.

52 General discretion to hold hearing in public or private

(1) Subject to sections 53 and 54, ASIC may direct that a hearing take place in public or take place in private.

(2) In exercising its discretion under subsection (1), ASIC must have regard to:

(a) whether evidence that may be given, or a matter that may arise, during the hearing is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence; and

(b) any unfair prejudice to a person's reputation that would be likely to be caused if the hearing took place in public; and

(c) whether it is in the public interest that the hearing take place in public; and

(d) any other relevant matter.

53 Request by person appearing at hearing that it take place in public

(1) Subject to section 54, where:

(a) the corporations legislation (other than the excluded provisions) requires ASIC to give a person an opportunity to appear at a hearing; and

(b) the person requests that the hearing or part of the hearing take place in public;

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the hearing or part must take place in public.

(2) Despite subsection (1), where ASIC is satisfied, having regard to the matters referred to in subsection 52(2), that it is desirable that a hearing or part of a hearing take place in private, it may direct that the hearing or part take place in private.

54 Certain hearings to take place in private

Where the corporations legislation (other than the excluded provisions and this section) requires a hearing to take place in private, the hearing must take place in private.

55 ASIC may restrict publication of certain material

(1) Where, at a hearing that is taking place in public or in private, ASIC is satisfied that it is desirable to do so, ASIC may give directions preventing or restricting the publication of evidence given before, or of matters contained in documents lodged with, ASIC.

(2) In determining whether or not to give a direction under subsection (1), ASIC must have regard to:

(a) whether evidence that has been or may be given, or a matter that has arisen or may arise, during the hearing is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence against an Australian law; and

(b) any unfair prejudice to a person's reputation that would be likely to be caused unless ASIC exercises its powers under this section; and

(c) whether it is in the public interest that ASIC exercises its powers under this section; and

(d) any other relevant matter.

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56 Who may be present when hearing takes place in private

(1) ASIC may give directions about who may be present during a hearing that is to take place in private.

(2) A direction under subsection (1) does not prevent:

(a) a person whom the corporations legislation (other than the excluded provisions) requires to be given the opportunity to appear at a hearing; or

(b) a person representing under section 59:

(i) a person of a kind referred to in paragraph (a) of this subsection; or

(ii) a person who, by virtue of such a direction, is entitled to be present at a hearing;

from being present during the hearing.

(3) Where ASIC directs that a hearing take place in private, a person must not be present at the hearing unless he or she:

(a) is a member; or

(b) is a staff member approved by ASIC; or

(c) is entitled to be present by virtue of:

(i) a direction under subsection (1); or

(ii) subsection (2).

Penalty: 30 penalty units.

(4) Subsection (3) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

57 Involvement of person entitled to appear at hearing

(1) This section applies where the corporations legislation (other than the excluded provisions) requires ASIC to give a person an opportunity to appear at a hearing and to make submissions and give evidence to it.

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(2) ASIC must appoint a place and time for the hearing and cause written notice of that place and time to be given to the person.

(3) If the person does not wish to appear at the hearing, the person may, before the day of the hearing, lodge with ASIC any written submissions that the person wishes ASIC to take into account in relation to the matter concerned.

58 Power to summon witnesses and take evidence

(1) A member may, by written summons in the prescribed form given to a person:

(a) require the person to appear before ASIC at a hearing to give evidence, to produce specified documents, or to do both; and

(b) require the person to attend from day to day unless excused, or released from further attendance, by a member.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(2) At a hearing, ASIC may take evidence on oath or affirmation, and for that purpose a member may:

(a) require a witness at the hearing to either take an oath or make an affirmation; and

(b) administer an oath or affirmation to a witness at the hearing.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(3) The oath or affirmation to be taken or made by a person for the purposes of this section is an oath or affirmation that the evidence the person will give will be true.

(4) The member presiding at a hearing:

(a) may require a witness at the hearing to answer a question put to the witness; and

(b) may require a person appearing at the hearing pursuant to a summons issued under this section to produce a document specified in the summons.

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Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(4A) An offence under subsection 63(3) relating to subsection (1), (2) or (4) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(5) ASIC may permit a witness at a hearing to give evidence by tendering, and if ASIC so requires, verifying by oath or affirmation, a written statement.

59 Proceedings at hearings

(1) A hearing must be conducted with as little formality and technicality, and with as much expedition, as the requirements of the corporations legislation (other than the excluded provisions) and a proper consideration of the matters before ASIC permit.

(2) At a hearing, ASIC:
(a) is not bound by the rules of evidence; and
(b) may, on such conditions as it thinks fit, permit a person to intervene; and
(c) must observe the rules of natural justice.

(3) Subject to subsection (4), Division 4 of Part 4 applies, so far as practicable, in relation to a hearing as if the hearing were a meeting of ASIC.

(4) At a hearing before a Division of ASIC, 2 members of the Division form a quorum.

(5) At a hearing, a natural person may appear in person or be represented by an employee of the person approved by ASIC.

