National Consumer Credit Protection Act 2009

No. 134, 2009

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This compilation is in 2 volumes

Volume 1:	**sections 1–322**
Volume 2:	sections 323–337
	Schedule 1
	Endnotes

Each volume has its own contents

This compilation includes commenced amendments made by Act No. 135, 2020

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About this compilation

This compilation

This is a compilation of the *National Consumer Credit Protection Act 2009* that shows the text of the law as amended and in force on 1 January 2021 (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. Any uncommenced amendments affecting the law are accessible on the Legislation Register (www.legislation.gov.au). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

Application, saving and transitional provisions for provisions and amendments

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.

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. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

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If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

Contents

Chapter 1—Introduction 1

Part 1-1—Introduction 1

1 Short title 1
2 Commencement 1
3 The National Credit Code 2

Part 1-2—Definitions 3

Division 1—Introduction 3

4 Guide to this Part 3

Division 2—The Dictionary 4

5 The Dictionary 4

Division 3—Definitions relating to the meaning of credit activity 20

6 Meaning of *credit activity* 20
7 Meaning of *credit service* 21
8 Meaning of *credit assistance* 21
9 Meaning of *acts as an intermediary* 22
10 Assignees of credit providers, lessors, mortgagees and beneficiaries of a guarantee 23

Division 4—Other definitions 24

12 When a business is *carried on in this jurisdiction* 24
13 Meaning of *misleading* 24
14 Meaning of *person*—generally includes a partnership 24
15 Meaning of *person*—generally includes multiple trustees 25
15A Meaning of *associate* 27
15B Meaning of *mortgage broker* 27
15C Meaning of *mortgage intermediary* 28
16 Qualified privilege 28
16A Meaning of *control* 29

Part 1-3—Application of this Act and the Transitional Act 31

Division 1—Introduction 31

17 Guide to this Part 31

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Constitutional basis and application of this Act and the Transitional Act 32
18 Constitutional basis for this Act and the Transitional Act 32
19 Meaning of *referring State* 33
20 Meaning of *referred credit matter* 37
21 General application of this Act and the Transitional Act 37
22 When Acts bind Crown 39
Division 3—Interaction between the Commonwealth credit legislation and State and Territory laws 40
23 Concurrent operation intended 40
24 When Commonwealth credit legislation does not apply 40
25 Avoiding direct inconsistency between Commonwealth and State and Territory laws 41
26 Regulations to deal with interaction between laws 43
Chapter 2—Licensing of persons who engage in credit activities 45
Part 2-1—Requirement to be licensed to engage in credit activities 45
Division 1—Introduction 45
27 Guide to this Part 45
Division 2—Engaging in credit activities without a licence 46
28 Application of this Division 46
29 Prohibition on engaging in credit activities without a licence 46
Division 3—Other prohibitions relating to the requirement to be licensed 48
30 Prohibitions on holding out and advertising etc. 48
31 Prohibition on conducting business with unlicensed persons 49
32 Prohibition on charging a fee etc. 49
Part 2-2—Australian credit licences 51
Division 1—Introduction 51
34 Guide to this Part 51

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Australian credit licences 52
35 Australian credit licences 52
Division 3—How to get an Australian credit licence 53
36 Applying for a licence 53
37 When a licence may be granted—applicants other than ADIs 53
37A Fit and proper person test 55
37B Fit and proper person test—matters to which ASIC must have regard 56
38 When a licence may be granted—ADIs 57
39 Regulations may prescribe streamlined process for other applicants 58
40 Licences must not be granted to certain applicants 58
41 Applicant must be given hearing before refusal of licence 59
42 Notice of grant or refusal of licence and date of effect 59
43 Australian credit licence numbers 59
44 Basis on which licence is granted 60
Division 4—Conditions on an Australian credit licence 61
45 The conditions on the licence 61
46 Licence conditions—special procedures for APRA-regulated bodies 62
46A ASIC may request information etc. in relation to an application for conditions to be varied 63
Division 5—Obligations of licensees 66
47 General conduct obligations of licensees 66
48 Requirements for compensation arrangements 68
49 Obligation to provide a statement or obtain an audit report if directed by ASIC 68
50 Obligation to give ASIC information required by the regulations 70
51 Obligation to provide ASIC with assistance if reasonably requested 71
52 Obligation to cite Australian credit licence number 72
53 Obligation to lodge annual compliance certificate 73
53A Obligation to notify ASIC of change in control 74
53B Obligation to notify ASIC if licensee does not engage in credit activities 75

Authorised Version C2021C00117 registered 17/02/2021

Division 6—When a licence can be suspended, cancelled or varied 76

Subdivision A—Suspensions and cancellations 76

54 Suspension or cancellation without hearing 76
55 Suspension or cancellation after offering a hearing 77
56 Suspension and cancellation—special procedures for APRA-regulated bodies 78

Subdivision B—Variations 79

57 Varying licences 79

Subdivision C—Miscellaneous rules about suspensions, cancellations and variations 80

58 Effect of suspension 80
59 Revocation of suspension 80
60 Date of effect, notice and publication of variation, cancellation or suspension etc. 80
61 Statement of reasons 80
62 ASIC may allow licence to continue in force 80

Part 2-3—Credit representatives and other representatives of licensees 82

Division 1—Introduction 82

63 Guide to this Part 82

Division 2—Authorisation of credit representatives 83

64 Licensee may authorise credit representatives 83
65 Credit representative that is a body corporate may sub-authorise natural persons as credit representatives 84
66 Credit representative of 2 or more licensees 85
67 A person cannot be a credit representative in relation to credit activities authorised by a person's licence 86
68 Variation and revocation of authorisations and sub-authorisations 86
69 Obligation not to give authorisation that has no effect 87
70 Obligation to vary or revoke authorisation that ceases to have effect 87
71 Obligation to notify ASIC etc. about credit representatives 88

Authorised Version C2021C00117 registered 17/02/2021

72 Credit representative numbers 90
Division 3—Information about representatives 91
73 ASIC may give licensee information about representatives 91
Division 4—Liability of licensees for representatives 94
74 Application of this Division 94
75 Responsibility if representative of only one licensee 94
76 Representatives of multiple licensees 94
77 Responsibility extends to loss or damage suffered by client 95
78 Effect of this Division 95
Part 2-4—Banning or disqualification of persons from engaging in credit activities 97
Division 1—Introduction 97
79 Guide to this Part 97
Division 2—Banning orders 98
80 ASIC's power to make a banning order 98
81 What a banning order prohibits 100
82 Effect of banning orders 101
83 Variation or cancellation of banning orders 102
84 Date of effect, notice and publication of banning order, variation or cancellation 103
85 Statement of reasons 103
Division 3—Disqualification by the court 104
86 Disqualification by the court 104
Part 2-5—Financial records, trust accounts and audit reports 105
Division 1—Introduction 105
87 Guide to this Part 105
Division 2—Financial records of licensees 106
88 Obligation to keep financial records 106
89 How financial records are to be kept 107
90 Language of financial records 107
91 Location of financial records 107
92 Information to be shown in financial records 108
93 Regulations may impose additional requirements 109

Authorised Version C2021C00117 registered 17/02/2021

94 Financial records taken to be made with licensee's authority 109
95 Obligation to retain financial records for 7 years 109
96 Financial records are prima facie evidence of matters 110

Division 3—Trust accounts of credit service licensees 111
97 Application of this Division 111
98 Obligation for credit service licensees to maintain trust account 111
99 Obligations in relation to trust account money 112
100 Obligation to lodge trust account statement and trust account audit report 113
101 Time of lodgment of trust account statement and trust account audit report 114

Division 4—Matters relating to audit reports 116
102 Auditor's right of access to records, information etc. 116
103 Auditor's fees and expenses 117
104 Auditor to report on certain matters 117
105 Qualified privilege for auditor etc. 118
106 Regulations in relation to audit reports etc. 119

Part 2-6—Exemptions and modifications relating to this Chapter 120

Division 1—Introduction 120
107 Guide to this Part 120

Division 2—Exemptions and modifications relating to this Chapter 121
108 Provisions to which this Part applies 121
109 Exemptions and modifications by ASIC 121
110 Exemptions and modifications by the regulations 123

Chapter 3—Responsible lending conduct 124

Part 3-1—Licensees that provide credit assistance in relation to credit contracts 124

Division 1—Introduction 124
111 Guide to this Part 124
112 Application of this Part 125

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Credit guide of credit assistance providers 126
113 Credit guide of credit assistance providers 126
Division 3—Quote for providing credit assistance etc. in relation to credit contracts 129
114 Quote for providing credit assistance etc. 129
Division 4—Obligations of credit assistance providers before providing credit assistance for credit contracts 132
115 Obligations of credit assistance providers before providing credit assistance for credit contracts 132
116 Preliminary assessment of unsuitability of the credit contract 133
117 Reasonable inquiries etc. about the consumer 133
118 When the credit contract must be assessed as unsuitable—entering contract or increasing the credit limit 134
119 When the credit contract must be assessed as unsuitable—remaining in credit contract 136
120 Providing the consumer with the preliminary assessment 138
Division 5—Fees, indirect remuneration etc. relating to credit contracts 140
121 Fees, indirect remuneration etc. relating to credit contracts 140
122 No profiting from fees etc. paid to third parties 141
Division 6—Prohibition on suggesting, or assisting with, unsuitable credit contracts 143
123 Prohibition on suggesting or assisting consumers to enter, or increase the credit limit under, unsuitable credit contracts 143
124 Prohibition on suggesting to consumers to remain in unsuitable credit contracts 145
Division 7—Special rules for short-term and small amount credit contracts 148
124A Prohibition on providing credit assistance in relation to short-term credit contracts 148
124B Licensee who makes representations about credit assistance in relation to small amount credit contracts must display information etc. 148

Authorised Version C2021C00117 registered 17/02/2021

Part 3-2—Licensees that are credit providers under credit contracts: general rules 150

Division 1—Introduction 150

125 Guide to this Part 150

Division 2—Credit guide of credit providers 151

126 Credit guide of credit providers 151

127 Credit guide of credit providers who are assignees 152

Division 3—Obligation to assess unsuitability 154

128 Obligation to assess unsuitability 154

129 Assessment of unsuitability of the credit contract 154

130 Reasonable inquiries etc. about the consumer 155

131 When credit contract must be assessed as unsuitable 156

132 Giving the consumer the assessment 158

Division 4—Prohibition on entering, or increasing the credit limit of, unsuitable credit contracts 160

133 Prohibition on entering, or increasing the credit limit of, unsuitable credit contracts 160

Part 3-2A—Licensees that are credit providers under credit contracts: additional rules relating to standard home loans 163

Division 1—Introduction 163

133A Guide to this Part 163

Division 2—Key Facts Sheets for standard home loans 164

133AA What is a *standard home loan*? 164

133AB What is a *Key Facts Sheet* for a standard home loan? 164

133AC Credit provider's website to provide capacity to generate Key Facts Sheet 165

133AD Credit provider to provide Key Facts Sheet in other situations 166

133AE What if more information is needed from the consumer? 167

133AF Defences to obligation to provide a Key Facts Sheet 168

Authorised Version C2021C00117 registered 17/02/2021

Part 3-2B—Licensees that are credit providers under credit contracts: additional rules relating to credit card contracts 170

Division 1—Introduction 170

133B Guide to this Part ... 170

Division 2—Credit card contracts and related concepts 172

133BA Meaning of *credit card contract* etc. ... 172

Division 3—Key Facts Sheets for credit card contract 174

133BB What is a *Key Facts Sheet* for a credit card contract? ... 174

133BC Application form for credit card contract to include up-to-date Key Facts Sheet ... 174

133BD Credit provider not to enter into credit card contract unless Key Facts Sheet has been provided etc. ... 175

Division 4—Offers etc. to increase, and entitlement to reduce, credit limit of credit card contract 177

133BE Credit provider not to offer etc. to increase credit limit of credit card contract ... 177

133BF Credit provider not to enter into credit card contract unless it allows credit limit to be reduced ... 178

133BFA Credit provider to provide online capacity to request reduction of credit limit ... 179

133BFB Credit provider not to suggest the consumer not reduce the credit limit ... 180

133BFC Credit provider to give effect to request to reduce credit limit ... 181

Division 5—Use of credit card in excess of credit limit 183

133BH Credit provider to notify consumer of use of credit card in excess of credit limit ... 183

133BI Credit provider not to impose fees etc. because credit card used in excess of credit limit ... 184

133BJ Records of consents and withdrawals to be kept ... 185

Division 6—Order of application of payments made under credit card contracts 186

133BO Credit provider to apply payments in accordance with this Division ... 186

133BP Agreement to apply payment against particular amount owed ... 187

Authorised Version C2021C00117 registered 17/02/2021

133BQ Application of payment against last statement balance, with higher interest debts to be discharged first 188
133BR Application of any remaining part of the relevant payment 188

Division 7—Calculation of interest under credit card contracts 189
133BS Credit provider not to impose retrospective interest charges 189

Division 8—Ending credit card contracts 190
133BT Credit provider not to enter into credit card contract unless it allows for termination of contracts 190
133BU Credit provider to provide online capacity to request termination of credit card contract 191
133BV Credit provider not to suggest the consumer not terminate the credit card contract 192
133BW Credit provider to give effect to request to terminate credit card contract 192

Part 3-2C—Licensees that are credit providers under credit contracts: additional rules relating to short-term and small amount credit contracts 194

Division 1—Introduction 194
133C Guide to this Part 194

Division 2—Short-term and small amount credit contracts 195
133CA Prohibition on entering, or increasing the credit limit of, short-term credit contracts 195
133CB Licensee who makes representations about small amount credit contracts must display information etc. 195
133CC Licensee must not enter into a small amount credit contract if the repayments do not meet the prescribed requirements 196

Part 3-2D—Licensees and reverse mortgages 198
133DA Guide to this Part 198
133DB Giving projections of equity before providing credit assistance or entering credit contract 198
133DC Making reverse mortgage information statement available on website of credit provider or credit assistance provider 200

Authorised Version C2021C00117 registered 17/02/2021

133DD Making reverse mortgage information statement available in other situations 201
133DE Representations that use the term "reverse mortgage" etc. 202

Part 3-3—Licensees that provide credit assistance in relation to consumer leases 204

Division 1—Introduction 204
134 Guide to this Part 204
135 Application of this Part 205

Division 2—Credit guide of credit assistance providers 206
136 Credit guide of credit assistance providers 206

Division 3—Quote for providing credit assistance etc. in relation to consumer leases 209
137 Quote for providing credit assistance etc. 209

Division 4—Obligations of credit assistance providers before providing credit assistance for consumer leases 211
138 Obligations of credit assistance providers before providing credit assistance for consumer leases 211
139 Preliminary assessment of unsuitability of the consumer lease 212
140 Reasonable inquiries etc. about the consumer 212
141 When the consumer lease must be assessed as unsuitable—entering lease 213
142 When the consumer lease must be assessed as unsuitable—remaining in lease 214
143 Providing the consumer with the preliminary assessment 216

Division 5—Fees, indirect remuneration etc. relating to consumer leases 218
144 Fees, indirect remuneration etc. relating to consumer leases 218
145 No profiting from fees etc. paid to third parties 219

Division 6—Prohibition on suggesting, or assisting with, unsuitable consumer leases 220
146 Prohibition on suggesting, or assisting with, unsuitable consumer leases 220
147 Prohibition on suggesting to consumers to remain in unsuitable consumer leases 222

Authorised Version C2021C00117 registered 17/02/2021

Part 3-4—Licensees that are lessors under consumer leases 225
Division 1—Introduction 225
148 Guide to this Part ... 225
Division 2—Credit guide of lessors 226
149 Credit guide of lessors ... 226
150 Credit guide of lessors who are assignees ... 227
Division 3—Obligation to assess unsuitability 229
151 Obligation to assess unsuitability ... 229
152 Assessment of unsuitability of the consumer lease ... 229
153 Reasonable inquiries etc. about the consumer ... 229
154 When consumer lease must be assessed as unsuitable ... 230
155 Giving the consumer the assessment ... 231
Division 4—Prohibition on entering unsuitable consumer leases 234
156 Prohibition on entering unsuitable consumer leases ... 234
Part 3-5—Credit representatives 236
Division 1—Introduction 236
157 Guide to this Part ... 236
Division 2—Credit guide of credit representatives 237
158 Credit guide of credit representatives ... 237
Part 3-5A—Mortgage brokers and mortgage intermediaries 240
Division 1—Introduction 240
Subdivision A—Guide to this Part 240
158K Guide to this Part ... 240
Subdivision B—Interpretation 240
158KA Doing acts ... 240
158KB Circumstances in which a secondary representative is taken to be acting within actual or apparent authority ... 241
158KC Obligations under this Part in addition to other obligations ... 241
Division 2—Best interests obligations 242
Subdivision A—Licensees that provide credit assistance in relation to credit contracts 242
158L Application of this Subdivision ... 242