(6) A body corporate may be represented at a hearing by:
(a) unless paragraph (b) applies—an officer or employee of the body corporate approved by ASIC; or
(b) if the body corporate is a CCIV—any of the following persons approved by ASIC:

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(i) an officer of the CCIV (other than the corporate director of the CCIV);
(ii) an officer or employee of the corporate director of the CCIV.

(7) An unincorporated association, or a person in the person's capacity as a member of an unincorporated association, may be represented at a hearing by a member, officer or employee of the association approved by ASIC.

(8) Any person may be represented at a hearing by a barrister or solicitor of the Supreme Court of a State or Territory or of the High Court.

59A Proceedings at hearings

(1) ASIC may decide to hold a hearing:
(a) at one or more physical venues; or
(b) at one or more physical venues and using virtual enquiry technology; or
(c) using virtual enquiry technology only.

(2) Subsections (3) and (4) apply if the hearing is held:
(a) at one or more physical venues and using virtual enquiry technology; or
(b) using virtual enquiry technology only.

(3) ASIC must ensure that the use of the virtual enquiry technology is reasonable.

(4) If the hearing is held in public, ASIC must ensure that:
(a) the virtual enquiry technology provides the public with a reasonable opportunity to observe the hearing; and
(b) information sufficient to allow the public to observe the hearing using the virtual enquiry technology is made publicly available in a reasonable way.

(5) If the hearing is held:

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(a) at more than one physical venue; or
(b) at one or more physical venues and using virtual enquiry technology; or
(c) using virtual enquiry technology only;

ASIC may appoint a single place and time at which the hearing is taken to have been held.

(6) This section applies to part of a hearing in the same way that it applies to all of a hearing.

60 ASIC to take account of evidence and submissions

ASIC must take into account:

(a) evidence given, or a submission made, to it at a hearing; or
(b) a submission lodged with it under section 57;

in making a decision on a matter to which the evidence or submission relates.

61 Reference to Court of question of law arising at hearing

(1) ASIC may, of its own motion or at a person's request, refer to the Court for decision a question of law arising at a hearing.

(3) Where a question has been referred under subsection (1), ASIC must not, in relation to a matter to which the hearing relates:

(a) give while the reference is pending a decision to which the question is relevant; or
(b) proceed in a manner, or make a decision, that is inconsistent with the Court's opinion on the question.

(4) Where a question is referred under subsection (1):

(a) ASIC must send to the Court all documents that were before ASIC in connection with the hearing; and
(b) at the end of the proceeding in the Court in relation to the reference, the Court must cause the documents to be returned to ASIC.

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62 Protection of members etc.

(1) A member has, in the performance or exercise of any of his or her functions and powers as a member in relation to a hearing, the same protection and immunity as a Justice of the High Court.

(1A) A delegate of a member has, in the performance or exercise of any delegated function or power in relation to a hearing, the same protection and immunity as a Justice of the High Court.

(2) A barrister, solicitor or other person appearing on a person's behalf at a hearing has the same protection and immunity as a barrister has in appearing for a party in a proceeding in the High Court.

(3) Subject to this Act, a person who is required by a summons under section 58 to appear at a hearing, or a witness at a hearing, has the same protection as a witness in a proceeding in the High Court.

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Division 7—Offences

63 Non-compliance with requirements made under this Part

(1) A person must not intentionally or recklessly fail to comply with a requirement made under:
  (a) section 19; or
  (b) subsection 21(3); or
  (c) section 30, 30A, 30B, 31, 32A, 33 or 34; or
  (d) subsection 37(9); or
  (e) section 38; or
  (f) section 39.

  Penalty: 2 years imprisonment.

(2) A person must not fail to comply with a requirement made under section 41, 42, 43 or 44.

  Penalty: 120 penalty units.

(3) A person must not fail to comply with a requirement made under subsection 21(1) or 29(2), paragraph 24(2)(a) or subsection 49(3) or 58(1), (2) or (4).

  Penalty: 3 months imprisonment.

(4) A person must comply with a requirement made under subsection 23(2) or 48(2).

  Penalty: 20 penalty units.

(5) Subsections (1), (1A), (2) and (3) do not apply to the extent that the person has a reasonable excuse.

  Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3) of the *Criminal Code*.

(6) Paragraph (1)(d) does not apply to the extent that the person has explained the matter to the best of his or her knowledge or belief.

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Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3) of the *Criminal Code*.

(7) Paragraph (1)(e) does not apply to the extent that the person has stated the matter to the best of his or her knowledge or belief.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3) of the *Criminal Code*.

(8) Paragraph (1)(f) does not apply to the extent that the person has, to the extent that the person is capable of doing so, performed the acts referred to in paragraphs 39(a) and (b).

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3) of the *Criminal Code*.

64 False information

(1) A person must not:

(a) in purported compliance with a requirement made under this Part; or

(b) in the course of an examination of the person;

give information, or make a statement, that is false or misleading in a material particular.

Penalty: 5 years imprisonment.

(2) A person must not, at a hearing, give evidence that is false or misleading in a material particular.

Penalty: 2 years imprisonment.

(3) It is a defence to a prosecution for a contravention of subsection (1) or (2) if it is proved that the defendant, when giving the information or evidence or making the statement, believed on reasonable grounds that it was true and not misleading.

Note: A defendant bears a legal burden in relation to the matter in subsection (3), see section 13.4 of the *Criminal Code*.

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65 Obstructing person acting under this Part

(1) A person must not engage in conduct that results in the obstruction or hindering of a person in the exercise of the power under this Part.

Penalty: 2 years imprisonment.

(1A) Subsection (1) does not apply to the extent that the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matters in this subsection, see subsection 13.3(3) of the *Criminal Code*.

66 Contempt of ASIC

(1) A person must not:

(a) engage in conduct that results in the obstruction or hindering of ASIC or a member in the performance or exercise of any of ASIC's functions and powers; or

(b) engage in conduct that results in the disruption of a hearing.

Penalty: 2 years imprisonment.

(2) A person must not contravene a direction given under subsection 55(1).

Penalty: 120 penalty units.

(2A) Subsection (2) does not apply to the extent that the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3) of the *Criminal Code*.

(2B) Subsection (2) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(3) An offence constituted by a contravention of subsection (1) or (2) is punishable on summary conviction.

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67 Concealing books relevant to investigation

(1) Where ASIC is investigating, or is about to investigate, a matter, a person must not:

(a) in any case—engage in conduct that results in the concealment, destruction, mutilation or alteration of a book relating to that matter; or

(b) if a book relating to that matter is in a particular State or Territory—engage in conduct that results in the taking or sending of the book out of that State or Territory or out of Australia.

Penalty: 5 years imprisonment.

(2) It is a defence to a prosecution for a contravention of subsection (1) if it is proved that the defendant intended neither to defeat the purposes of the corporations legislation, nor to delay or obstruct an investigation, or a proposed investigation, by ASIC.

Note: A defendant bears a legal burden in relation to a matter mentioned in subsection (2), see section 13.4 of the *Criminal Code*.

68 Self-incrimination

(1) For the purposes of this Part, of Division 3 of Part 10, and of Division 2 of Part 11, it is not a reasonable excuse for a person to refuse or fail:

(a) to give information; or

(b) to sign a record; or

(c) to produce a book;

in accordance with a requirement made of the person, that the information, signing the record or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty.

(2) Subsection (3) applies where:

(a) before:

(i) making an oral statement giving information; or

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(ii) signing a record;

pursuant to a requirement made under this Part, Division 3 of Part 10 or Division 2 of Part 11, a person (other than a body corporate) claims that the statement, or signing the record, as the case may be, might tend to incriminate the person or make the person liable to a penalty; and

(b) the statement, or signing the record, as the case may be, might in fact tend to incriminate the person or make the person so liable.

(3) The statement, or the fact that the person has signed the record, as the case may be, is not admissible in evidence against the person in:

(a) a criminal proceeding; or

(b) a proceeding for the imposition of a penalty;

other than a proceeding in respect of:

(c) in the case of the making of a statement—the falsity of the statement; or

(d) in the case of the signing of a record—the falsity of any statement contained in the record.

69 Legal professional privilege

(1) This section applies where:

(a) under this Part, Division 3 of Part 10, or Division 2 of Part 11, a person requires a lawyer:

(i) to give information; or

(ii) to produce a book; and

(b) giving the information would involve disclosing, or the book contains, as the case may be, a privileged communication made by, on behalf of or to the lawyer in his or her capacity as a lawyer.

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(2) The lawyer is entitled to refuse to comply with the requirement unless:

(a) if the person to whom, or by or on behalf of whom, the communication was made is a body corporate that is being wound up—the liquidator of the body; or

(b) otherwise—the person to whom, or by or on behalf of whom, the communication was made;

consents to the lawyer complying with the requirement.

(3) If the lawyer so refuses, he or she must, as soon as practicable, give to the person who made the requirement a written notice setting out:

(a) if the lawyer knows the name and address of the person to whom, or by or on behalf of whom, the communication was made—that name and address; and

(b) if subparagraph (1)(a)(i) applies and the communication was made in writing—sufficient particulars to identify the document containing the communication; and

(c) if subparagraph (1)(a)(ii) applies—sufficient particulars to identify the book, or the part of the book, containing the communication.

Penalty: 3 months imprisonment.

70 Powers of Court where non-compliance with Part

(1) This section applies where ASIC is satisfied that a person has, without reasonable excuse, failed to comply with a requirement made under this Part (other than Division 8).

(2) ASIC may by writing certify the failure to the Court.

(3) If ASIC does so, the Court may inquire into the case and may order the person to comply with the requirement as specified in the order.

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Division 8—ASIC's powers where non-compliance with Part

71 Orders by ASIC

This Division applies where, in ASIC's opinion, information about:

(a) affairs of a body corporate; or

(b) financial products; or

(c) trust property acquired or disposed of by a trustee company;

needs to be found out for the purposes of the exercise of any of ASIC's powers under this Part but cannot be found out because a person has failed to comply with a requirement made under this Part.