Authorised Version C2021C00117 registered 17/02/2021

158LA Licensee must act in the best interests of the consumer 242
158LB Conflict between consumer's interests and those of the licensee etc. 242

Subdivision B—Credit representatives that provide credit assistance in relation to credit contracts 243
158LD Application of this Subdivision 243
158LE Credit representative must act in the best interests of the consumer 243
158LF Conflict between consumer's interests and those of the credit representative etc. 243

Division 4—Conflicted remuneration 245

Subdivision A—What is conflicted remuneration? 245
158N *Conflicted remuneration* 245
158NA Regulations may further define *conflicted remuneration* 245

Subdivision B—Ban on accepting conflicted remuneration 246
158NB Licensee must not accept conflicted remuneration 246
158NC Credit representative must not accept conflicted remuneration 246

Subdivision C—Ban on giving conflicted remuneration 246
158ND Employer must not give employees conflicted remuneration 246
158NE Credit provider must not give conflicted remuneration 247
158NF Mortgage intermediary must not give conflicted remuneration 247

Division 6—Miscellaneous 249
158T Anti-avoidance 249

Part 3-6—Debt collectors 250

Division 1—Introduction 250
159 Guide to this Part 250

Division 2—Credit guide of debt collectors 251
160 Credit guide of debt collectors 251

Part 3-6A—Miscellaneous rules 253

Division 1—Introduction 253
160A Guide to this Part 253

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Representations 254
160B "Independent", "impartial" or "unbiased" etc. 254
160C "Financial counsellor" etc. 255
Division 3—Giving misleading information 257
160D Prohibition on giving misleading information etc. 257
Division 4—Giving authorisation for deductions by employer of debtor or lessee 258
160E Requirements for giving authorisation to employer 258
Division 5—Periods for determining unsuitability in respect of credit card contracts 260
160F Periods for determining unsuitability in respect of credit card contracts....260
Part 3-7—Exemptions and modifications relating to this Chapter 261
Division 1—Introduction 261
161 Guide to this Part....261
Division 2—Exemptions and modifications relating to this Chapter 262
162 Provisions to which this Part applies....262
163 Exemptions and modifications by ASIC 262
164 Exemptions and modifications by the regulations....263
Chapter 4—Remedies 265
Part 4-1—Civil penalty provisions 265
Division 1—Introduction 265
165 Guide to this Part....265
Division 2—Declarations and pecuniary penalty orders for contraventions of civil penalty provisions 266
166 Declaration of contravention of civil penalty provision....266
167 Court may order person to pay pecuniary penalty for contravening civil penalty provision....266
167A Maximum pecuniary penalty....267
167B Pecuniary penalty applicable....268
167C Relinquishing the benefit derived from contravening a civil penalty provision....269

Authorised Version C2021C00117 registered 17/02/2021

167D Meaning of *benefit derived and detriment avoided* because of a contravention of a civil penalty provision....270

Division 3—General provisions relating to civil penalty provisions 271

168 Contravening a civil penalty provision is not an offence....271
169 Attempt and involvement in contravention treated in same way as actual contravention....271
170 Civil evidence and procedure rules for proceedings relating to civil penalty provisions....271
171 Criminal proceedings before civil proceedings....271
172 Criminal proceedings during civil proceedings....271
173 Criminal proceedings after civil proceedings....272
174 Evidence given in proceedings for pecuniary penalty not admissible in criminal proceedings....272
175 Civil double jeopardy....273
175A Continuing contraventions of civil penalty provisions....273
175B State of mind....274
175C Mistake of fact....274
175D Exceptions etc. to civil penalty provisions—burden of proof....275
175E Civil penalty provisions contravened by employees, agents or officers....275

Part 4-2—Power of the court to grant remedies 277

Division 1—Introduction 277

176 Guide to this Part....277

Division 2—Power of the court to grant remedies 278

177 Injunctions....278
178 Compensation orders....279
179 Other orders to compensate loss or damage....280
180 Orders in relation to unlawful credit activities....283
180A Orders to remedy unfair or dishonest conduct by credit service providers....285
181 Preference must be given to compensate consumers....288
182 Adverse publicity orders....289

Authorised Version C2021C00117 registered 17/02/2021

183 Relief from liability for contravention of civil penalty provision 289
184 Multiple remedies may be granted 290

Part 4-3—Jurisdiction and procedure of courts 291

Division 1—Introduction 291
185 Guide to this Part 291

Division 2—Civil proceedings 292

Subdivision A—Application of this Division 292
186 Application of this Division 292

Subdivision B—Conferral of civil jurisdiction 292
187 Civil jurisdiction of courts 292
188 Jurisdiction—decisions to prosecute and related criminal justice process decisions made by Commonwealth officers 293
189 Cross-jurisdictional appeals 295
190 Courts to act in aid of each other 296

Subdivision C—Transfers between courts 296
191 Transfers—application of Subdivision 296
192 Transfers—exercise of transfer power 297
193 Transfers—criteria for transfer 298
194 Transfers—how initiated 299
195 Transfers—documents and procedure 299
196 Transfers—conduct of proceedings 299
197 Transfers—entitlement to practise as a lawyer 300
198 Transfers—limitation on appeals 300

Subdivision D—Other matters 300
199 Plaintiffs may choose small claims procedure 300
200 Costs only if proceedings brought vexatiously etc. 306
201 Civil proceedings not to be stayed 306
202 Standard of proof in civil proceedings 306

Division 3—Criminal proceedings 308

Subdivision A—Application of this Division 308
203 Application of this Division 308

Subdivision B—Conferral of criminal jurisdiction 308
204 Criminal jurisdiction of courts 308
205 Criminal proceedings—laws to be applied 311

Authorised Version C2021C00117 registered 17/02/2021

206 Criminal proceedings—how taken 312
207 Certain persons to assist in prosecutions 312
208 Privilege against self-incrimination not available to bodies corporate in criminal proceedings 313

Division 4—Proceedings generally 315
209 ASIC's power to intervene in proceedings 315
210 Evidence of contravention 315
211 Power of court to punish for contempt of court 316

Chapter 5—Administration 317

Part 5-1—Registers relating to credit activities 317

Division 1—Introduction 317
212 Guide to this Part 317

Division 2—Registers relating to credit activities 318
213 Credit registers 318
214 Inspection and public availability of credit registers 319

Part 5-2—Documents lodged with ASIC or required by this Act 320

Division 1—Introduction 320
215 Guide to this Part 320

Division 2—Lodgment of documents with ASIC 321
216 When documents are lodged with ASIC 321
217 Approved forms for documents to be lodged with ASIC 321
218 ASIC may refuse to receive document etc 322

Division 3—ASIC's register of documents 324
219 Register of documents lodged with ASIC 324
220 ASIC may require person to give information for document registers 324
221 Written document setting out information from document registers is prima facie evidence of matters 325

Division 4—Other provisions relating to documents lodged with ASIC or required under this Act 327
222 Certified copy or extract of document lodged with ASIC is admissible in evidence 327
223 ASIC may destroy or dispose of certain documents 327

Authorised Version C2021C00117 registered 17/02/2021

224 Court may order lodgment of document etc. 327
225 False or misleading documents..... 328

Part 5-3—Concealment or falsification of credit books 332

Division 1—Introduction 332
226 Guide to this Part..... 332

Division 2—Prohibitions relating to the concealment or falsification of credit books 333
227 Concealing etc. of credit books 333
228 Falsification of credit books 334
229 Precautions against falsification of credit books 335

Part 5-4—Fees imposed by the National Consumer Credit Protection (Fees) Act 2009 336

Division 1—Introduction 336
230 Guide to this Part..... 336

Division 2—Fees imposed by the National Consumer Credit Protection (Fees) Act 2009 337
231 Fees are payable to the Commonwealth 337
232 Lodgment of document without payment of fee..... 337
233 Doing act without payment of fee 337
234 Effect of sections 232 and 233 337
235 Waiver and refund of fees 338
236 Debts due to the Commonwealth..... 338
237 Payment of fee does not give right to inspect or search 338

Part 5-5—Other administrative matters 339

Division 1—Introduction 339
238 Guide to this Part..... 339

Division 1A—Codes of conduct 340

Subdivision A—Approved codes of conduct 340
238A Approved codes of conduct..... 340
238B Variations to approved codes of conduct..... 341
238C Review of approved codes of conduct..... 342
238D Obligation to comply with enforceable code provisions 342
238E Regulations..... 342

Authorised Version C2021C00117 registered 17/02/2021

Subdivision B—Mandatory codes of conduct 343
238F Mandatory codes of conduct 343
238G Obligation to comply with mandatory code of conduct 343

Division 2—Other administrative matters 344
239 ASIC has general administration of this Act 344
240 Obstructing or hindering ASIC etc. 344
242 ASIC may arrange for use of computer programs to make decisions 344
243 Qualified privilege for information given to ASIC 345
244 ASIC certificate is prima facie evidence of matters 345
245 Operator of AFCA scheme may give information to ASIC 346

Chapter 6—Compliance and enforcement 347

Part 6-1—Investigations 347

Division 1—Introduction 347
246 Guide to this Part 347

Division 2—Investigations 348
247 General powers of investigation 348
248 Minister may direct investigations 348
249 Interim report on investigation 349
250 Final report on investigation 350
251 Distribution of report 350

Part 6-2—Examination of persons 352

Division 1—Introduction 352
252 Guide to this Part 352

Division 2—Examination of persons 353
253 Notice requiring appearance for examination 353
254 Proceedings at examination 353
255 Requirements made of examinee 353
256 Examination to take place in private 354
257 Examinee's lawyer may attend 354
258 Record of examination 355
259 Giving to other persons copies of record 356
260 Copies given subject to conditions 356
261 Record to accompany report 357

Authorised Version C2021C00117 registered 17/02/2021

Part 6-3—Inspection of books and audit information-gathering powers 358

Division 1—Introduction 358

262 Guide to this Part ... 358

Division 2—Inspection of books and audit information-gathering powers 359

263 When certain powers may be exercised ... 359

264 ASIC may inspect books without charge ... 359

265 Notice to auditors concerning information and books ... 360

266 Notice to produce books about credit activities ... 361

267 Notice to produce documents in person's possession ... 362

268 ASIC may authorise persons to require production of books, giving of information etc. ... 362

271 Powers if books produced or seized ... 363

272 Powers if books not produced ... 365

Part 6-3A—Search warrants 366

Division 1—Introduction 366

272A Guide to this Part ... 366

Division 2—Extra application of Crimes Act search warrant provisions 367

Subdivision A—Basic extra application 367

272B Extra application of Crimes Act search warrant provisions ... 367

272C Interpretation of modifications ... 368

Subdivision B—Modifications 368

272D Major modifications—evidential material ... 368

272E Major modifications—who may apply for a warrant etc. ... 368

272F Major modifications—purposes for which things may be used and shared ... 369

272G Minor modifications ... 373

Part 6-4—Proceedings after an investigation 375

Division 1—Introduction 375

273 Guide to this Part ... 375

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Proceedings after an investigation 376
274 ASIC may prosecute....376
275 ASIC may bring civil proceedings 377
Part 6-5—Hearings 378
Division 1—Introduction 378
276 Guide to this Part....378
Division 2—Hearings 379
277 Power to hold hearings....379
278 General discretion to hold hearing in public or private....379
279 Request by person appearing at hearing that it take place in public 379
280 Certain hearings to take place in private....380
281 ASIC may restrict publication of certain material 380
282 Who may be present when hearing takes place in private....381
283 Involvement of person entitled to appear at hearing....382
284 Power to summon witnesses and take evidence 382
285 Proceedings at hearings....383
286 ASIC to take account of evidence and submissions 384
287 Reference to court of question of law arising at hearing....384
288 Protection of ASIC members etc. 385
Part 6-5A—Penalties for offences 386
Division 1—Introduction 386
288A Guide to this Part....386
Division 2—Penalty for committing an offence 387
288B Penalty for committing an offence 387
288C Penalty applicable to an offence committed by an individual....387
288D Penalty applicable to an offence committed by a body corporate....388
288E Meaning of *benefit derived and detriment avoided* because of an offence 389
288F Where is the penalty for an offence specified?....389
288G If no penalty is specified....390

Authorised Version C2021C00117 registered 17/02/2021

Part 6-5B—Infringement notices 391

Division 1—Introduction 391

288H Guide to this Part 391

Division 2—Infringement notices 392

288J When an infringement notice may be given 392
288K Provisions subject to an infringement notice 392
288L Matters to be included in an infringement notice 393
288M Payment period 396
288N Extension of time to pay amount 397
288P Payment by instalments 398
288Q Withdrawal of an infringement notice 399
288R Effect of payment of amount 401
288S Effect of this Part 402

Part 6-6—Offences under this Chapter 403

Division 1—Introduction 403

289 Guide to this Part 403

Division 2—Offences 404

290 Contraventions of requirements made under this Chapter 404
291 False information 405
293 Disrupting hearings 405
294 Concealing books relevant to investigation 406
295 Self-incrimination 406
296 Legal professional privilege 407
297 Powers of court relating to contraventions of this Chapter 408

Part 6-7—ASIC's powers in relation to contraventions of this Chapter 410

Division 1—Introduction 410

298 Guide to this Part 410

Division 2—ASIC's powers in relation to contraventions of this Chapter 411

299 Application of this Part 411
300 Orders by ASIC relating to credit contracts, mortgages, guarantees or consumer leases 411
301 Orders under this Part 412

Authorised Version C2021C00117 registered 17/02/2021

Part 6-7A—Product intervention orders 413

Division 1—Introduction 413

301A Guide to this Part....413

Division 2—Product intervention orders 414

301B Definitions....414
301C Application of product intervention orders....414
301D ASIC may make product intervention orders....414
301E Significant detriment to consumers....416
301F ASIC to consult before making product intervention orders....416
301G Commencement and duration of product intervention orders....417
301H Extension of product intervention orders....418
301J Amendment of product intervention orders....419
301K Revocation of product intervention orders....420
301L ASIC to issue public notice of product intervention orders....420
301M Remaking product intervention orders....422
301N Product intervention orders may require notification....422
301P Enforcement of product intervention orders....422

Part 6-8—Evidentiary use of certain material 424

Division 1—Introduction 424

302 Guide to this Part....424

Division 2—Evidentiary use of certain material 425

303 Statements made at an examination: proceedings against examinee....425
304 Statements made at an examination: other proceedings....426
305 Weight of evidence admitted under section 304....426
306 Objection to admission of statements made at examination....427
307 Copies of, or extracts from, certain books....428
308 Report under Part 6-1....429
309 Exceptions to admissibility of report....429
310 Material otherwise admissible....430

Authorised Version C2021C00117 registered 17/02/2021

Part 6-9—Miscellaneous provisions relating to compliance and enforcement 431

Division 1—Introduction 431

311 Guide to this Part....431

Division 2—Miscellaneous provisions relating to compliance and enforcement 432

312 Requirement made of a body corporate....432
313 Evidence of authority....432
314 Giving documents to natural persons....432
315 Place and time for production of books....433
316 Application of Crimes Act and Evidence Act....433
317 Allowances and expenses....433
318 Expenses of investigation under Part 6-1....434
319 Recovery of expenses of investigation....434
320 Compliance with this Chapter....435
321 Effect of this Chapter....435
322 Enforcement of undertakings....435

Authorised Version C2021C00117 registered 17/02/2021

An Act relating to credit, and for related purposes

Chapter 1—Introduction

Part 1-1—Introduction

1 Short title

This Act may be cited as the *National Consumer Credit Protection Act 2009*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information

Column 1	Column 2	Column 3
Provision(s)	**Commencement**	**Date/Details**
1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	15 December 2009
2. Sections 3 to 337 and Schedule 1	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	1 April 2010 (*see* F2010L00301)

Authorised Version C2021C00117 registered 17/02/2021

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

(2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 The National Credit Code

Schedule 1 (which is the National Credit Code) has effect as a law of the Commonwealth.

Authorised Version C2021C00117 registered 17/02/2021

Part 1-2—Definitions

Division 1—Introduction

4 Guide to this Part

This Part is about the terms that are defined in this Act (other than the National Credit Code). (For the terms that are defined in the National Credit Code, see section 204 of that Code.)

Division 2 has the Dictionary (see section 5). The Dictionary is a list of every term that is defined in this Act (other than the National Credit Code). A term will either be defined in the Dictionary itself, or in another provision of this Act. If another provision defines the term, the Dictionary will have a signpost to that definition.

Division 3 has definitions relating to the meaning of credit activity.

Division 4 has some other definitions that apply across this Act (other than the National Credit Code).

Authorised Version C2021C00117 registered 17/02/2021

Division 2—The Dictionary

5 The Dictionary

(1) In this Act (other than the National Credit Code):

acts as an intermediary: see section 9.

ADI has the same meaning as in subsection 5(1) of the *Banking Act 1959*.

adverse publicity order: see section 182.