72 Orders in relation to securities of a body corporate

(1) If paragraph 71(a) applies, ASIC may make one or more of the following:

(a) an order restraining a specified person from disposing of any interest in specified securities of the body corporate referred to in that paragraph;

(b) an order restraining a specified person from acquiring any interest in specified securities of the body;

(c) an order restraining the exercise of voting or other rights attached to specified securities of the body;

(d) an order directing the holder of securities in respect of which an order under this section is in force to give written notice of that order to any person whom the holder knows to be entitled to exercise a right to vote attached to the securities;

(e) an order directing the body not to pay, except in the course of winding up, a sum due from the body in respect of specified securities of the body;

(f) an order directing the body not to register the transfer or transmission of specified securities of the body;

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(g) an order directing the body not to issue to a person who holds shares in the body shares that the body proposed to issue to the person:

(i) because the person holds shares in the body; or

(ii) pursuant to an offer or invitation made or issued to the person because the person holds shares in the body.

(2) An offence under subsection 75(5) relating to subsection (1) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

73 Orders in relation to financial products and trust property generally

(1) If paragraph 71(b) applies, ASIC may make one or more of the following:

(a) an order restraining a specified person from disposing of any interest in specified financial products;

(b) an order restraining a specified person from acquiring any interest in specified financial products;

(c) an order restraining the exercise of voting or other rights attached to specified financial products;

(d) an order directing the holder of financial products in respect of which an order under this section is in force to give written notice of that order to any person whom the holder knows to be entitled to exercise a right to vote attached to the financial products;

(e) an order directing a body corporate not to pay, except in the course of winding up, a sum due from the body in respect of specified financial products;

(f) an order directing a body corporate not to register the transfer or transmission of specified financial products;

(g) an order directing a body corporate not to issue to a person who holds shares in the body shares that the body proposed to issue to the person:

(i) because the person holds such shares; or

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(ii) pursuant to an offer or invitation made or issued to the person because the person holds such shares;

(h) an order requiring a specified person to dispose of specified derivatives, or to dispose of specified derivatives in a specified manner.

(1A) If paragraph 71(c) applies, ASIC may make one or more of the following:

(a) an order restraining a specified person from disposing of any interest in specified trust property;

(b) an order restraining a specified person from acquiring any interest in specified trust property;

(c) an order directing a body corporate not to pay, except in the course of winding up, a sum due from the body corporate in respect of specified trust property;

(d) an order directing a body corporate not to register the transfer or transmission of specified trust property.

(2) An order under subsection (1) or (1A) does not prejudice or affect a right of an operator of a financial market or clearing and settlement facility:

(a) to cause or enter into a transaction that causes a derivative to be closed out; or

(b) to cause to be registered in a person's name, or to register in a person's name, a derivative that was previously registered in another person's name.

(3) An offence under subsection 75(5) relating to subsection (1) or (1A) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

75 Orders under this Division

(1) ASIC may make an order varying or revoking an order in force under this Division.

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(2) An order under this Division must be made by notice published in the *Gazette*.

(3) Where an order is made under this Division (other than subsection (1)), ASIC must cause to be given to the person to whom the order is directed:

(a) a copy of the order; and

(b) a copy of each order varying or revoking it.

(4) Where an order under this Division relates to financial products, ASIC must cause:

(a) a copy of the order; and

(b) a copy of each order varying or revoking it;

to be given to:

(c) in any case—the person who issued or made available, or who will issue or make available, the financial products; or

(d) if the financial products are rights or options—the person against whom the right or option is, or would be enforceable.

(5) A person must comply with an order in force under this Division.

Penalty: 60 penalty units.

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Division 9—Evidentiary use of certain material

76 Statements made at an examination: proceedings against examinee

(1) A statement that a person makes at an examination of the person is admissible in evidence against the person in a proceeding unless:

(a) because of subsection 68(3), the statement is not admissible in evidence against the person in the proceeding; or

(b) the statement is not relevant to the proceeding and the person objects to the admission of evidence of the statement; or

(c) the statement is qualified or explained by some other statement made at the examination, evidence of the other statement is not tendered in the proceeding and the person objects to the admission of evidence of the first-mentioned statement; or

(d) the statement discloses matter in respect of which the person could claim legal professional privilege in the proceeding if this subsection did not apply in relation to the statement, and the person objects to the admission of evidence of the statement.

(2) Subsection (1) applies in relation to a proceeding against a person even if it is heard together with a proceeding against another person.

(3) Where a written record of an examination of a person is signed by the person under subsection 24(2) or authenticated in any other prescribed manner, the record is, in a proceeding, prima facie evidence of the statements it records, but nothing in this Part limits or affects the admissibility in the proceeding of other evidence of statements made at the examination.

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77 Statements made at an examination: other proceedings

Where direct evidence by a person (the ***absent witness***) of a matter would be admissible in a proceeding, a statement that the absent witness made at an examination of the absent witness and that tends to establish that matter is admissible in the proceeding as evidence of that matter:

(a) if it appears to the court or tribunal that:

(i) the absent witness is dead or is unfit, because of physical or mental incapacity, to attend as a witness; or

(ii) the absent witness is outside the State or Territory in which the proceeding is being heard and it is not reasonably practicable to secure his or her attendance; or

(iii) all reasonable steps have been taken to find the absent witness but he or she cannot be found; or

(b) if it does not so appear to the court or tribunal—unless another party to the proceeding requires the party tendering evidence of the statement to call the absent witness as a witness in the proceeding and the tendering party does not so call the absent witness.

78 Weight of evidence admitted under section 77

(1) This section applies where evidence of a statement made by a person at an examination of the person is admitted under section 77 in a proceeding.

(2) In deciding how much weight (if any) to give to the statement as evidence of a matter, regard is to be had to:

(a) how long after the matters to which it related the statement was made; and

(b) any reason the person may have had for concealing or misrepresenting a material matter; and

(c) any other circumstances from which it is reasonable to draw an inference about how accurate the statement is.

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(3) If the person is not called as a witness in the proceeding:
   (a) evidence that would, if the person had been so called, have been admissible in the proceeding for the purpose of destroying or supporting his or her credibility is so admissible; and
   (b) evidence is admissible to show that the statement is inconsistent with another statement that the person has made at any time.

(4) However, evidence of a matter is not admissible under this section if, had the person been called as a witness in the proceeding and denied the matter in cross-examination, evidence of the matter would not have been admissible if adduced by the cross-examining party.

79 Objection to admission of statements made at examination

(1) A party (the ***adducing party***) to a proceeding may, not less than 14 days before the first day of the hearing of the proceeding, give to another party to the proceeding written notice that the adducing party:
   (a) will apply to have admitted in evidence in the proceeding specified statements made at an examination; and
   (b) for that purpose, will apply to have evidence of those statements admitted in the proceeding.

(2) A notice under subsection (1) must set out, or be accompanied by writing that sets out, the specified statements.

(3) Within 14 days after a notice is given under subsection (1), the other party may give to the adducing party a written notice:
   (a) stating that the other party objects to specified statements being admitted in evidence in the proceeding; and
   (b) specifies, in relation to each of those statements, the grounds of objection.

(4) The period prescribed by subsection (3) may be extended by the court or tribunal or by agreement between the parties concerned.

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(5) On receiving a notice given under subsection (3), the adducing party must give to the court or tribunal a copy of:
  (a) the notice under subsection (1) and any writing that subsection (2) required to accompany that notice; and
  (b) the notice under subsection (3).

(6) Where subsection (5) is complied with, the court or tribunal may either:
  (a) determine the objections as a preliminary point before the hearing of the proceeding begins; or
  (b) defer determination of the objections until the hearing.

(7) Where a notice has been given in accordance with subsections (1) and (2), the other party is not entitled to object at the hearing of the proceeding to a statement specified in the notice being admitted in evidence in the proceeding, unless:
  (a) the other party has, in accordance with subsection (3), objected to the statement being so admitted; or
  (b) the court or tribunal gives the other party leave to object to the statement being so admitted.

80 Copies of, or extracts from, certain books

(1) A copy of, or an extract from, a book relating to:
  (a) affairs of a body corporate; or
  (aa) an audit-related matter referred to in subparagraph 30A(2)(a)(i); or
  (ab) a matter referred to in paragraph 30B(2)(a); or
  (b) a matter referred to in any of paragraphs 31(1)(g) to (m), inclusive; or
  (c) a matter referred to in paragraph 32A(c) or (d);

is admissible in evidence in a proceeding as if the copy were the original book, or the extract were the relevant part of the original book, as the case may be, whether or not the copy or extract was made under section 37.

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(2) A copy of, or an extract from, a book is not admissible in evidence under subsection (1) unless it is proved that the copy or extract is a true copy of the book, or of the relevant part of the book, as the case may be.

(3) For the purposes of subsection (2), a person who has compared:

(a) a copy of a book with the book; or

(b) an extract from a book with the relevant part of the book;

may give evidence, either orally or by an affidavit or statutory declaration, that the copy or extract is a true copy of the book or relevant part, as the case may be.

81 Report under Division 1

Subject to section 82, where a copy of a report under Division 1 purports to be certified by ASIC as a true copy of such a report, the copy is admissible in a proceeding (other than a criminal proceeding) as prima facie evidence of:

(a) ASIC's report of its opinion for the purposes of paragraph 461(1)(h) or subparagraph 583(c)(iii) of the Corporations Act; and

(b) any facts or matters that the report states ASIC to have found to exist.

82 Exceptions to admissibility of report

(1) This section applies where a party to a proceeding tenders a copy of a report as evidence against another party.

(2) The copy is not admissible under section 81 in the proceeding as evidence against the other party unless the court or tribunal is satisfied that:

(a) a copy of the report has been given to the other party; and

(b) the other party, and the other party's lawyer, have had a reasonable opportunity to examine that copy and to take its contents into account in preparing the other party's case.