AFCA scheme has the same meaning as in Chapter 7 of the *Corporations Act 2001*.

affairs, in relation to a person that is a body corporate, has the same meaning as in Part 3 of the ASIC Act.

affidavit includes affirmation.

ancillary offence, in relation to another offence, means:

(a) an offence against section 6 of the *Crimes Act 1914*; or

(b) an ancillary offence within the meaning of the *Criminal Code*;

that relates to the other offence.

annual percentage rate has the same meaning as in section 27 of the National Credit Code.

annual turnover, of a body corporate during a 12-month period, means the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during the 12-month period, other than:

(a) supplies made from any of those bodies corporate to any other of those bodies corporate; or

(b) supplies that are input taxed; or

Authorised Version C2021C00117 registered 17/02/2021

(c) 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*); or

(d) supplies that are not made in connection with an enterprise that the body corporate carries on; or

(e) supplies that are not connected with Australia.

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

appeal includes:

(a) an application for a new trial; and

(b) proceedings to review or call in question the proceedings, decision or jurisdiction of a court or judge.

approved code of conduct means a code of conduct approved by ASIC by legislative instrument under section 238A, and includes a replacement code of conduct approved under that section.

APRA means the Australian Prudential Regulation Authority.

ASIC means the Australian Securities and Investments Commission.

ASIC Act means the *Australian Securities and Investments Commission Act 2001*, and includes instruments made under that Act.

ASIC member means a member of ASIC within the meaning of the ASIC Act.

ASIC staff member means a staff member within the meaning of subsection 5(1) of the ASIC Act.

associate: see section 15A.

Australia, when used in a geographical sense, does not include an external Territory.

Authorised Version C2021C00117 registered 17/02/2021

Note: Section 2B of the *Acts Interpretation Act 1901* would otherwise provide that ***Australia*** included the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands.

Australian credit licence: see subsection 35(1).

Australian credit licence number means the number given to a licence under section 43.

Australian financial services licence has the same meaning as in section 761A of the *Corporations Act 2001*.

authorised, in relation to a credit activity: see subsection 35(2).

banker has the same meaning as in section 9 of the *Corporations Act 2001*.

banned from engaging in a credit activity under a law of a State or Territory: a person is ***banned from engaging in a credit activity under a law of a State or Territory*** if:

(a) the person holds a State or Territory credit licence that is suspended (otherwise than by request of the person); or

(b) the person has held a State or Territory credit licence that has been cancelled within the last 7 years (otherwise than by the person's request); or

(c) an order of a court made under a law of a State or Territory prohibits the person from engaging in a credit activity; or

(d) the person is otherwise prohibited under a law of a State or Territory from engaging in a credit activity.

banning order means an order made under subsection 80(1).

beneficiary of a guarantee means a person who is a party to a guarantee and who has the benefit of the guarantee, and includes a person who is a beneficiary of a guarantee because of section 10.

benefit derived and detriment avoided:

(a) because of an offence—has the meaning given by section 288E; and

Authorised Version C2021C00117 registered 17/02/2021

(b) because of a contravention of a civil penalty provision—has the meaning given by section 167D.

body regulated by APRA has the same meaning as in subsection 3(2) of the *Australian Prudential Regulation Authority Act 1998*.

book includes:

(a) a register; and

(b) any other record of information; and

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

(d) a document.

business day has the same meaning as in section 204 of the National Credit Code.

carried on in this jurisdiction has a meaning affected by section 12.

civil penalty provision: a subsection of this Act (or a section of this Act that is not divided into subsections) is a ***civil penalty provision*** if:

(a) the words "civil penalty" and one or more amounts in penalty units are set out at the foot of the subsection (or section); or

(b) another provision of this Act specifies that the subsection (or section) is a civil penalty provision.

coastal sea:

(a) in relation to Australia—means:

(i) the territorial sea of Australia; and

(ii) the sea on the landward side of the territorial sea of Australia and not within the limits of a State or internal Territory;

and includes the airspace over, and the sea-bed and subsoil beneath, any such sea; and

(b) in relation to a State or Territory—means so much of the coastal sea of Australia as is within the area described in

Authorised Version C2021C00117 registered 17/02/2021

Schedule 1 to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* under the heading that refers to that State or Territory.

code of conduct means a code of conduct that relates to any aspect of the activities of:

(a) licensees; or

(b) credit representatives;

being activities in relation to which ASIC has a regulatory responsibility.

commission includes any financial or other benefit in the nature of a commission.

Note: Commissions may be conflicted remuneration: see Division 4 of Part 3-5A.

Commonwealth credit legislation means this Act and the Transitional Act.

conflicted remuneration: see sections 158N and 158NA.

consumer means a natural person or a strata corporation.

consumer lease means a consumer lease to which Part 11 of the National Credit Code applies.

continuing credit contract has the same meaning as in section 204 of the National Credit Code.

contravention:

(a) in relation to an offence against a law—includes an ancillary offence relating to the offence against the law; and

(b) in relation to a civil penalty provision—has a meaning affected by section 169.

control has the meaning given by section 16A.

credit has the same meaning as in subsection 3(1) of the National Credit Code.

Authorised Version C2021C00117 registered 17/02/2021

credit activity: see section 6.

credit assistance: see section 8.

credit book: see subsection 227(4).

credit card: see subsection 133BA(2).

credit card contract: see subsection 133BA(1).

credit card termination entitlement: see subsection 133BT(3).

credit contract has the same meaning as in section 4 of the National Credit Code.

credit legislation means:

(a) this Act; and
(b) the Transitional Act; and
(c) Division 2 of Part 2 of the ASIC Act and regulations made for the purpose of that Division; and
(d) any other Commonwealth, State or Territory legislation that covers conduct relating to credit activities (whether or not it also covers other conduct), but only in so far as it covers conduct relating to credit activities.

credit limit of a credit contract means the maximum amount of credit that may be provided under the contract.

credit limit increase invitation, in relation to a credit card contract: see subsection 133BE(5).

credit limit reduction entitlement: see subsection 133BF(3).

credit provider has the same meaning as in section 204 of the National Credit Code, and includes a person who is a credit provider because of section 10.

credit registers: see section 213.

credit representative: see subsections 64(2) and 65(2).

Authorised Version C2021C00117 registered 17/02/2021

credit representative number means the number given to a credit representative under section 72.

credit service: see section 7.

criminal procedure: see section 205.

debtor has the same meaning as in section 204 of the National Credit Code.

director has the same meaning as in section 9 of the *Corporations Act 2001*.

disqualification order means an order of the court under section 86.

document registers: see section 219.

enforceable code provision means a provision of an approved code of conduct identified by ASIC under subsection 238A(2).

engage in conduct means:

(a) do an act; or

(b) omit to perform an act.

examination, when used in Chapter 6 (which deals with compliance and enforcement), means an examination of a person pursuant to a requirement made under section 253.

expenses, in relation to an investigation under Part 6-1, includes costs and expenses incurred by ASIC in relation to proceedings brought under section 275 as a result of the investigation.

Federal Circuit Court means the Federal Circuit Court of Australia.

Federal Court means the Federal Court of Australia.

financial records: see subsection 88(2).

financial year: see subsection 100(6).

Authorised Version C2021C00117 registered 17/02/2021

function includes a duty.

give:

(a) when used in Chapter 6 (which deals with compliance and enforcement) in relation to a document—has a meaning affected by section 314; and

(b) when used in relation to information, includes:

(i) explaining or stating a matter; and

(ii) identifying a person, matter or thing; and

(iii) disclosing information; and

(iv) answering a question.

guarantee means a guarantee to which the National Credit Code applies.

hearing, when used in Chapter 6 (which deals with compliance and enforcement), means a hearing before ASIC and, in sections 278, 280, 281 and 282 (which are in that Chapter), includes part of such a hearing.

indirect remuneration means a commission or conflicted remuneration.

individual fine formula means the formula set out in subsection 288C(3).

infringement notice means a notice given under section 288J.

initial National Credit Code: see subsection 20(2).

insolvent means:

(a) in the case of a natural person—a person who is an insolvent under administration; or

(b) in the case of a body corporate—a body corporate that is a Chapter 5 body corporate (within the meaning of the *Corporations Act 2001*); or

(c) in the case of a partnership—a partnership against which a creditor's petition or a debtor's petition is presented under Division 2 or 3 of Part IV of the *Bankruptcy Act 1966*.

Authorised Version C2021C00117 registered 17/02/2021

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

involved in: a person is ***involved in*** a contravention of a provision of legislation if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

judgment means a judgment, decree or order, whether final or interlocutory.

Key Facts Sheet:

(a) for a credit card contract—see section 133BB; and

(b) for a standard home loan—see section 133AB.

law of a referring State or a Territory means a law of, or in force in, a referring State or a Territory but does not include a law of the Commonwealth in force in the referring State or the Territory.

law of a State or Territory means a law of, or in force in, a State or Territory but does not include a law of the Commonwealth in force in the State or Territory.

lawyer means a person who is admitted to the legal profession by a federal court or a Supreme Court of a State or Territory.

lessee means the lessee under a consumer lease.

lessor has the same meaning as in section 204 of the National Credit Code, and includes a person who is a lessor because of section 10.

licence means an Australian credit licence.

Authorised Version C2021C00117 registered 17/02/2021

licensee means a person who holds a licence.

licensing anniversary: see subsection 53(7).

linked: for when a credit card is ***linked*** to a credit card contract, see subsection 133BA(3).

lodge with ASIC: see section 216.

lower court means:

(a) the Federal Circuit Court; or

(b) a court of a State or Territory that is not a superior court.

malice: see subsection 16(2).

mandatory code of conduct means a code of conduct that is declared by regulations under section 238F to be mandatory.

matter includes an act, an omission, a body, a person or a thing.

misleading: see section 13.

mortgage means a mortgage to which the National Credit Code applies.

mortgage broker: see section 15B.

mortgagee means the mortgagee under a mortgage, and includes a person who is a mortgagee because of section 10.

mortgage intermediary: see section 15C.

mortgagor means the mortgagor under a mortgage.

National Credit Code means Schedule 1 to this Act, and includes:

(a) regulations made under section 329 for the purposes of that Schedule; and

(b) instruments made under that Schedule.

officer of the Commonwealth has the same meaning as in paragraph 75(v) of the Constitution.

Authorised Version C2021C00117 registered 17/02/2021

payment period, in relation to an infringement notice, has the meaning given by section 288M.

pecuniary penalty order means an order made under section 167.

penalty unit has the same meaning as in section 4AA of the *Crimes Act 1914*.

person has a meaning affected by section 14 (which deals with partnerships) and section 15 (which deals with multiple trustees).

power includes an authority.

premises includes:

(a) a structure, building, aircraft, vehicle or vessel; and
(b) any land or place (whether enclosed or built in or not); and
(c) a part of a structure, building, aircraft, vehicle, vessel or of such a place.

prescribed State or Territory order means an order under a law of a State or Territory, being an order of a kind prescribed by the regulations.

proceedings:

(a) when used in Chapter 6 (which deals with compliance and enforcement)—has the same meaning as the definition of ***proceeding*** in subsection 5(1) of the ASIC Act; and
(b) otherwise—means proceedings, whether criminal or civil, before a court.

qualified privilege has a meaning affected by section 16.

receiving court: see section 191.

record, when used in Chapter 6 (which deals with compliance and enforcement) in relation to an examination, means the whole or part of a record made under section 258 of statements made at the examination.

referred credit matter: see subsection 20(1).

Authorised Version C2021C00117 registered 17/02/2021

referring State: see section 19.

registered company auditor has the same meaning as in section 9 of the *Corporations Act 2001*.

related body corporate has the same meaning as in section 9 of the *Corporations Act 2001*.

related criminal justice process decision: see section 188.

relevant criminal law: see subsection 204(5).

relevant superior court, in relation to a lower court, means:

(a) if the lower court is the Federal Circuit Court—the Federal Court; or

(b) if the lower court is a court of a State or Territory—the Supreme Court of the State or Territory.

relinquishment order means an order made under subsection 167C(1).

representative of a person means:

(a) if the person is a licensee:

(i) an employee or director of the licensee; or

(ii) an employee or director of a related body corporate of the licensee; or

(iii) a credit representative of the licensee; or

(iv) any other person acting on behalf of the licensee; or

(b) otherwise:

(i) an employee or director of the person; or

(ii) an employee or director of a related body corporate of the person; or

(iii) any other person acting on behalf of the person.

residential property has the same meaning as in section 204 of the National Credit Code.

reverse mortgage has the same meaning as in section 13A of the National Credit Code.

Authorised Version C2021C00117 registered 17/02/2021

reverse mortgage information statement means a document relating to reverse mortgages that complies with the regulations.

senior manager has the same meaning as in section 9 of the *Corporations Act 2001*.

serious fraud means an offence involving fraud or dishonesty, being an offence:

(a) against a law of the Commonwealth, or of a State or Territory, or any other law; and

(b) punishable by imprisonment for life or for a period, or maximum period, of at least 3 months.

short-term credit contract: a credit contract is a ***short-term credit contract*** if:

(a) the contract is not a continuing credit contract; and

(b) the credit provider under the contract is not an ADI; and

(c) the credit limit of the contract is $2,000 (or such other amount as is prescribed by the regulations) or less; and

(d) the term of the contract is 15 days or less; and

(e) the contract meets any other requirements prescribed by the regulations.

small amount credit contract: a credit contract is a ***small amount credit contract*** if:

(a) the contract is not a continuing credit contract; and

(b) the credit provider under the contract is not an ADI; and

(c) the credit limit of the contract is $2,000 (or such other amount as is prescribed by the regulations) or less; and

(d) the term of the contract is at least 16 days but not longer than 1 year (or such other number of years as is prescribed by the regulations); and

(e) the debtor's obligations under the contract are not, and will not be, secured; and

(f) the contract meets any other requirements prescribed by the regulations.

Authorised Version C2021C00117 registered 17/02/2021

standard home loan: see subsection 133AA(1).

State, when used in a geographical sense, includes the coastal sea of the State.

statement, when used in Chapter 6 (which deals with compliance and enforcement) in relation to an examination, includes a question asked, an answer given, and any other comment or remark made, at the examination.

state of mind: the ***state of mind*** of a person includes:

(a) the knowledge, intention, opinion, belief or purpose of the person; and

(b) the person's reasons for the intention, opinion, belief or purpose.

State or Territory credit licence means a licence or registration that:

(a) is granted under a law of a State or Territory; and

(b) authorises the licensee or registered person to engage in a credit activity.

strata corporation has the same meaning as in section 204 of the National Credit Code.

subject to an infringement notice, in relation to an offence provision or civil penalty provision, has the meaning given by section 288K.

subscriber, in relation to an approved code of conduct:

(a) means a person or entity that agrees, in a way required by the applicant for the code's approval, to be bound by the code; and

(b) if a person or entity no longer agrees to be bound by the code—includes the person or entity during the period that the person or entity did agree to be so bound.

superior court means any of the following courts:

(a) the Federal Court;

Authorised Version C2021C00117 registered 17/02/2021

(b) the Supreme Court of a State or Territory.

Territory means:

(a) the Australian Capital Territory; or

(b) the Northern Territory; or

(c) the Jervis Bay Territory;

and, when used in a geographical sense, includes the coastal sea of the Territory.

this Act includes instruments made under this Act.

this jurisdiction: see subsections 21(2) and (3).

transfer matter: see section 191.

transferring court: see section 191.

Transitional Act means the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*, and includes instruments made under that Act.

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.

use of a credit card: see subsection 133BA(4).

value of a credit contract, mortgage, guarantee or consumer lease: see section 199.

within the authority: a representative's conduct is ***within the authority*** of a person if:

(a) for a representative who is an employee of the person or of a related body corporate of the person—the conduct is within the scope of the employee's employment; or

(b) for a representative who is a director of the person or of a related body corporate of the person—the conduct is within the scope of the director's duties as director; or

Authorised Version C2021C00117 registered 17/02/2021

(c) for a representative who is a credit representative of the person—the conduct is within the scope of the authorisation of the credit representative under subsection 64(1) or 65(1); or

(d) otherwise—the conduct is within the scope of the authority given by the person.

witness, in relation to a hearing before ASIC, means a person appearing at the hearing to give evidence.

written record, when used in Chapter 6 (which deals with compliance and enforcement) 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) In this Act (other than the National Credit Code), a reference to a provision is a reference to a provision of this Act, unless the contrary intention appears.

Authorised Version C2021C00117 registered 17/02/2021

Division 3—Definitions relating to the meaning of credit activity

6 Meaning of *credit activity*

(1) The following table sets out when a person engages in a ***credit activity***.

Meaning of *credit activity*

Item	Topic	A person engages in a *credit activity* if:
1	credit contracts	(a) the person is a credit provider under a credit contract; or (b) the person carries on a business of providing credit, being credit the provision of which the National Credit Code applies to; or (c) the person performs the obligations, or exercises the rights, of a credit provider in relation to a credit contract or proposed credit contract (whether the person does so as the credit provider or on behalf of the credit provider); or
2	credit service	the person provides a credit service; or
3	consumer leases	(a) the person is a lessor under a consumer lease; or (b) the person carries on a business of providing consumer leases; or (c) the person performs the obligations, or exercises the rights, of a lessor in relation to a consumer lease or proposed consumer lease (whether the person does so as the lessor or on behalf of the lessor); or
4	mortgages	(a) the person is a mortgagee under a mortgage; or (b) the person performs the obligations, or exercises the rights, of a mortgagee in relation to a mortgage or proposed mortgage (whether the person does so as the mortgagee or on behalf of the mortgagee); or

Authorised Version C2021C00117 registered 17/02/2021

Meaning of *credit activity*		
Item	**Topic**	**A person engages in a *credit activity* if:**
5	guarantees	(a) the person is the beneficiary of a guarantee; or (b) the person performs the obligations, or exercises the rights, of another person who is a beneficiary of a guarantee or proposed guarantee, in relation to the guarantee or proposed guarantee (whether the person does so on the person's own behalf or on behalf of the other person); or
6	prescribed activities	the person engages in an activity prescribed by the regulations in relation to credit, being credit the provision of which the National Credit Code applies to, or would apply to if the credit were provided.

(2) A subclass of any of the conduct referred to in the table in subsection (1) is also a ***credit activity***.

Note: For example, ASIC could impose a condition on a licence under subsection 45(6) that provides that a person is authorised to be a credit provider only under particular types of credit contracts (such as credit card contracts).

7 Meaning of *credit service*

A person provides a ***credit service*** if the person:

(a) provides credit assistance to a consumer; or

(b) acts as an intermediary.

8 Meaning of *credit assistance*

A person provides ***credit assistance*** to a consumer if, by dealing directly with the consumer or the consumer's agent in the course of, as part of, or incidentally to, a business carried on in this jurisdiction by the person or another person, the person:

(a) suggests that the consumer apply for a particular credit contract with a particular credit provider; or

Authorised Version C2021C00117 registered 17/02/2021

(b) suggests that the consumer apply for an increase to the credit limit of a particular credit contract with a particular credit provider; or

(c) suggests that the consumer remain in a particular credit contract with a particular credit provider; or

(d) assists the consumer to apply for a particular credit contract with a particular credit provider; or

(e) assists the consumer to apply for an increase to the credit limit of a particular credit contract with a particular credit provider; or

(f) suggests that the consumer apply for a particular consumer lease with a particular lessor; or

(g) suggests that the consumer remain in a particular consumer lease with a particular lessor; or

(h) assists the consumer to apply for a particular consumer lease with a particular lessor.

It does not matter whether the person does so on the person's own behalf or on behalf of another person.

9 Meaning of *acts as an intermediary*

A person ***acts as an intermediary*** if, in the course of, as part of, or incidentally to, a business carried on in this jurisdiction by the person or another person, the person:

(a) acts as an intermediary (whether directly or indirectly) between a credit provider and a consumer wholly or partly for the purposes of securing a provision of credit for the consumer under a credit contract for the consumer with the credit provider; or

(b) acts as an intermediary (whether directly or indirectly) between a lessor and a consumer wholly or partly for the purposes of securing a consumer lease for the consumer with the lessor.

It does not matter whether the person does so on the person's own behalf or on behalf of another person.

Authorised Version C2021C00117 registered 17/02/2021

10 Assignees of credit providers, lessors, mortgagees and beneficiaries of a guarantee

(1) For the purposes of this Act (other than the National Credit Code), a person is a credit provider, lessor, mortgagee or beneficiary of a guarantee whether the person is:

(a) the original credit provider, lessor, mortgagee or beneficiary of a guarantee under a credit contract, consumer lease, mortgage or guarantee; or

(b) a person to whom the rights of a credit provider, lessor, mortgagee or beneficiary of a guarantee under a credit contract, consumer lease, mortgage or guarantee have been assigned or passed by law.

Note: For example, a person who is assigned the rights of a credit provider under a credit contract would engage in a credit activity within the meaning of paragraph (a) of item 1 of the table in subsection 6(1).

(2) For the purposes of paragraph (1)(b), it does not matter whether an assignment or passing by law of rights is the first or a subsequent assignment or passing by law of those rights.

Authorised Version C2021C00117 registered 17/02/2021

Division 4—Other definitions

12 When a business is *carried on in this jurisdiction*

(1) Division 3 of Part 1.2 of the *Corporations Act 2001* applies for the purposes of working out whether a business is ***carried on in this jurisdiction***.

(2) Without limiting subsection (1), a business is taken to be ***carried on in this jurisdiction*** by a person if, in the course of carrying on the business, the person engages in conduct that is:

(a) intended to induce people in this jurisdiction to use the goods or services the person provides; or

(b) is likely to have that effect;

whether or not the conduct is intended, or likely, to have that effect in other places as well.

13 Meaning of *misleading*

(1) A representation made by a person is ***misleading*** if:

(a) the representation relates to a future matter (including the doing of, or refusing to do, any act); and

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

(2) Subsection (1) does not limit the circumstances in which a representation may be misleading.

14 Meaning of *person*—generally includes a partnership

(1) This Act (other than the National Credit Code) applies to a partnership as if the partnership were a person, but it applies with the following changes:

(a) obligations that would be imposed on the partnership are imposed instead on each partner, but may be discharged by any of the partners;

Authorised Version C2021C00117 registered 17/02/2021

(b) any contravention of this Act (other than the National Credit Code) that would otherwise be a contravention by the partnership is taken (whether for the purposes of criminal or civil liability) to have been a contravention by each partner who:

(i) aided, abetted, counselled or procured the relevant act or omission; or

(ii) was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the partner).

Note: For the purposes of paragraph (b), to determine whether the partnership has contravened this Act, see section 325.

(2) For the purposes of this Act (other than the National Credit Code), a change in the composition of a partnership does not affect the continuity of the partnership.

(3) Subsections (1) and (2) have effect subject to:

(a) an express or implied contrary intention in a provision of this Act (other than the National Credit Code); and

(b) the regulations, which may exclude or modify the effect of those subsections in relation to specified provisions.

15 Meaning of *person*—generally includes multiple trustees

(1) This section applies in relation to a trust during a period while the trust continues to have:

(a) 2 or more trustees; or

(b) a single trustee who was a trustee of the trust at a time when it had 2 or more trustees.

(2) Subject to subsections (3) and (4), during the period this Act (other than the National Credit Code) applies to the trust as if the trustee or trustees of the trust from time to time during the period were a single person (the ***notional person***) that remained the same for the duration of that period.

Authorised Version C2021C00117 registered 17/02/2021

Note: So, for example, a licence granted under this Act during the period to the trustees of the trust will continue in force, despite a change in the persons who are the trustees.

(3) If, during the period or any part of the period, the trust has 2 or more trustees, this Act (other than the National Credit Code) applies to the trustees as referred to in subsection (2), but it applies with the following changes:

(a) obligations that would be imposed on the notional person are imposed instead on each trustee, but may be discharged by any of the trustees;

(b) any contravention of this Act (other than the National Credit Code) that would otherwise be a contravention by the notional person is taken (whether for the purposes of criminal or civil liability) to have been a contravention by each trustee who:

(i) aided, abetted, counselled or procured the relevant act or omission; or

(ii) was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the trustee).

Note: For the purposes of paragraph (b), to determine whether the notional person has contravened this Act, see section 325.

(4) If, during the period or any part of the period, the trust has only one trustee, this Act (other than the National Credit Code) applies to the trustee as referred to in subsection (2), but it applies with the following changes:

(a) obligations that would be imposed on the notional person are imposed instead on that single trustee;

(b) any contravention of this Act (other than the National Credit Code) that would otherwise be a contravention by the notional person is taken (whether for the purposes of criminal or civil liability) to have been a contravention by that single trustee.

(5) Subsections (2), (3) and (4) have effect subject to:

Authorised Version C2021C00117 registered 17/02/2021

(a) an express or implied contrary intention in a provision of this Act (other than the National Credit Code); and
(b) the regulations, which may exclude or modify the effect of those subsections in relation to specified provisions.

15A Meaning of *associate*

(1) If a person is associated with a credit provider for the purposes of the National Credit Code:
(a) the person is an ***associate*** of the credit provider; and
(b) the credit provider is an ***associate*** of the person.

(2) In any other case, a person is an ***associate*** of another person in the circumstances prescribed by the regulations.

15B Meaning of *mortgage broker*

(1) A licensee is a ***mortgage broker*** if:
(a) the licensee carries on a business of providing credit assistance in relation to credit contracts secured by mortgages over residential property; and
(b) the licensee does not perform the obligations, or exercise the rights, of a credit provider in relation to the majority of those credit contracts; and
(c) in carrying on the business, the licensee provides credit assistance in relation to credit contracts offered by more than one credit provider.

(2) A credit representative of a licensee is a ***mortgage broker*** if:
(a) the credit representative carries on a business of providing credit assistance in relation to credit contracts secured by mortgages over residential property; and
(b) neither the credit representative nor the licensee performs the obligations, or exercises the rights, of a credit provider in relation to the majority of those credit contracts; and

Authorised Version C2021C00117 registered 17/02/2021

(c) in carrying on the business, the credit representative provides credit assistance in relation to credit contracts offered by more than one credit provider.

15C Meaning of *mortgage intermediary*

(1) A licensee is a ***mortgage intermediary*** if:

(a) the licensee carries on a business of acting as an intermediary in relation to credit contracts secured by mortgages over residential property; and

(b) the licensee does not perform the obligations, or exercise the rights, of a credit provider in relation to the majority of those credit contracts; and

(c) in carrying on the business, the licensee acts as an intermediary in relation to credit contracts offered by more than one credit provider.

(2) A credit representative of a licensee is a ***mortgage intermediary*** if:

(a) the credit representative carries on a business of acting as an intermediary in relation to credit contracts secured by mortgages over residential property; and

(b) neither the credit representative nor the licensee performs the obligations, or exercises the rights, of a credit provider in relation to the majority of those credit contracts; and

(c) in carrying on the business, the credit representative acts as an intermediary in relation to credit contracts offered by more than one credit provider.

16 Qualified privilege

(1) If this Act provides that a person has qualified privilege in relation to an act, matter or thing, then the person:

(a) has qualified privilege in proceedings for defamation; or

(b) is not, in the absence of malice on the person's part, liable to an action for defamation at the suit of a person;

in relation to that act, matter or thing.

Authorised Version C2021C00117 registered 17/02/2021

(2) ***Malice*** includes ill will to the person concerned or any other improper motive.

(3) Neither this section nor a provision of this Act that provides as referred to in subsection (1) limits or affects any right, privilege or immunity that a person has, apart from this section or such a provision, as defendant in proceedings, or an action, for defamation.

16A Meaning of *control*

(1) ***Control***, of a body corporate, is:

(a) having the capacity to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the body corporate; or

(b) directly or indirectly holding more than one half of the issued share capital of the body corporate (not including any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital, and not including MCIs); or

(c) having the capacity to control the composition of the body corporate's board or governing body; or

(d) having the capacity to determine the outcome of decisions about the body corporate's financial and operating policies, taking into account:

(i) the practical influence that can be exerted (rather than the rights that can be enforced); and

(ii) any practice or pattern of behaviour affecting the body corporate's financial or operating policies (whether or not it involves a breach of an agreement or a breach of trust).

(2) ***Control***, of a person other than a body corporate, is:

(a) having the capacity to control the composition of the person's board or governing body (if any); or

Authorised Version C2021C00117 registered 17/02/2021

(b) having the capacity to determine the outcome of decisions about the person's financial and operating policies, taking into account:

(i) the practical influence that can be exerted (rather than the rights that can be enforced); and

(ii) any practice or pattern of behaviour affecting the person's financial or operating policies (whether or not it involves a breach of an agreement or a breach of trust).

(3) For the purposes of paragraph (1)(b), ***MCI*** has the same meaning as in the *Corporations Act 2001*, and ***issued*** has the same meaning as in Chapter 7 of that Act.

Authorised Version C2021C00117 registered 17/02/2021

Part 1-3—Application of this Act and the Transitional Act

Division 1—Introduction

17 Guide to this Part

This Part deals with the application of this Act and the Transitional Act.

Division 2 is about the constitutional basis and geographical application of those Acts. It also deals with the application of those Acts to the Crown.

Division 3 deals with the interaction between those Acts and laws of the States and Territories.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Constitutional basis and application of this Act and the Transitional Act

18 Constitutional basis for this Act and the Transitional Act

Application in a referring State

(1) The application of this Act and the Transitional Act in the referring States is based on:

(a) the legislative powers that the Commonwealth Parliament has under section 51 of the Constitution (other than paragraph 51(xxxvii)); and

(b) the legislative powers that the Commonwealth Parliament has because of a reference or an adoption by the Parliaments of the referring States under paragraph 51(xxxvii) of the Constitution.

Application in a Territory

(2) The application of this Act and the Transitional Act in a Territory is based on:

(a) the legislative powers that the Commonwealth Parliament has under section 122 of the Constitution to make laws for the government of a Territory; and

(b) the legislative powers that the Commonwealth Parliament has under section 51 of the Constitution.

Despite section 2H of the *Acts Interpretation Act 1901*, this Act and the Transitional Act as applying in the Territory are laws of the Commonwealth.

Application outside Australia

(3) The operation of this Act and the Transitional Act outside Australia is based on:

(a) the legislative power the Commonwealth Parliament has under paragraph 51(xxix) of the Constitution; and

Authorised Version C2021C00117 registered 17/02/2021

(b) the other legislative powers that the Commonwealth Parliament has under section 51 of the Constitution; and

(c) the legislative powers that the Commonwealth Parliament has under section 122 of the Constitution to make laws for the government of a Territory.

Application in a non-referring State

(4) The application of this Act and the Transitional Act in a State that is not a referring State is based on:

(a) the legislative powers that the Commonwealth Parliament has under section 51 (other than paragraph 51(xxxvii)) and section 122 of the Constitution; and

(b) the legislative powers that the Commonwealth Parliament has because of a reference or an adoption by the Parliaments of the referring States under paragraph 51(xxxvii) of the Constitution.

19 Meaning of *referring State*

*Meaning of **referring State***

(1) A State is a ***referring State*** if, for the purposes of paragraph 51(xxxvii) of the Constitution, the Parliament of the State:

(a) has referred the matters covered by subsections (3) and (4) to the Commonwealth Parliament; or

(b) has:

(i) adopted the relevant version of this Act and the relevant version of the Transitional Act; and

(ii) referred the matter covered by subsection (4) to the Commonwealth Parliament.

(2) A State is a ***referring State*** even if the State's referral law provides that:

(a) the reference to the Commonwealth Parliament of a matter covered by subsection (3) or (4) is to terminate in particular circumstances; or

Authorised Version C2021C00117 registered 17/02/2021

(b) the adoption of the relevant version of this Act or the relevant version of the Transitional Act is to terminate in particular circumstances; or

(c) the reference to the Commonwealth Parliament of the matter covered by subsection (4) does not include:

(i) the matter of making provision with respect to the imposition or payment of State taxes, duties, charges or other imposts, however described; or

(ii) the matter of making provision with respect to the general system for the recording of estates or interests in land and related information; or

(iii) the matter of providing for the priority of interests in real property; or

(iv) the matter of making a law that excludes or limits the operation of a State law, to the extent that the State law makes provision with respect to the creation, holding, transfer, assignment, disposal or forfeiture of a State statutory right; or

(d) the reference to the Commonwealth Parliament of a matter covered by subsection (3) or (4) has effect only:

(i) if and to the extent that the matter is not included in the legislative powers of the Commonwealth Parliament (otherwise than by a reference under section 51(xxxvii) of the Constitution); or

(ii) if and to the extent that the matter is included in the legislative powers of the Parliament of the State.

Reference covering the relevant versions of this Act and the Transitional Act

(3) This subsection covers the matters to which the referred provisions relate to the extent of the making of laws with respect to those matters by including the referred provisions in the relevant version of this Act and the relevant version of the Transitional Act.

Authorised Version C2021C00117 registered 17/02/2021

Reference covering amendments of this Act or the Transitional Act

(4) This subsection covers a referred credit matter (see section 20) to the extent of the making of laws with respect to that matter by making express amendments of this Act or the Transitional Act.

Effect of terminating reference or adoption of relevant versions

(5) A State ceases to be a ***referring State*** if:
  (a) in the case where the Parliament of the State has referred to the Commonwealth Parliament the matters covered by subsection (3)—that reference terminates; or
  (b) in the case where the Parliament of the State has adopted the relevant version of this Act and the relevant version of the Transitional Act—the adoption of the relevant version of this Act or the relevant version of the Transitional Act terminates.

Effect of terminating amendment reference

(6) A State ceases to be a ***referring State*** if:
  (a) the State's amendment reference terminates; and
  (b) subsection (7) does not apply to the termination.