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(3) Before or after the copy referred to in subsection (1) is admitted in evidence, the other party may apply to cross-examine, in relation to the report, a specified person who, or 2 or more specified persons each of whom:

(a) was concerned in preparing the report or making a finding about a fact or matter that the report states ASIC to have found to exist; or

(b) whether or not pursuant to a requirement made under this Part, gave information, or produced a book, on the basis of which, or on the basis of matters including which, such a finding was made.

(4) The court or tribunal must grant an application made under subsection (3) unless it considers that, in all the circumstances, it is not appropriate to do so.

(5) If:

(a) the court or tribunal grants an application or applications made under subsection (3); and

(b) a person to whom the application or any of the applications relate, or 2 or more such persons, is or are unavailable, or does not or do not attend, to be cross-examined in relation to the report; and

(c) the court or tribunal is of the opinion that to admit the copy under section 81 in the proceeding as evidence against the other party without the other party having the opportunity so to cross-examine the person or persons would unfairly prejudice the other party;

the court or tribunal must refuse so to admit the copy, or must treat the copy as not having been so admitted, as the case requires.

83 Material otherwise admissible

Nothing in this Division renders evidence inadmissible in a proceeding in circumstances where it would have been admissible in that proceeding if this Division had not been enacted.

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Division 10—Miscellaneous

84 Requirement made of a body corporate

If a provision of this Part empowers a person to make a requirement of a body corporate, the provision also empowers the person to make that requirement of a person who is or has been:

(a) unless paragraph (b) applies—an officer or employee of the body corporate; or

(b) if the body corporate is a CCIV:

(i) an officer of the CCIV; or

(ii) an officer or employee of the corporate director of the CCIV.

85 Evidence of authority

A person (the ***inspector***), other than ASIC, who is about to make, or has made, a requirement of another person under this Part (other than Division 6) must, if the other person requests evidence of the inspector's authority to make the requirement, produce to the other person:

(a) a current identity card that was issued to the inspector by ASIC and incorporates a photograph of the inspector; and

(b) if the requirement will be, or was, made under an authorisation by ASIC—a document that was issued by ASIC and sets out the effect of so much of the authorisation as is relevant to making the requirement; and

(c) otherwise—such evidence (if any) of the inspector's authority to make the requirement as ASIC determines.

86 Giving documents to natural persons

Section 109X of the Corporations Act has effect for the purposes of this Part as if a reference in subsection (2) of that section to leaving a document at an address were a reference to leaving it at

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that address with a person whom the person leaving the document believes on reasonable grounds:

(a) to live or work at that address; and

(b) to have attained the age of 16 years.

87 Place and time for production of books

A provision of this Part that empowers a person to require the production of books at a place and time specified by the person is taken:

(a) to require the person to specify a place and time that are reasonable in all the circumstances; and

(b) if it is reasonable in all the circumstances for the person to require the books to be produced forthwith—to empower the person to require the books to be produced forthwith.

88 Application of Crimes Act and Evidence Act

(1) For the purposes of Part III of the *Crimes Act 1914*, an examination or a hearing is a judicial proceeding.

(2) Part 2.2, sections 69, 70, 71 and 147 and Division 2 of Part 4.6 of the *Evidence Act 1995* apply to an examination in the same way that they apply to a proceeding to which that Act applies under section 4 of that Act.

89 Allowances and expenses

(1) A person who, pursuant to a requirement made under section 19, appears for examination is entitled to the prescribed allowances and expenses (if any).

(2) A person who, pursuant to a summons issued under section 58, appears at a hearing is entitled to be paid:

(a) if the summons was issued at another person's request—by that other person; or

(b) otherwise—by ASIC;

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the prescribed allowances and expenses (if any).

(3) ASIC may pay such amount as it thinks reasonable on account of the costs and expenses (if any) that a person incurs in complying with a requirement made under this Part.

90 Expenses of investigation under Division 1

Subject to section 91, ASIC must pay the expenses of an investigation.

91 Recovery of expenses of investigation

(1) Where:

(a) a person is convicted of an offence against a law of the Commonwealth, or of a State or Territory in this jurisdiction, in a prosecution; or

(b) a judgment is awarded, or a declaration or other order is made, against a person in a proceeding in a court of this jurisdiction; 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;

begun as a result of an investigation under Division 1, ASIC may make one of the following orders:

(c) an order that the person pay the whole, or a specified part, of the expenses of the investigation;

(d) an order that the person reimburse ASIC to the extent of a specified amount of such of the expenses of the investigation as ASIC has paid;

(e) an order that the person pay, or reimburse ASIC in respect of, the whole, or a specified part, of the cost to ASIC of making the investigation, including the remuneration of a member or staff member concerned in the investigation.

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(2) An order under this section must be in writing and must specify when and how the payment or reimbursement is to be made.

(3) A person must comply with an order under this section that is applicable to the person.

Penalty: 120 penalty units.