(7) A State does not cease to be a ***referring State*** because of the termination of its amendment reference if:
  (a) the termination is effected by the Governor of that State fixing a day by Proclamation as the day on which the reference terminates; and
  (b) the day fixed is no earlier than the first day after the end of the period of 6 months beginning on the day on which the Proclamation is published; and
  (c) that State's amendment reference, and the amendment reference of every other State, terminates on the same day.

Definitions

(8) In this section:

Authorised Version C2021C00117 registered 17/02/2021

amendment reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matter covered by subsection (4).

express amendment of this Act or the Transitional Act means the direct amendment of the text of this Act or the Transitional Act (whether by the insertion, omission, repeal, substitution or relocation of words or matter) by another Commonwealth Act or by an instrument under a Commonwealth Act, but does not include the enactment by a Commonwealth Act of a provision that has, or will have, substantive effect otherwise than as part of the text of this Act or the Transitional Act.

forfeiture means confiscation, seizure, extinguishment, cancellation, suspension or any other forfeiture.

referral law, of a State, means the Act of the State that refers the matter covered by subsection (4) to the Commonwealth Parliament.

referred provisions means:

(a) the relevant version of this Act; and

(b) the relevant version of the Transitional Act;

to the extent to which they deal with matters that are included in the legislative powers of the Parliaments of the States.

relevant version of the Transitional Act means the Transitional Act as originally enacted.

relevant version of this Act means:

(a) if, at the time the State's referral law was enacted, this Act had not been enacted—this Act as originally enacted; or

(b) otherwise—this Act as originally enacted, and as later amended by the *National Consumer Credit Protection Amendment Act 2010*.

State law means:

Authorised Version C2021C00117 registered 17/02/2021

(a) any Act of the State or any instrument made under such an Act, whenever enacted or made and as in force from time to time; or

(b) the general law, being the principles and rules of common law and equity to the extent that they have effect in the State from time to time.

State statutory right means a right, entitlement or authority that is granted by or under any Act of the State or any instrument made under such an Act, whenever enacted or made and as in force from time to time, other than a right, entitlement or authority that relates to:

(a) credit covered by paragraph (a) of the definition of ***referred credit matter***; or

(b) a consumer lease covered by paragraph (b) of that definition.

20 Meaning of *referred credit matter*

(1) ***Referred credit matter*** means a matter relating to either of the following:

(a) credit, being credit the provision of which would be covered by the expression "provision of credit to which this Code applies" in the initial National Credit Code;

(b) consumer leases, being consumer leases each of which would be covered by the expression "consumer lease to which Part 11 applies" in the initial National Credit Code.

(2) ***Initial National Credit Code*** means Schedule 1 to the relevant version of this Act (within the meaning of subsection 19(8)).

21 General application of this Act and the Transitional Act

Application in this jurisdiction

(1) Each provision of this Act and the Transitional Act applies in this jurisdiction.

Authorised Version C2021C00117 registered 17/02/2021

Geographical coverage of "this jurisdiction"

(2) ***This jurisdiction*** means the geographical area that consists of:
  (a) each referring State (including its coastal sea); and
  (b) each Territory (including its coastal sea).

(3) Throughout this Act and the Transitional Act, ***this jurisdiction*** therefore consists of either:
  (a) if all of the States are referring States—the whole of Australia; or
  (b) if one or more States are not referring States—Australia (other than any State that is not a referring State).

Application outside this jurisdiction

(4) Subject to subsection (5), each provision of this Act and the Transitional Act also applies, according to its tenor, in relation to acts and omissions outside this jurisdiction.

Application in non-referring States

(5) This Act does not apply to an act or omission in a State that is not a referring State to the extent to which that application would be beyond the legislative powers of the Parliament (including powers it has under paragraphs 51(xxxvii) and (xxxix) of the Constitution).

Residence, place of formation etc.

(6) Each provision of this Act and the Transitional Act applies, according to its tenor, to:
  (a) natural persons whether:
    (i) resident in this jurisdiction or not; and
    (ii) resident in Australia or not; and
    (iii) Australian citizens or not; and
  (b) all bodies corporate and unincorporated bodies whether:
    (i) formed or carrying on a business in this jurisdiction or not; and
    (ii) formed or carrying on a business in Australia or not.

Authorised Version C2021C00117 registered 17/02/2021

22 When Acts bind Crown

(1) This Act (other than the National Credit Code) and the Transitional Act do not bind the Crown in any of its capacities.

(2) Despite subsection (1), the regulations may provide that this Act (other than the National Credit Code) and the Transitional Act, or specified provisions of this Act (other than the National Credit Code) or the Transitional Act, bind either or both of the following in circumstances (if any) prescribed by the regulations:

(a) the Crown in right of the Commonwealth;

(b) the Crown in all of its other capacities.

(3) The National Credit Code binds the Crown in each of its capacities.

(4) This Act and the Transitional Act do not make the Crown liable to be prosecuted for an offence or to any pecuniary penalty.

Authorised Version C2021C00117 registered 17/02/2021

Division 3—Interaction between the Commonwealth credit legislation and State and Territory laws

23 Concurrent operation intended

(1) This Act and the Transitional Act (the ***Commonwealth credit legislation***) 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 the Commonwealth credit legislation and an offence against the law of a State or Territory; and

(b) the person is convicted of either of those offences;

the person is not liable to be convicted of the other of those offences.

(3) This section does not apply to a law of a State or Territory if there is a direct inconsistency between that law and the Commonwealth credit legislation.

Note: Section 25 avoids direct inconsistency arising in some cases by limiting the operation of the Commonwealth credit legislation.

24 When Commonwealth credit legislation does not apply

(1) Subsection (2) applies if a provision of a law of a referring State or a Territory declares a matter to be an excluded matter for the purposes of this section in relation to:

(a) the whole of the Commonwealth credit legislation; or

(b) a specified provision of the Commonwealth credit legislation; or

(c) the Commonwealth credit legislation other than a specified provision; or

(d) the Commonwealth credit legislation otherwise than to a specified extent.

Authorised Version C2021C00117 registered 17/02/2021

(2) By force of this subsection:

(a) none of the provisions of the Commonwealth credit legislation (other than this section) applies in or in relation to the State or Territory with respect to the matter if the declaration is one to which paragraph (1)(a) applies; and

(b) the specified provision of the Commonwealth credit legislation does not apply in or in relation to the State or Territory with respect to the matter if the declaration is one to which paragraph (1)(b) applies; and

(c) the provisions of the Commonwealth credit legislation (other than this section and the specified provisions) do not apply in or in relation to the State or Territory with respect to the matter if the declaration is one to which paragraph (1)(c) applies; and

(d) the provisions of the Commonwealth credit legislation (other than this section and otherwise than to the specified extent) do not apply in or in relation to the State or Territory with respect to the matter if the declaration is one to which paragraph (1)(d) applies.

(3) Subsection (2) does not apply to the declaration to the extent to which the regulations provide that that subsection does not apply to that declaration.

25 Avoiding direct inconsistency between Commonwealth and State and Territory laws

This section overrides other Commonwealth credit legislation

(1) This section has effect despite anything else in the Commonwealth credit legislation.

When this section does not apply to a State or Territory law

(2) This section does not apply to a provision of a law of a referring State or a Territory that is capable of concurrent operation with the Commonwealth credit legislation.

Authorised Version C2021C00117 registered 17/02/2021

Note: This kind of provision is dealt with by section 23.

When this section applies to a State or Territory law

(3) This section applies to the interaction between a provision (the ***displacement provision***) of a law of a referring State or a Territory and a provision (the ***Commonwealth provision***) of the Commonwealth credit legislation only if the displacement provision is declared by a law of the State or Territory to be a Commonwealth credit legislation displacement provision for the purposes of this section (either generally or specifically in relation to the Commonwealth provision).

Effect of displacement provision

(4) The Commonwealth provision does not:
(a) prohibit the doing of an act; or
(b) impose a liability (whether civil or criminal) for doing an act;
if the displacement provision specifically permits, authorises or requires the doing of that act.

(5) The Commonwealth provision does not operate in or in relation to the State or Territory to the extent necessary to ensure that no inconsistency arises between:
(a) the Commonwealth provision; and
(b) the displacement provision to the extent to which the displacement provision would, apart from this subsection, be inconsistent with the Commonwealth provision.

Note 1: The displacement provision is not covered by this subsection if subsection (4) applies to the displacement provision: if that subsection applies there would be no potential inconsistency to be dealt with by this subsection.

Note 2: The operation of the displacement provision will be supported by section 23 to the extent to which it can operate concurrently with the Commonwealth provision.

(6) Subsections (4) and (5) do not apply in relation to the displacement provision to the extent to which the regulations provide that those subsections do not apply in relation to the displacement provision.

Authorised Version C2021C00117 registered 17/02/2021

26 Regulations to deal with interaction between laws

(1) The regulations may modify the operation of the Commonwealth credit legislation so that:

(a) provisions of the Commonwealth credit legislation do not apply to a matter that is dealt with by a law of a referring State or a Territory specified in the regulations; or

(b) no inconsistency arises between the operation of a provision of the Commonwealth credit legislation and the operation of a provision of a law of a referring State or a Territory specified in the regulations.

(2) Without limiting subsection (1), regulations made for the purposes of that subsection may provide that a provision of the Commonwealth credit legislation:

(a) does not apply to:

(i) a person specified in the regulations; or

(ii) a body specified in the regulations; or

(iii) circumstances specified in the regulations; or

(iv) a person or body specified in the regulations in the circumstances specified in the regulations; or

(b) does not prohibit an act to the extent to which the prohibition would otherwise give rise to an inconsistency with a law of a referring State or a Territory; or

(c) does not require a person to do an act to the extent to which the requirement would otherwise give rise to an inconsistency with a law of a referring State or a Territory; or

(d) does not authorise a person to do an act to the extent to which the conferral of that authority on the person would otherwise give rise to an inconsistency with a law of a referring State or a Territory; or

(e) does not impose an obligation on a person to the extent to which complying with that obligation would require the person not to comply with an obligation imposed on the person under a law of a referring State or a Territory; or

Authorised Version C2021C00117 registered 17/02/2021

(f) authorises a person to do something for the purposes of the Commonwealth credit legislation that the person:
  (i) is authorised to do under a law of a referring State or a Territory; and
  (ii) would not otherwise be authorised to do under the Commonwealth credit legislation; or

(g) will be taken to be satisfied if a law of a referring State or a Territory is satisfied.

Authorised Version C2021C00117 registered 17/02/2021

Chapter 2—Licensing of persons who engage in credit activities

Part 2-1—Requirement to be licensed to engage in credit activities

Division 1—Introduction

27 Guide to this Part

This Part is about the licensing of persons to engage in credit activities. In general, a person cannot engage in a credit activity if the person does not hold an Australian credit licence.

Division 2 prohibits a person from engaging in credit activities without an Australian credit licence. However, the prohibition does not apply to employees and directors of licensees or related bodies corporate of licensees, or to credit representatives of licensees.

Division 3 deals with other prohibitions relating to the requirement to be licensed and to credit activities. These prohibitions relate to holding out and advertising, conducting business with unlicensed persons, and charging fees for unlicensed conduct.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Engaging in credit activities without a licence

28 Application of this Division

This Division applies on or after 1 July 2011, or a later day prescribed by the regulations.

29 Prohibition on engaging in credit activities without a licence

Prohibition on engaging in credit activities without a licence

(1) A person must not engage in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 2 years imprisonment.

Defences

(3) For the purposes of subsections (1) and (2), it is a defence if:
  (a) the person engages in the credit activity on behalf of another person (the ***principal***); and
  (b) the person is:
    (i) an employee or director of the principal or of a related body corporate of the principal; or
    (ii) a credit representative of the principal; and

Authorised Version C2021C00117 registered 17/02/2021

(c) the person's conduct in engaging in the credit activity is within the authority of the principal; and

(d) the principal holds a licence authorising the principal to engage in the credit activity.

Note: For the purposes of subsection (2), a defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

(4) For the purposes of subsections (1) and (2), it is a defence if:

(a) the person engages in the credit activity on behalf of another person (the ***principal***); and

(b) the person is a representative of the principal; and

(c) the person's conduct in engaging in the credit activity is within the authority of the principal; and

(d) the principal is exempted from subsections (1) and (2) under paragraph 109(1)(a), 109(3)(a) or 110(1)(a).

Note: For the purposes of subsection (2), a defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

Authorised Version C2021C00117 registered 17/02/2021

Division 3—Other prohibitions relating to the requirement to be licensed

30 Prohibitions on holding out and advertising etc.

Prohibitions on holding out and advertising etc.

(1) A person must not hold out:
  (a) that the person holds a licence; or
  (b) that the person holds a licence authorising the person to engage in a particular credit activity; or
  (c) that a credit activity engaged in by the person or by someone else is exempt from a requirement to hold a licence; or
  (d) that, in engaging in a credit activity, the person acts on behalf of another person; or
  (e) that conduct, or proposed conduct, of the person is within the authority of a licensee;

  if that is not the case.

  Civil penalty: 5,000 penalty units.

(2) A person must not hold out or advertise that the person engages or is able to engage in a credit activity if the person would, if the person engaged in the credit activity, contravene section 29 (which deals with the requirement to be licensed).

  Civil penalty: 5,000 penalty units.

Offence

(3) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1) or (2); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

  Criminal penalty: 1 year imprisonment.

Authorised Version C2021C00117 registered 17/02/2021

31 Prohibition on conducting business with unlicensed persons

Prohibition on conducting business with unlicensed persons

(1) A licensee must not:

(a) engage in a credit activity; and

(b) in the course of engaging in that credit activity, conduct business with another person who is engaging in a credit activity;

if, by engaging in the credit activity, the other person contravenes section 29 (which deals with the requirement to be licensed).

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:

(a) the person is subject to a requirement under subsection (1); and

(b) the person engages in conduct; and

(c) the conduct contravenes the requirement.

Criminal penalty: 2 years imprisonment.

32 Prohibition on charging a fee etc.

Prohibition on charging a fee etc.

(1) A person must not demand, receive or accept any fee, charge or other amount from a consumer for engaging in a credit activity if, by engaging in that credit activity, the person contravenes, or would contravene, section 29 (which deals with the requirement to be licensed).

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:

Authorised Version C2021C00117 registered 17/02/2021

(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 1 year imprisonment.

Authorised Version C2021C00117 registered 17/02/2021

Part 2-2—Australian credit licences

Division 1—Introduction

34 Guide to this Part

This Part is about Australian credit licences.

Division 2 explains what an Australian credit licence is and the credit activities that are authorised by it.

Division 3 is about how to get an Australian credit licence, including how to apply for it and when ASIC may grant or refuse to grant it.

Division 4 is about the conditions that may be imposed on an Australian credit licence.

Division 5 is about conduct obligations of licensees.

Division 6 is about the suspension, cancellation or variation of an Australian credit licence.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Australian credit licences

35 Australian credit licences

(1) An ***Australian credit licence*** is a licence that authorises the licensee to engage in particular credit activities.

(2) The credit activities that the licensee is ***authorised*** to engage in are those credit activities specified in a condition of the licence as the credit activities that the licensee is authorised to engage in.

Authorised Version C2021C00117 registered 17/02/2021

Division 3—How to get an Australian credit licence

36 Applying for a licence

(1) A person may apply for a licence by lodging an application with ASIC on or after 1 July 2010, or a later day prescribed by the regulations.

(2) The application must be in the approved form.

37 When a licence may be granted—applicants other than ADIs

When ASIC must grant a licence

(1) ASIC must grant a person (other than an ADI) a licence if (and must not grant the person a licence unless):

(a) the person has applied for the licence in accordance with section 36; and

(b) ASIC has no reason to believe that the person is likely to contravene the obligations that will apply under section 47 if the licence is granted; and

(c) the requirement in section 37A (fit and proper person test) is satisfied in relation to the applicant and the licence applied for; and

(e) the person meets any other requirements prescribed by the regulations.

Note: ASIC must not grant a licence to a person contrary to a banning order or disqualification order, or if a prescribed State or Territory order is in force against the person or certain representatives of the person (see section 40).

False, misleading or incomplete information

(2) ASIC must refuse to grant the licence if ASIC is satisfied that:

(a) the application for the licence, or any information, audit report or statement lodged with ASIC in accordance with

Authorised Version C2021C00117 registered 17/02/2021

subsection (4), was false in a material particular or materially misleading; or

(b) there was an omission of a material matter from the application or the information, audit report or statement.

ASIC may request information etc. from applicant

(4) ASIC may give a written notice to a person who has applied for a licence requesting the person to lodge with ASIC, within the time specified in the notice, any of the following:

(a) information specified in the notice in relation to any matters that ASIC may have regard to in deciding whether to grant the licence;

(b) an audit report, prepared by a suitably qualified person specified in the notice, in relation to matters that ASIC may have regard to in deciding whether to grant the licence;

(c) if ASIC proposes to grant the applicant a licence—a statement that either:

(i) informs ASIC of any material changes in any information provided to ASIC in, or in connection with, the application; or

(ii) confirms that there have been no such changes.

(5) To avoid doubt:

(a) a notice under subsection (4), and the information, audit report or statement requested in the notice, may relate to any person mentioned in section 37A in relation to the applicant and the licence applied for; and

(b) subsection (7) applies in relation to such a request even if the applicant is unable to comply with the request.

(6) ASIC may, by written notice to the applicant before the time specified in the notice:

(a) withdraw a request under subsection (4); or

(b) extend the time specified in the notice.

(7) If the applicant does not lodge with ASIC the information, audit report or statement requested by ASIC in a notice under

Authorised Version C2021C00117 registered 17/02/2021

subsection (4) within the specified time, the applicant is taken to have withdrawn the application.

(8) To avoid doubt, section 41 does not apply to an application that is taken to have been withdrawn under subsection (7) of this section.

37A Fit and proper person test

(1) For the purposes of paragraph 37(1)(c), subsection 46A(2) and paragraph 55(1)(c), the requirement in this section is satisfied in relation to a person (the ***first person***) and a licence, or a proposed licence, if ASIC is satisfied that there is no reason to believe any of the following:

(a) that the first person is not a fit and proper person to engage in the credit activities authorised by the licence;

(b) if the first person is a body corporate—that an officer (within the meaning of the *Corporations Act 2001*) of the first person is not a fit and proper person to perform one or more functions as an officer of a person that engages in the credit activities authorised by the licence;

(c) if the first person is a partnership or the multiple trustees of a trust:

(i) that any of the partners or trustees are not fit and proper persons to engage in the credit activities authorised by the licence; or

(ii) that any of the senior managers of the partnership or the trust are not fit and proper persons to perform one or more functions as an officer (within the meaning of the *Corporations Act 2001*) of a person that engages in the credit activities authorised by the licence;

(d) that any person who controls the first person is not a fit and proper person to control a person that engages in the credit activities authorised by the licence;

(e) if a controller mentioned in paragraph (d) is a body corporate—that an officer (within the meaning of the *Corporations Act 2001*) of the controller is not a fit and proper person to perform one or more functions as an officer

Authorised Version C2021C00117 registered 17/02/2021

of an entity (as defined by section 64A of that Act) that controls a person that engages in the credit activities authorised by the licence;

(f) if a controller mentioned in paragraph (d) is a partnership or the multiple trustees of a trust:

(i) that any of the partners or trustees are not fit and proper persons to control a person that engages in the credit activities authorised by the licence; or

(ii) that any of the senior managers of the partnership or the trust are not fit and proper persons to perform one or more functions as an officer (within the meaning of the *Corporations Act 2001*) of an entity (as defined by section 64A of that Act) that controls a person that engages in the credit activities authorised by the licence.

(2) In considering whether a person is fit and proper for a purpose mentioned in subsection (1), ASIC must have regard to the matters in section 37B.

37B Fit and proper person test—matters to which ASIC must have regard

(1) ASIC must have regard to the matters set out in subsection (2) (subject to Part VIIC of the *Crimes Act 1914*) for the purposes of applying any of the following provisions to a person:

(a) a paragraph of subsection 37A(1);

(b) paragraph 80(1)(f).

Note: Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them.

(2) The matters are as follows:

(a) whether any of the following of the person has ever been suspended or cancelled:

(i) a licence, or a registration under the Transitional Act;

(ii) an Australian financial services licence;

Authorised Version C2021C00117 registered 17/02/2021

(b) whether any of the following has ever been made against the person:
  (i) a banning order, or a disqualification order under Part 2-4;
  (ii) a banning order, or a disqualification order, under Division 8 of Part 7.6 of the *Corporations Act 2001*;
(c) if the person is an individual—whether the person has ever been disqualified under the *Corporations Act 2001*, or any other law of the Commonwealth or of a State or Territory, from managing corporations;
(d) whether the person has ever been banned from engaging in a credit activity under a law of a State or Territory;
(e) whether the person has ever been linked to a refusal or failure to give effect to a determination made by AFCA (as defined in section 910C of the *Corporations Act 2001*);
(f) if the person is not the multiple trustees of a trust—whether the person has ever been insolvent;
(g) if the person is the multiple trustees of a trust—whether a trustee of the trust has ever been insolvent;
(h) whether, in the last 10 years, the person has been convicted of an offence;
(i) any relevant information given to ASIC by a State or Territory, or an authority of a State or Territory, in relation to the person;
(j) any other matter prescribed by the regulations;
(k) any other matter ASIC considers relevant.

38 When a licence may be granted—ADIs

If:
(a) an ADI applies under section 36 for a licence; and
(b) the application includes a statement (in accordance with the requirements of the approved form) to the effect that the ADI will, if granted the licence, comply with its obligations as a licensee;

Authorised Version C2021C00117 registered 17/02/2021

then ASIC must grant the ADI a licence authorising the ADI to engage in credit activities that equate (as closely as possible) to the credit activities in relation to which the application was made.

Note: ASIC must not grant a licence to a person contrary to a banning order or disqualification order, or if a prescribed State or Territory order is in force against the person or certain representatives of the person (see section 40).

39 Regulations may prescribe streamlined process for other applicants

Despite sections 36 and 37, the regulations may provide that:

(a) some or all of sections 36 and 37 do not apply in relation to particular classes of applicants; and

(b) alternative processes apply to applications for licences by, and the grant of licences to, those classes of applicants.

40 Licences must not be granted to certain applicants

Banning or disqualification order in force against person

(1) Despite subsection 37(1) and section 38, ASIC must not grant a licence that authorises a person to engage in a credit activity if a banning order or disqualification order under Part 2-4 is in force against the person in relation to that credit activity.

Prescribed State or Territory order in force against person etc.

(2) Despite subsection 37(1) and section 38, ASIC must not grant a licence to a person if:

(a) the person is a natural person against whom a prescribed State or Territory order is in force; or

(b) the person is a body corporate, and a prescribed State or Territory order is in force against a director, secretary or senior manager of the body corporate who would perform duties in relation to the credit activities to be authorised by the licence; or

Authorised Version C2021C00117 registered 17/02/2021

(c) the person is a partnership or the trustees of a trust, and a prescribed State or Territory order is in force against a partner or trustee who would perform duties in relation to the credit activities to be authorised by the licence.

41 Applicant must be given hearing before refusal of licence

ASIC may only refuse to grant a licence after giving the person who applied for the licence an opportunity:

(a) to appear, or be represented, at a hearing before ASIC that takes place in private; and

(b) to make submissions to ASIC in relation to the refusal.

42 Notice of grant or refusal of licence and date of effect

(1) ASIC must give a person (the ***applicant***) who has applied for a licence written notice of:

(a) ASIC's decision on the application; and

(b) if the decision is to grant the applicant a licence—the day on which the licence takes effect; and

(c) if the decision is not to grant the applicant a licence—the reasons for the decision.

(2) The licence comes into force on the day specified in the notice, which must not be before the day on which the decision to grant the licence was made.

43 Australian credit licence numbers

(1) ASIC must allocate each licence a unique Australian credit licence number when it is granted.

(2) If:

(a) a person is granted a licence; and

(b) the person holds an Australian financial services licence;

then the Australian credit licence number that ASIC gives to the licence held by that person must be the same number as the person's Australian financial services licence number.

Authorised Version C2021C00117 registered 17/02/2021

(3) ASIC must give the licensee written notice of the Australian credit licence number.

44 Basis on which licence is granted

A licence granted under this Division is granted on the basis that:

(a) conditions on the licence may be imposed, varied or revoked under section 45 or 46; and

(b) the licence may be suspended under section 54, 55 or 56; and

(c) the licence may be cancelled under section 54, 55 or 56; and

(d) the licence may be varied under section 57; and

(e) the licence may be cancelled, revoked, terminated or varied by or under later legislation; and

(f) no compensation is payable if:

(i) conditions on the licence are imposed, varied or revoked as referred to in paragraph (a); or

(ii) the licence is suspended, cancelled, varied, revoked or terminated as referred to in paragraphs (b) to (e).

Authorised Version C2021C00117 registered 17/02/2021

Division 4—Conditions on an Australian credit licence

45 The conditions on the licence

ASIC may impose, vary or revoke conditions on licences

(1) Subject to section 46A, ASIC may, at any time:
  (a) impose conditions, or additional conditions, on a licence; and
  (b) vary or revoke conditions imposed on a licence.

(2) ASIC may do so:
  (a) on its own initiative; or
  (b) if the licensee lodges an application with ASIC for the imposition, variation or revocation.

(3) The application must be in the approved form.

Notice and effect of imposition, variation or revocation of conditions

(4) ASIC must give the licensee written notice of the imposition, variation or revocation of the conditions. The imposition, variation or revocation of the conditions comes into force on the day specified in the notice, which must not be before the day on which the decision to impose, vary or revoke the conditions was made.

ASIC must give the licensee a hearing

(5) Despite subsection (1), ASIC may only impose conditions or additional conditions, or vary or revoke the conditions, on the licence after giving the licensee an opportunity:
  (a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
  (b) to make submissions to ASIC in relation to the conditions.

This subsection does not apply to ASIC imposing conditions when the licence is granted, or imposing or varying conditions in accordance with an application under paragraph (2)(b).

Authorised Version C2021C00117 registered 17/02/2021

Condition in relation to credit activities authorised

(6) ASIC must ensure that the licence is subject to a condition that specifies the credit activities or classes of credit activities that the licensee is authorised to engage in.

Regulations may prescribe conditions

(7) The licence is subject to such other conditions as are prescribed by the regulations. However, ASIC cannot vary or revoke those conditions.

46 Licence conditions—special procedures for APRA-regulated bodies

Special procedures for APRA-regulated bodies (other than ADIs)

(1) If the licensee, or a related body corporate, is a body (the ***APRA body***) regulated by APRA (other than an ADI), then the following provisions apply:

(a) ASIC cannot:

(i) impose, vary or revoke a condition on the licence that, in ASIC's opinion, has or would have the result of preventing the APRA body from being able to carry on all or any of its usual activities (being activities in relation to which APRA has regulatory or supervisory responsibilities); or

(ii) vary a condition so that it would, in ASIC's opinion, become a condition that would have a result as described in subparagraph (i);

unless ASIC has first consulted APRA about the proposed action;

(b) if ASIC imposes, varies or revokes a condition on the licence and paragraph (a) does not apply to that action, ASIC must, within one week, inform APRA of the action that has been taken.

Authorised Version C2021C00117 registered 17/02/2021

Special procedures for ADIs

(2) If the licensee, or a related body corporate, is an ADI, then the following provisions apply:

(a) subject to paragraphs (b) and (c), the powers that ASIC would otherwise have under section 45:

(i) to impose, vary or revoke a condition on the licence that, in ASIC's opinion, has or would have the result of preventing the ADI from being able to carry on all or any of its banking business (within the meaning of the *Banking Act 1959*); or

(ii) to vary a condition so that it would, in ASIC's opinion, become a condition that would have a result as described in subparagraph (i);

are instead powers of the Minister;

(b) the following provisions apply in relation to a power to which paragraph (a) applies:

(i) the procedures for the exercise of the power are the same as would apply if ASIC could exercise the power, except that the Minister must not exercise the power unless he or she has first considered advice from ASIC on the proposed action, being advice given after ASIC has consulted APRA about the proposed action;

(ii) ASIC (rather than the Minister) must still conduct any hearing required under paragraph 45(5)(a) and receive any submissions under paragraph 45(5)(b);

(c) if ASIC imposes, varies or revokes a condition on the licence and paragraph (a) does not apply to that action, ASIC must, within one week, inform APRA of the action that has been taken.

46A ASIC may request information etc. in relation to an application for conditions to be varied

(1) This section applies if a licensee applies under paragraph 45(2)(b) for ASIC to:

(a) impose conditions, or additional conditions, on the licence; or

Authorised Version C2021C00117 registered 17/02/2021

(b) vary or revoke conditions imposed on the licence.

However, this section does not apply in relation to a power to which paragraph 46(2)(a) applies.

(2) ASIC must not grant the application unless the requirement in section 37A (fit and proper person test) is satisfied in relation to the applicant and the licence as proposed to be varied.

ASIC may request information etc. from applicant

(3) ASIC may give a written notice to the applicant requesting the applicant to lodge with ASIC, within the time specified in the notice, any of the following:

(a) information specified in the notice in relation to any matters that ASIC must have regard to for the purposes of deciding whether the requirement in section 37A is satisfied as mentioned in subsection (2) of this section;

(b) an audit report, prepared by a suitably qualified person specified in the notice, in relation to matters that ASIC must have regard to for the purposes of deciding whether the requirement in section 37A is satisfied as mentioned in subsection (2) of this section;

(c) if ASIC proposes to grant the application—a statement that either:

(i) informs ASIC of any material changes in any information provided to ASIC in, or in connection with, the application; or

(ii) confirms that there have been no such changes.

(4) To avoid doubt:

(a) a notice under subsection (3), and the information, audit report or statement requested in the notice, may relate to any person mentioned in section 37A in relation to the applicant and the licence as proposed to be varied; and

(b) subsection (6) applies in relation to such a request even if the applicant is unable to comply with the request.

Authorised Version C2021C00117 registered 17/02/2021

(5) ASIC may, by written notice to the applicant within the time specified in the notice:
  (a) withdraw the request; or
  (b) extend the time specified in the notice.

(6) If the applicant does not lodge with ASIC the information, audit report or statement requested by ASIC in a notice under subsection (3) within the specified time, the applicant is taken to have withdrawn the application.

(7) To avoid doubt, subsection (8) does not apply to an application that is taken to have been withdrawn under subsection (6).

Applicant must be given hearing before refusal of application

(8) ASIC may only refuse to grant the application after giving the applicant an opportunity:
  (a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
  (b) to make submissions to ASIC in relation to the matter.

Authorised Version C2021C00117 registered 17/02/2021

Division 5—Obligations of licensees

47 General conduct obligations of licensees

General conduct obligations

(1) A licensee must:

(a) do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly; and

(b) have in place adequate arrangements to ensure that clients of the licensee are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by the licensee or its representatives; and

(c) comply with the conditions on the licence; and

(d) comply with the credit legislation; and

(e) take reasonable steps to ensure that its representatives comply with the credit legislation; and

(f) maintain the competence to engage in the credit activities authorised by the licence; and

(g) ensure that its representatives are adequately trained, and are competent, to engage in the credit activities authorised by the licence; and

(h) have an internal dispute resolution procedure that:

(i) complies with standards and requirements made or approved by ASIC in accordance with the regulations; and

(ii) covers disputes in relation to the credit activities engaged in by the licensee or its representatives; and

(ha) give to ASIC the same information it would be required to give under subparagraph 912A(1)(g)(ii) of the *Corporations Act 2001* if it were a financial services licensee (within the meaning of Chapter 7 of that Act); and

(i) be a member of the AFCA scheme; and

Authorised Version C2021C00117 registered 17/02/2021

(j) have compensation arrangements in accordance with section 48; and

(k) have adequate arrangements and systems to ensure compliance with its obligations under this section, and a written plan that documents those arrangements and systems; and

(l) unless the licensee is a body regulated by APRA:

(i) have available adequate resources (including financial, technological and human resources) to engage in the credit activities authorised by the licence and to carry out supervisory arrangements; and

(ii) have adequate risk management systems; and

(m) comply with any other obligations that are prescribed by the regulations.

Assessment of whether compliance is adequate

(2) For the purposes of paragraphs (1)(b), (g), (k) and (l), in considering whether a matter is adequate, the nature, scale and complexity of the credit activities engaged in by the licensee must be taken into account.

Regulations in relation to internal dispute resolution procedures

(3) Regulations made for the purposes of paragraph (1)(h) may also deal with the variation or revocation of:

(a) standards or requirements made by ASIC; or

(b) approvals given by ASIC.

Civil penalty for non-compliance

(4) The licensee must not contravene paragraph (1)(a), (b), (e), (f), (g), (h), (i), (j), (k), (l) or (m).

Civil penalty: 5,000 penalty units.

Note: Contravening paragraphs (1)(c) (obligation to comply with conditions on the licence) and (d) (compliance with the credit legislation) has consequences under other provisions.

Authorised Version C2021C00117 registered 17/02/2021

48 Requirements for compensation arrangements

Requirement to have adequate compensation arrangements

(1) A licensee must have adequate arrangements for compensating persons for loss or damage suffered because of a contravention of this Act by the licensee or its representatives.

When arrangements are adequate

(2) For the purposes of subsection (1), arrangements are adequate if, and only if, they:
  (a) satisfy any requirements prescribed by the regulations; or
  (b) are approved in writing by ASIC.

Approval of arrangements by ASIC

(3) Before approving arrangements under paragraph (2)(b), ASIC must have regard to:
  (a) the credit activities authorised by the licence; and
  (b) whether the arrangements will continue to cover persons after the licensee ceases to engage in credit activities, and the length of time for which that cover will continue; and
  (c) any other matters that are prescribed by the regulations.