(3A) Subsection (3) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(4) ASIC may recover in a court of competent jurisdiction as a debt due to ASIC so much of the amount payable under an order made under this section as is not paid in accordance with the order.

(5) A report under Division 1 may include recommendations about the making of orders under this section.

92 Compliance with Part

A person is neither liable to a proceeding, nor subject to a liability, merely because the person has complied, or proposes to comply, with a requirement made, or purporting to have been made, under this Part.

93 Effect of Part

(1) Except as expressly provided, nothing in this Part limits the generality of anything else in this Part.

(2) The functions and powers that this Part confers are in addition to, and do not derogate from, any other function or power conferred by a law of the Commonwealth, a State or a Territory.

93AA Enforcement of undertakings given to ASIC

(1) ASIC may accept a written undertaking given by a person in connection with a matter in relation to which ASIC has a function or power under this Act.

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(2) The person may withdraw or vary the undertaking at any time, but only with ASIC's consent.

(3) If ASIC considers that the person who gave the undertaking has breached any of its terms, ASIC 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.

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Part 3A—Enforceable undertakings

93A Undertakings—registered schemes

(1) ASIC may accept a written undertaking given by the responsible entity of a registered scheme in connection with a matter:

(a) concerning the registered scheme; and

(b) in relation to which ASIC has a power or function under the corporations legislation (other than the excluded provisions).

(2) The responsible entity may withdraw or vary the undertaking at any time, but only with ASIC's consent.

(3) If ASIC considers that the responsible entity has breached any of the terms of the undertaking, ASIC may apply to the Court for an order under subsection (4).

(4) If the Court is satisfied that the responsible entity has breached a term of the undertaking, the Court may make all or any of the following orders:

(a) an order directing the responsible entity to comply with that term of the undertaking;

(b) an order directing the responsible entity to transfer to scheme property an amount up to the amount of any financial benefit that the responsible entity has obtained directly or indirectly and that is reasonably attributable to the breach;

(c) any order that the Court considers appropriate directing the responsible entity to compensate any person who has suffered loss or damage as a result of the breach;

(d) any other order that the Court considers appropriate.

(5) ASIC must keep a record of the full text of the undertaking.

(6) ASIC must make available to a person who asks for it a copy of the text of the undertaking, but ASIC must delete from the copy information:

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(a) that the responsible entity has asked it not to release; and
(b) that ASIC is satisfied:
(i) is commercial in confidence; or
(ii) should not be disclosed because it would be against the public interest to do so; or
(iii) consists of personal details of an individual.

(7) If ASIC makes available a copy that has information deleted from it, the copy must include a note stating that information has been deleted.

93B Undertakings—notified foreign passport funds

(1) ASIC may accept a written undertaking given by the operator of a notified foreign passport fund in connection with a matter:
(a) concerning the fund; and
(b) in relation to which ASIC has a power or function under the corporations legislation (other than the excluded provisions).

(2) The operator may withdraw or vary the undertaking at any time, but only with ASIC's consent.

(3) If ASIC considers that the operator has breached any of the terms of the undertaking, ASIC may apply to the Court for an order under subsection (4).

(4) If the Court is satisfied that the operator has breached a term of the undertaking, the Court may make all or any of the following orders:
(a) an order directing the operator to comply with that term of the undertaking;
(b) an order directing the operator to transfer to fund property an amount up to the amount of any financial benefit that the operator has obtained directly or indirectly and that is reasonably attributable to the breach;

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(c) any order that the Court considers appropriate directing the operator to compensate any person who has suffered loss or damage as a result of the breach;

(d) any other order that the Court considers appropriate.

(5) ASIC must keep a record of the full text of the undertaking.

(6) ASIC must make available to a person who asks for it a copy of the text of the undertaking, but ASIC must delete from the copy information:

(a) that the operator has asked it not to release; and

(b) that ASIC is satisfied:

(i) is commercial in confidence; or

(ii) should not be disclosed because it would be against the public interest to do so; or

(iii) consists of personal details of an individual.

(7) If ASIC makes available a copy that has information deleted from it, the copy must include a note stating that information has been deleted.

93BA Undertakings by corporate director of a CCIV

(1) ASIC may accept a written undertaking given by the corporate director of a CCIV in connection with a matter:

(a) concerning the CCIV; and

(b) in relation to which ASIC has a power or function under the corporations legislation (other than the excluded provisions).

(2) The corporate director may withdraw or vary the undertaking at any time, but only with ASIC's consent.

(3) If ASIC considers that the corporate director has breached any of the terms of the undertaking, ASIC may apply to the Court for an order under subsection (4).

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(4) If the Court is satisfied that the corporate director has breached a term of the undertaking, the Court may make all or any of the following orders:

(a) an order directing the corporate director to comply with that term of the undertaking;

(b) an order directing the corporate director to transfer to the CCIV an amount up to the amount of any financial benefit that the corporate director has obtained directly or indirectly and that is reasonably attributable to the breach;

(c) any order that the Court considers appropriate directing the corporate director to compensate any person who has suffered loss or damage as a result of the breach;

(d) any other order that the Court considers appropriate.