(4) Without limiting paragraph (3)(c), the regulations may, in particular, prescribe additional details in relation to the matters to which ASIC must have regard under paragraphs (3)(a) and (b).

49 Obligation to provide a statement or obtain an audit report if directed by ASIC

Notice to licensee to provide a statement

(1) ASIC may give a licensee a written notice directing the licensee to lodge with ASIC a written statement containing specified information about:

Authorised Version C2021C00117 registered 17/02/2021

(a) the credit activities engaged in by the licensee or its representatives; or

(b) for the purposes of considering whether the requirement in section 37A (fit and proper person test) is satisfied in relation to the licensee and the licence—any matters mentioned in section 37B in relation to a person mentioned in a paragraph of subsection 37A(1).

(2) Notices under subsection (1):

(a) may be given at any time; and

(b) may be given to one or more particular licensees, or to each licensee in one or more classes of licensee, or to all licensees; and

(c) may require all the same information, or may contain differences as to the information they require; and

(d) may require a statement containing information to be given on a periodic basis, or each time a particular event or circumstance occurs, without ASIC having to give a further written notice.

Notice to licensee to obtain an audit report

(3) ASIC may also give a licensee a written notice directing the licensee to obtain an audit report, prepared by a suitably qualified person specified in the notice, on a statement, or on each statement in a class of statements, under subsection (1) before the statement is given to ASIC.

(4) A notice under subsection (3) is not a legislative instrument.

Notice must specify day by which licensee must comply

(5) A notice given under this section must specify the day by which the licensee must comply with the notice (which must be a reasonable period after the notice is given). ASIC may extend the day by giving a written notice to the licensee.

Authorised Version C2021C00117 registered 17/02/2021

Requirement to comply with notice

(6) The licensee must comply with a notice given under this section within the time specified in the notice.

Civil penalty: 5,000 penalty units.

Offence

(7) A person commits an offence if:
(a) the person is subject to a requirement under subsection (6); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 6 months imprisonment.

Strict liability offence

(8) A person commits an offence if:
(a) the person is subject to a requirement under subsection (6); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 20 penalty units.

(9) Subsection (8) is an offence of strict liability.

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

50 Obligation to give ASIC information required by the regulations

Regulations may require licensee to give information

(1) The regulations may require a licensee, or each licensee in a class of licensees, to give ASIC specified information about the credit activities engaged in by the licensee or its representatives.

Authorised Version C2021C00117 registered 17/02/2021

Requirement to comply with regulations

(2) If regulations under subsection (1) require a licensee to give ASIC information, the licensee must give ASIC that information.

Civil penalty: 5,000 penalty units.

Offence

(3) A person commits an offence if:
(a) the person is subject to a requirement to give ASIC information under subsection (2); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 6 months imprisonment.

Strict liability offence

(4) A person commits an offence if:
(a) the person is subject to a requirement to give ASIC information under subsection (2); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 20 penalty units.

(5) Subsection (4) is an offence of strict liability.

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

51 Obligation to provide ASIC with assistance if reasonably requested

Requirement to provide assistance

(1) If ASIC, or a person authorised by ASIC, reasonably requests assistance from a licensee in relation to whether the licensee and its representatives are complying with the credit legislation, the

Authorised Version C2021C00117 registered 17/02/2021

licensee must give ASIC or the authorised person the requested assistance.

Civil penalty: 5,000 penalty units.

(2) If the request is in writing, it is not a legislative instrument.

Offence

(3) A person commits an offence if:
(a) the person is subject to a requirement to give ASIC or an authorised person assistance under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 6 months imprisonment.

Assistance may include showing ASIC credit books etc.

(4) The assistance referred to in subsection (1) may include showing ASIC the person's credit books or giving ASIC other information.

52 Obligation to cite Australian credit licence number

When this section applies

(1) This section applies on or after the day that is 2 years after the day section 3 commences.

Requirement to include licence number in documents

(2) Whenever a licensee identifies itself in a document of a kind prescribed by the regulations, the licensee must:
(a) include in the document the licensee's Australian credit licence number; and
(b) identify in the document that the number is the licensee's Australian credit licence number.

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Strict liability offence

(3) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (2) to include and identify its Australian credit licence number in a document; and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 20 penalty units.

(4) Subsection (3) is an offence of strict liability.

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

53 Obligation to lodge annual compliance certificate

Requirement to lodge annual compliance certificate

(1) A licensee must, no later than 45 days after the licensee's licensing anniversary in each year, lodge a compliance certificate with ASIC in accordance with this section. ASIC may extend the day by giving a written notice to the licensee.

Civil penalty: 5,000 penalty units.

Compliance certificate must be in approved form

(2) The compliance certificate must be in the approved form.

Who must sign compliance certificate

(3) The compliance certificate must be signed by:
  (a) if the licensee is a single natural person—the licensee; or
  (b) if the licensee is a body corporate—a person of a kind prescribed by the regulations; or
  (c) if the licensee is a partnership or the trustees of a trust—a partner or trustee who performs duties in relation to credit activities.

Authorised Version C2021C00117 registered 17/02/2021

Requirement to ensure compliance certificate is lodged

(4) Each person by whom the compliance certificate may be signed under subsection (3) must ensure that the licensee lodges the compliance certificate with ASIC in accordance with this section.

Civil penalty: 5,000 penalty units.

Strict liability offence

(5) A person commits an offence if:
(a) the person is subject to a requirement under subsection (1) or (4); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 60 penalty units.

(6) Subsection (5) is an offence of strict liability.

*Meaning of **licensing anniversary***

(7) ***Licensing anniversary*** of a licensee means the anniversary of the day on which the licensee's licence came into force under section 42.

53A Obligation to notify ASIC of change in control

Requirement to notify ASIC of change in control

(1) If an entity (as defined by section 64A of the *Corporations Act 2001*) starts to control, or stops controlling, a licensee, the licensee must lodge a notification with ASIC:
(a) in the approved form; and
(b) before the end of 30 business days after the day the entity starts to control, or stops controlling, the licensee.

Strict liability offence

(2) A person commits an offence if:

Authorised Version C2021C00117 registered 17/02/2021

(a) the person is subject to a requirement under subsection (1) to lodge a notification with ASIC; and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal 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*.

53B Obligation to notify ASIC if licensee does not engage in credit activities

Requirement to notify ASIC if licensee does not engage in credit activities

(1) If a licensee does not engage in the credit activities authorised by the licence before the end of 6 months after the licence is granted, the licensee must lodge a notification with ASIC:
(a) in the approved form; and
(b) before the end of 15 business days after the end of the 6 months.

Strict liability offence

(2) A person commits an offence if:
(a) the person is subject to a requirement under subsection (1) to lodge a notification with ASIC; and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal 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*.

Authorised Version C2021C00117 registered 17/02/2021

Division 6—When a licence can be suspended, cancelled or varied

Subdivision A—Suspensions and cancellations

54 Suspension or cancellation without hearing

(1) ASIC may suspend or cancel a licensee's licence if:

(a) the licensee lodges with ASIC an application for the suspension or cancellation; or

(b) the licensee ceases to engage in credit activities; or

(c) any of the matters set out in subsection (2) applies to any of the following persons:

(i) the licensee;

(ii) if the licensee is a body corporate—a director, secretary or senior manager of the body corporate;

(iii) if the licensee is a partnership or the trustees of a trust—a partner or trustee; or

(d) in the case of a licensee that is a leviable entity (within the meaning of the *ASIC Supervisory Cost Recovery Levy Act 2017*)—the following have not been paid in full at least 12 months after the due date for payment:

(i) an amount of levy (if any) payable in respect of the licensee;

(ii) an amount of late payment penalty payable (if any) in relation to the levy;

(iii) an amount of shortfall penalty payable (if any) in relation to the levy.

(1A) ASIC may cancel a licensee's licence if the licensee does not engage in the credit activities authorised by the licence before the end of 6 months after the licence is granted.

(2) For the purposes of paragraph (1)(c), the matters are as follows:

Authorised Version C2021C00117 registered 17/02/2021

(a) if the person is not the trustees of a trust—the person is insolvent;

(b) if the person is a natural person:

(i) the person is convicted of serious fraud; or

(ii) the person is incapable of managing his or her affairs because of physical or mental incapacity; or

(iii) a prescribed State or Territory order is in force against the person.

(3) An application for suspension or cancellation of a licence must be in the approved form.

55 Suspension or cancellation after offering a hearing

(1) ASIC may suspend or cancel a licensee's licence (subject to complying with subsection (4)) if:

(a) the licensee has contravened an obligation under section 47 (which deals with general conduct obligations of licensees); or

(b) ASIC has reason to believe that the licensee is likely to contravene an obligation under that section; or

(c) the requirement in section 37A (fit and proper person test) is not satisfied in relation to the licensee and the licence; or

(d) the application for the licence:

(i) was false in a material particular or materially misleading; or

(ii) omitted a material matter; or

(e) any information, audit report or statement lodged with ASIC in accordance with a request under subsection 37(4) in relation to the application for the licence:

(i) was false in a material particular or materially misleading; or

(ii) omitted a material matter; or

(f) an application made by the licensee under paragraph 45(2)(b) in relation to the licence:

Authorised Version C2021C00117 registered 17/02/2021

(i) was false in a material particular or materially misleading; or

(ii) omitted a material matter; or

(g) any information, audit report or statement lodged with ASIC in accordance with a request under subsection 46A(3) in relation to an application made by the licensee under paragraph 45(2)(b) in relation to the licence:

(i) was false in a material particular or materially misleading; or

(ii) omitted a material matter.

(4) ASIC may only suspend or cancel a licensee's licence under this section after giving the licensee an opportunity:

(a) to appear, or be represented, at a hearing before ASIC that takes place in private; and

(b) to make submissions to ASIC on the matter.

56 Suspension and cancellation—special procedures for APRA-regulated bodies

Special procedures for APRA-regulated bodies (other than ADIs)

(1) If a licensee, or a related body corporate, is a body (the ***APRA body***) regulated by APRA (other than an ADI), then the following provisions apply:

(a) ASIC cannot suspend or cancel the licensee's licence if doing so would, in ASIC's opinion, have the result of preventing the APRA body from being able to carry on all or any of its usual activities (being activities in relation to which APRA has regulatory or supervisory responsibilities), unless ASIC has first consulted APRA about the proposed action;

(b) if ASIC suspends or cancels the licensee's licence and paragraph (a) does not apply to that action, ASIC must, within one week, inform APRA of the action that has been taken.

Authorised Version C2021C00117 registered 17/02/2021

Special procedures for ADIs

(2) If:

(a) a licensee is an ADI; or

(b) a related body corporate of a licensee is an ADI, and cancellation or suspension of the licensee's licence would, in ASIC's opinion, have the result of preventing the ADI from being able to carry on all or any of its banking business (within the meaning of the *Banking Act 1959*);

then the following provisions have effect:

(c) subject to paragraph (d), the powers that ASIC would otherwise have under this Division to cancel or suspend the licensee's licence, or to revoke a suspension to which this subsection applied, are instead powers of the Minister;

(d) the procedures for the exercise of a power to which paragraph (c) applies are the same as would apply if ASIC could exercise the power, except that the Minister must not exercise the power unless he or she has first considered advice from ASIC on the proposed action, being advice given after ASIC has consulted APRA about the proposed action;

(e) ASIC (rather than the Minister) must still conduct any hearing required under paragraph 55(4)(a) and receive any submissions under paragraph 55(4)(b).

Subdivision B—Variations

57 Varying licences

ASIC may vary a person's licence to take account of a change in the person's name.

Note: The conditions on the licence can be varied under section 45.

Authorised Version C2021C00117 registered 17/02/2021

Subdivision C—Miscellaneous rules about suspensions, cancellations and variations

58 Effect of suspension

(1) A suspended licence has no effect while it remains suspended.

(2) Subsection (1) has effect subject to section 62 (which deals with the continued effect of some suspended or cancelled licences).

59 Revocation of suspension

ASIC may at any time revoke the suspension of a licence.

60 Date of effect, notice and publication of variation, cancellation or suspension etc.

(1) ASIC must give a licensee written notice of a variation, suspension, revocation of a suspension, or cancellation of the licensee's licence.

(2) A variation, suspension, revocation of a suspension, or cancellation of a licence comes into force when the written notice of that action is given to the licensee.

(3) As soon as practicable after the notice is given to the licensee, ASIC must publish a notice of the action on ASIC's website. The notice must state when the action took effect.

61 Statement of reasons

A notice of suspension or cancellation given to a licensee must be accompanied by a statement of reasons for the action taken.

62 ASIC may allow licence to continue in force

(1) If ASIC gives a written notice of suspension or cancellation to a licensee, ASIC may include terms in the notice specifying that the licence continues in force as though the suspension or cancellation

Authorised Version C2021C00117 registered 17/02/2021

had not happened for the purposes of specified provisions of this Act in relation to specified matters, a specified period, or both.

(2) If ASIC includes terms in a notice under subsection (1), the licence continues in force in accordance with the terms of the notice.

Authorised Version C2021C00117 registered 17/02/2021

Part 2-3—Credit representatives and other representatives of licensees

Division 1—Introduction

63 Guide to this Part

This Part is about credit representatives of licensees (which are a particular type of representative of licensees). A person who is authorised as a credit representative of a licensee does not need to hold an Australian credit licence when engaging in credit activities on behalf of the licensee.

This Part also deals with information that ASIC may give to licensees about their representatives (such as their employees, directors and credit representatives, and persons who act on their behalf), and the liability of licensees for their representatives.

Division 2 deals with how a credit representative may be authorised to engage in credit activities on behalf of a licensee. It also deals with certain obligations of licensees in relation to the authorisation of their credit representatives.

Division 3 deals with information about representatives that ASIC may give to a licensee and the use of that information.

Division 4 deals with the liability of licensees for the conduct of their representatives.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Authorisation of credit representatives

64 Licensee may authorise credit representatives

Authorisation of credit representative by licensee

(1) A licensee may give a person a written notice authorising the person to engage in specified credit activities on behalf of the licensee.

(2) A person who is authorised under subsection (1) is a ***credit representative*** of the relevant licensee.

(3) The credit activities specified may be some or all of the credit activities authorised by the licensee's licence.

When authorisation is of no effect

(4) The authorisation:
   (a) is of no effect if subsection (5) applies to it when it is given; and
   (b) ceases to have effect if and when subsection (5) starts to apply to it after it is given;

   to the extent that subsection (5) applies.

(5) This section applies to the authorisation to the extent that it purports to authorise:
   (a) a person to engage in a credit activity that is not authorised by the licensee's licence; or
   (b) a person to engage in a credit activity, and a banning order or disqualification order under Part 2-4 is in force against the person in relation to the credit activity; or
   (c) a person who is not a member of the AFCA scheme; or
   (d) a person who is banned from engaging in a credit activity under a law of a State or Territory; or
   (e) a natural person who has been convicted, within the last 10 years, of serious fraud; or

Authorised Version C2021C00117 registered 17/02/2021

(f) a natural person against whom a prescribed State or Territory order is in force; or

(g) a person that is a body corporate, if a prescribed State or Territory order is in force against a director, secretary or senior manager of the body corporate who would perform duties in relation to the credit activities specified in the authorisation; or

(h) a person that is a partnership or the trustees of a trust, if a prescribed State or Territory order is in force against a partner or trustee who would perform duties in relation to the credit activities specified in the authorisation.

65 Credit representative that is a body corporate may sub-authorise natural persons as credit representatives

Authorisation of natural person as credit representative by credit representative that is a body corporate

(1) A body corporate that is a credit representative of a licensee may, in that capacity, give a natural person a written notice authorising that natural person to engage in specified credit activities on behalf of the licensee.

(2) A natural person who is authorised under subsection (1) is a ***credit representative*** of the relevant licensee.

(3) The credit activities specified may be some or all of the credit activities authorised by the licensee's licence.

Licensee must give consent to authorisation

(4) The authorisation can only be given if the licensee gives the body corporate its written consent to the authorisation. The licensee may give consent in relation to either a specified natural person or a specified class of natural persons (the membership of which might change from time to time).

Authorised Version C2021C00117 registered 17/02/2021

When authorisation is of no effect

(5) The authorisation:

(a) is of no effect if subsection (6) applies to it when it is given; and

(b) ceases to have effect if and when subsection (6) starts to apply to it after it is given;

to the extent that subsection (6) applies.

(6) This subsection applies to the authorisation to the extent that it purports to authorise:

(a) a natural person to engage in a credit activity that is not authorised by the licensee's licence; or

(b) a natural person to engage in a credit activity, and a banning order or disqualification order under Part 2-4 is in force against the natural person in relation to the credit activity; or

(c) a natural person who is not a member of the AFCA scheme; or

(d) a natural person who is banned from engaging in a credit activity under a law of a State or Territory; or

(e) a natural person who has been convicted, within the last 10 years, of serious fraud; or

(f) a natural person against whom a prescribed State or Territory order is in force; or

(g) a natural person in relation to the authorisation of whom the licensee has not given its written consent in accordance with subsection (4).