(5) ASIC must keep a record of the full text of the undertaking.

(6) ASIC must make available to a person who asks for it a copy of the text of the undertaking, but ASIC must delete from the copy information:

(a) that the corporate director has asked it not to release; and

(b) that ASIC is satisfied:

(i) is commercial in confidence; or

(ii) should not be disclosed because it would be against the public interest to do so; or

(iii) consists of personal details of an individual.

(7) If ASIC makes available a copy that has information deleted from it, the copy must include a note stating that information has been deleted.

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Part 3B—Criminal penalties

93C Penalty for committing an offence

(1) A person who commits an offence against this Act is punishable on conviction by a penalty not exceeding the penalty applicable to the offence.

(2) If:

(a) a person commits an offence against this Act in the person's capacity as trustee of a registrable superannuation entity; and

(b) the penalty applicable to the offence is, or includes, a fine;

then, in determining the fine for the offence, the court must take into account the impact that the fine under consideration would have on the beneficiaries of the entity.

93D Penalty applicable to an offence committed by an individual

(1) The ***penalty applicable*** to an offence committed by an individual is:

(a) for an offence for which a fine is the only penalty specified—the fine specified; and

(b) for an offence for which a term of imprisonment is the only penalty specified—either the term of imprisonment, the fine worked out under this section, or both.

(2) If:

(a) a term of imprisonment is the only penalty specified for an offence; and

(b) the term of imprisonment is less than 10 years;

the fine mentioned in paragraph (1)(b) is worked out using the individual fine formula.

(3) The ***individual fine formula*** is:

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$$\text{Term of imprisonment, expressed in months} \times 10$$

(4) If:

(a) a term of imprisonment is the only penalty specified for an offence; and

(b) the term of imprisonment is 10 years or more;

the fine mentioned in paragraph (1)(b) is the greater of:

(c) 4,500 penalty units; and

(d) if the court can determine the benefit derived and detriment avoided because of the offence—that amount multiplied by 3.

(5) This section applies in relation to an offence committed by an individual unless there is a contrary intention under this Act in relation to the penalty applicable to the offence. In that case, the ***penalty applicable*** is the penalty specified for the offence.

93E Penalty applicable to an offence committed by a body corporate

(1) The ***penalty applicable*** to an offence committed by a body corporate is:

(a) for an offence for which a fine is the only penalty specified—the fine specified multiplied by 10; and

(b) for an offence for which a term of imprisonment is the only penalty specified—the fine worked out under this section.

(2) If:

(a) a term of imprisonment is the only penalty specified as the penalty; and

(b) the term of imprisonment is less than 10 years;

the fine mentioned in paragraph (1)(b) is the number of penalty units worked out using the individual fine formula, multiplied by 10.

(3) If:

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(a) a term of imprisonment is the only penalty specified for an offence; and

(b) the term of imprisonment is 10 years or more;

the fine mentioned in paragraph (1)(b) is the greatest of:

(c) 45,000 penalty units; and

(d) if the court can determine the benefit derived and detriment avoided because of the offence—that amount multiplied by 3; and

(e) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate committed, or began committing, the offence.

(4) This section applies in relation to an offence committed by a body corporate unless there is a contrary intention under this Act in relation to the penalty applicable to the offence. In that case, the ***penalty applicable*** is the penalty specified for the offence.

93F Meaning of *benefit derived and detriment avoided* because of an offence

The ***benefit derived and detriment avoided*** because of an offence is the sum of:

(a) the total value of all benefits obtained by one or more persons that are reasonably attributable to the commission of the offence; and

(b) the total value of all detriments avoided by one or more persons that are reasonably attributable to the commission of the offence.

93G Where is the penalty for an offence specified?

(1) The penalty ***specified*** for an offence is the penalty specified for the provision under which the offence is created, or a provision or provisions in which that provision is included.

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(2) To avoid doubt, a penalty is not ***specified*** for an offence if it is a consequence for committing the offence that is not a punishment on conviction for the offence.

(3) Without limiting subsection (2), each of the following is a consequence for committing an offence that is not a punishment on conviction for the offence:

(a) the availability of a pecuniary penalty order for the contravention of a civil penalty provision that relates to the same conduct as that which gave rise to the offence;

(b) the availability of an infringement notice in relation to an alleged commission of the offence;

(c) the availability of administrative consequences as a result of the commission of the offence, such as:

(i) disqualification from any office; or

(ii) consequences in relation to a licence; or

(iii) other actions that may be taken by ASIC under the Corporations legislation;

(d) the availability under any law of the Commonwealth or of a State or Territory (including the general law) of an order to refund money, pay compensation, relinquish a benefit or make any other payment if the offence is committed;

(e) the availability under any law of the Commonwealth or of a State or Territory (including the general law) of an injunction or any other order directing a person to take, or refrain from taking, action if the offence is committed.

93H If no penalty is specified

If no penalty is specified for an offence:

(a) the offence is an offence of strict liability; and

(b) 20 penalty units is taken to be the penalty specified for the offence.

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