(7) To avoid doubt, an authorisation under subsection (1) is taken, for the purposes of sections 66 to 72, to be given by the body corporate, not the licensee.

66 Credit representative of 2 or more licensees

(1) One person can be the credit representative of 2 or more licensees, but only if:

Authorised Version C2021C00117 registered 17/02/2021

(a) each of those licensees has consented to the person also being the credit representative of each of the other licensees; or
(b) each of the licensees is a related body corporate of each of the other licensees.

(2) An authorisation:
(a) is of no effect if it contravenes subsection (1) when it is given; and
(b) ceases to have effect if and when it starts to contravene subsection (1) after it is given.

67 A person cannot be a credit representative in relation to credit activities authorised by a person's licence

(1) A person must not authorise another person to engage in a credit activity as a credit representative under subsection 64(1) or 65(1) if the other person holds a licence authorising the person to engage in the credit activity.

(2) An authorisation:
(a) is of no effect if it contravenes subsection (1) when it is given; and
(b) ceases to have effect if and when it starts to contravene subsection (1) after it is given.

68 Variation and revocation of authorisations and sub-authorisations

Variation and revocation of authorisations

(1) An authorisation under subsection 64(1) may be varied or revoked at any time by the licensee giving written notice to the credit representative.

Variation and revocation of sub-authorisations

(2) An authorisation under subsection 65(1) may be varied or revoked at any time by:

Authorised Version C2021C00117 registered 17/02/2021

(a) the licensee in relation to whom the authorisation was given; or

(b) the body corporate that gave the authorisation;

giving written notice to the credit representative.

(3) If a person varies or revokes an authorisation under subsection (2), that person must give the other person who could have varied or revoked the authorisation written notice of the variation or revocation.

69 Obligation not to give authorisation that has no effect

Requirement not to give authorisation

(1) A person must not purport to authorise a credit representative under subsection 64(1) or 65(1) if, at the time the person first purports to give the authorisation, it is of no effect, to any extent, under this Division.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:

(a) the person is subject to a requirement under subsection (1); and

(b) the person engages in conduct; and

(c) the conduct contravenes the requirement.

Criminal penalty: 2 years imprisonment.

70 Obligation to vary or revoke authorisation that ceases to have effect

Requirement to vary or revoke authorisation

(1) If a person:

Authorised Version C2021C00117 registered 17/02/2021

(a) has authorised a credit representative under subsection 64(1) or 65(1); and

(b) becomes aware of a matter because of which the authorisation of the credit representative has ceased to have effect under this Division;

the person must, as soon as practicable:

(c) revoke the authorisation; or

(d) vary the authorisation so that it is no longer, to any extent, of no effect under this Division.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:

(a) the person is required to vary or revoke an authorisation under subsection (1); and

(b) the person engages in conduct; and

(c) the conduct contravenes subsection (1).

Criminal penalty: 2 years imprisonment.

71 Obligation to notify ASIC etc. about credit representatives

Requirement to notify ASIC when credit representative authorised

(1) If a person authorises a credit representative under subsection 64(1) or 65(1), the person must, within 15 business days of the authorisation, lodge with ASIC a written notice in accordance with subsection (3).

Civil penalty: 5,000 penalty units.

Requirement to notify licensee of sub-authorisation

(2) If:

Authorised Version C2021C00117 registered 17/02/2021

(a) a person authorises a natural person as a credit representative of a licensee under subsection 65(1) (which deals with sub-authorisations); and

(b) the consent of the licensee to the authorisation was given in relation to a specified class of natural persons;

then the person must, within 15 business days of the authorisation, give the licensee written notice of the authorisation in accordance with subsection (3).

Civil penalty: 5,000 penalty units.

Details to be included in notice

(3) The notice must include the following details:

(a) the name and business address of the credit representative;

(b) details of the authorisation, including the date on which it was made and what the credit representative is authorised to do on behalf of the licensee;

(c) details of the external dispute resolution scheme of which the credit representative is a member;

(d) details of each other licensee on behalf of whom the credit representative is a credit representative.

Requirement to notify ASIC of change in details etc.

(4) If:

(a) a person authorises a credit representative under subsection 64(1) or 65(1); and

(b) either:

(i) any of the details that are referred to in subsection (3) in relation to the credit representative changes; or

(ii) the person revokes the authorisation;

then the person must, within 10 business days of the change or revocation, lodge with ASIC a written notice of the change or revocation.

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

(5) A notice given under subsection (1), (2) or (4) must be in the approved form.

Strict liability offence

(6) A person commits an offence if:
  (a) the person is subject to a requirement to give a notice under subsection (1), (2) or (4); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 60 penalty units.

(7) Subsection (6) is an offence of strict liability.

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

72 Credit representative numbers

(1) Within a reasonable period after receiving a notice under subsection 71(1) of the authorisation of a credit representative, ASIC must allocate the credit representative a unique credit representative number.

(2) ASIC must give written notice of the credit representative number to:
  (a) the credit representative; and
  (b) the person who authorised the credit representative.

(3) This section does not apply in relation to a credit representative that has already been allocated a credit representative number.

Authorised Version C2021C00117 registered 17/02/2021

Division 3—Information about representatives

73 ASIC may give licensee information about representatives

ASIC may give licensee information about representatives

(1) If ASIC considers it appropriate to do so, it may give information to a licensee about a person whom ASIC believes is, or will be, a representative of the licensee. However, ASIC may only do so if it believes, on reasonable grounds, that the information is true.

Requirements about use of information

(2) A licensee to whom information is given under subsection (1) may make use of, make a record of, or give to another person, the information for a purpose connected with:
  (a) the licensee making a decision about what action (if any) to take in relation to the representative, as a consequence of receiving the information; or
  (b) the licensee taking action pursuant to such a decision.

(3) A licensee to whom information is given under subsection (1) must not make use of, make a record of, or give to another person, the information other than as permitted by subsection (2).

Civil penalty: 5,000 penalty units.

(4) A person to whom information has been given for a purpose or purposes under subsection (2) or this subsection may make use of, make a record of, or give to another person, that information for that purpose or any of those purposes.

(5) A person to whom information has been given for a purpose or purposes under subsection (2) or (4) must not make use of, make a record of, or give to another person, the information other than as permitted by subsection (4).

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Offence

(6) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (3) or (5); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 1 year imprisonment.

Qualified privilege

(7) A person has qualified privilege in relation to an act done by the person under subsection (2) or (4).

Use of information obtained under this section in court

(8) A person to whom information is given in accordance with this section must not give any of the information to a court, or produce in a court a document that sets out some or all of the information, except:
  (a) for a purpose connected with:
    (i) a licensee making a decision about what action (if any) to take in relation to the representative, as a consequence of receiving some or all of the information; or
    (ii) a licensee taking action pursuant to that decision; or
    (iii) proving in proceedings in that court that particular action taken by a licensee in relation to the representative was taken pursuant to that decision; or
  (b) in proceedings in that court, in so far as the proceedings relate to an alleged contravention of this section; or
  (c) in proceedings about giving to a court false information some, at least, of which was the information given under this section.

(9) For the purposes of subsection (8), a licensee takes action in relation to a representative if the licensee:

Authorised Version C2021C00117 registered 17/02/2021

(a) takes action by way of making, terminating or varying the terms and conditions of an agreement; or

(b) otherwise takes action in relation to an agreement;

to the extent that the agreement relates to the representative acting on behalf of the licensee.

(10) Subsection (8) also has the effect it would have if:

(a) a reference in it to a court were a reference to a court of an external Territory or of a country outside Australia and the external Territories; and

(b) paragraph (8)(b) were omitted.

Authorised Version C2021C00117 registered 17/02/2021

Division 4—Liability of licensees for representatives

74 Application of this Division

This Division applies to any conduct of a representative of a licensee:

(a) that relates to a credit activity; and

(b) on which a third person (the ***client***) could reasonably be expected to rely; and

(c) on which the client in fact relied in good faith.

75 Responsibility if representative of only one licensee

If the representative is the representative of only one licensee, the licensee is responsible, as between the licensee and the client, for the conduct of the representative, whether or not the representative's conduct is within the authority of the licensee.

76 Representatives of multiple licensees

When this section applies

(1) This section applies if the representative is the representative of more than one licensee.

Conduct covered by only one authority

(2) If:

(a) the representative is the representative of one of the licensees only in relation to a particular class of credit activity; and

(b) the conduct relates to that class of credit activity;

that licensee is responsible for the conduct, as between that licensee and the client, whether or not the conduct is within the authority of the licensee.

Authorised Version C2021C00117 registered 17/02/2021

Conduct covered by multiple authorities

(3) If:

(a) the representative is the representative of more than one of the licensees in relation to a particular class of credit activity; and

(b) the conduct relates to that class of credit activity; and

(c) the conduct is within the authority of:

(i) only one of those licensees (the ***authorising licensee***); or

(ii) 2 or more of those licensees (the ***authorising licensees***);

then:

(d) if subparagraph (c)(i) applies—the authorising licensee is responsible for the conduct, as between that licensee and the client; or

(e) if subparagraph (c)(ii) applies—the authorising licensees are jointly and severally responsible for the conduct, as between themselves and the client.

All other cases

(4) In any other case, all of the licensees are jointly and severally responsible for the conduct, as between themselves and the client, whether or not the representative's conduct is within the authority of any of them.

77 Responsibility extends to loss or damage suffered by client

The responsibility of a licensee under this Division extends so as to make the licensee liable to the client in relation to any loss or damage suffered by the client as a result of the representative's conduct.

78 Effect of this Division

(1) If a licensee is responsible for the conduct of its representative under this Division, the client has the same remedies against the licensee that the client has against the representative.

Authorised Version C2021C00117 registered 17/02/2021

(2) The licensee and the representative (along with any other licensees that are also responsible) are all jointly and severally liable to the client in relation to those remedies.

(3) However, nothing in this Division imposes:
  (a) any criminal responsibility; or
  (b) any civil liability under a provision of this Act apart from this Division;
on a licensee that would not otherwise be imposed on the licensee.

(4) This Division does not relieve a representative of a licensee of any liability that the representative has to the client or the licensee.

(5) An agreement has no effect in so far as it purports to alter or restrict the operation of section 75, 76 or 77.

(6) However, subsection (5) does not apply to the extent that the agreement:
  (a) provides for a representative of a licensee to indemnify the licensee for a liability of the licensee in relation to the representative; or
  (b) provides for a licensee, for whom a representative acts, to indemnify another licensee for a liability in relation to the representative.

(7) A licensee must not make, or offer to make, an agreement that has, or would have, no effect under subsection (5).

Authorised Version C2021C00117 registered 17/02/2021

Part 2-4—Banning or disqualification of persons from engaging in credit activities

Division 1—Introduction

79 Guide to this Part

This Part is about banning or disqualifying persons from:

(a) engaging in credit activities; or

(b) controlling others who engage in credit activities; or

(c) performing some or any functions involved in others engaging in credit activities.

The bans are orders made by ASIC under Division 2.

The disqualifications are orders made by the court under Division 3.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Banning orders

80 ASIC's power to make a banning order

Making a banning order

(1) ASIC may, in writing, make one or more orders (***banning orders***) against a person:

(a) if ASIC suspends or cancels a licence of the person; or

(b) if the person becomes insolvent; or

(c) for a natural person—if the person is convicted of fraud; or

(d) if the person has:

(i) contravened any credit legislation; or

(ii) been involved in a contravention of a provision of any credit legislation by another person; or

(e) if ASIC has reason to believe that the person is likely to:

(i) contravene any credit legislation; or

(ii) be involved in a contravention of a provision of any credit legislation by another person; or

(f) if ASIC has reason to believe that the person is not a fit and proper person to:

(i) engage in one or more credit activities; or

(ii) perform one or more functions as an officer (within the meaning of the *Corporations Act 2001*) of another person who engages in credit activities; or

(iii) control another person who engages in credit activities; or

(fa) if ASIC has reason to believe that the person is not adequately trained, or is not competent, to:

(i) engage in one or more credit activities; or

(ii) perform one or more functions as an officer (within the meaning of the *Corporations Act 2001*) of another person who engages in credit activities; or

Authorised Version C2021C00117 registered 17/02/2021

(iii) control another person who engages in credit activities; or

(fb) if the person has, at least twice, been linked to a refusal or failure to give effect to a determination made by AFCA (as defined in section 910C of the *Corporations Act 2001*) relating to a complaint that relates to:

(i) credit activities; or

(ii) a financial services business (within the meaning of the *Corporations Act 2001*); or

(fc) if subsection (3) applies to the person in relation to 2 or more corporations; or

(g) if a prescribed State or Territory order is in force against the person; or

(h) in any other circumstances prescribed by the regulations.

When a person is not a fit and proper person

(2) For the purposes of paragraph (1)(f), ASIC must have regard to the matters in section 37B.

When a person has been an officer of a corporation unable to pay its debts

(3) This subsection applies to a person in relation to a corporation if, within the last 7 years:

(a) the person was an officer (within the meaning of the *Corporations Act 2001*) of the corporation when the corporation was:

(i) engaging in credit activities; or

(ii) carrying on a financial services business (within the meaning of the *Corporations Act 2001*); and

(b) the corporation was wound up either:

(i) while the person was such an officer of the corporation; or

(ii) within the 12 months after the person ceased to be such an officer of the corporation; and

Authorised Version C2021C00117 registered 17/02/2021

(c) a liquidator lodged a report under subsection 533(1) of the *Corporations Act 2001* (including that subsection as applied by section 526-35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation's inability to pay its debts.

Person to be given an opportunity to be heard

(4) Despite subsection (1), ASIC may only make a banning order against a person after giving the person an opportunity:
(a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
(b) to make submissions to ASIC on the matter.

(5) Subsection (4) does not apply if:
(a) ASIC's grounds for making a banning order against a person include that ASIC has suspended or cancelled a licence of the person (see paragraph (1)(a)); and
(b) the suspension or cancellation took place without a hearing under section 54.

(6) Subsection (4) also does not apply if:
(a) ASIC's grounds for making a banning order against a person include that the person has been convicted of fraud (see paragraph (1)(c)); and
(b) the person has been convicted of serious fraud.

Copy of banning order to be given to the person

(7) ASIC must give a copy of a banning order to the person against whom it was made.

81 What a banning order prohibits

(1) A banning order made against a person may specify that the person is prohibited from doing one or more of the following:
(a) engaging in any credit activities;

Authorised Version C2021C00117 registered 17/02/2021

(b) engaging in specified credit activities in specified circumstances or capacities;

(c) controlling, whether alone or in concert with one or more other entities (as defined by section 64A of the *Corporations Act 2001*), another person who engages in credit activities;

(d) performing any function involved in the engaging in of credit activities (including as an officer (within the meaning of the *Corporations Act 2001*), manager, employee, contractor or in some other capacity);

(e) performing specified functions involved in the engaging in of credit activities.

(2) The banning order may specify that a particular prohibition specified in the order applies against the person:

(a) if the sole ground for the banning order is because paragraph 80(1)(fc) applies—for a specified period of up to 5 years; or

(b) otherwise—either permanently or for a specified period.

Note: This subsection applies separately to each prohibition specified in the order.

(3) A banning order may include a provision allowing the person against whom it was made, subject to any specified conditions:

(a) to do specified acts; or

(b) to do specified acts in specified circumstances;

that the order would otherwise prohibit them from doing.

(4) A banning order is not a legislative instrument.

82 Effect of banning orders

Requirement not to engage in conduct contrary to banning order

(1) A person must not engage in conduct that is contrary to a banning order that is in force against the person.

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Offence

(2) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 5 years imprisonment.

Note: A person against whom a banning order is in force cannot be granted a licence authorising the person to engage in a credit activity to which the banning order applies (see subsection 40(1)).

83 Variation or cancellation of banning orders

(1) ASIC may vary or cancel a banning order if ASIC is satisfied that it is appropriate to do so because of a change in any of the circumstances based on which ASIC made the order.

(2) ASIC may do so:
  (a) on its own initiative; or
  (b) if the person against whom the order was made lodges with ASIC an application for the variation or cancellation.

(3) The application must be in the approved form.

(4) If ASIC proposes not to vary or cancel a banning order in accordance with an application given by a person under paragraph (2)(b), ASIC must give the person an opportunity:
  (a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
  (b) to make submissions to ASIC on the matter.

(5) ASIC must give written notice of the variation or cancellation of a banning order to the person against whom the order was made.

Authorised Version C2021C00117 registered 17/02/2021

84 Date of effect, notice and publication of banning order, variation or cancellation

(1) A banning order comes into force when it is given to the person against whom it is made.

(2) A variation or cancellation of a banning order comes into force when written notice of the variation or cancellation is given to the person against whom the order was made.

(3) ASIC must publish a notice on ASIC's website as soon as practicable after making, varying or cancelling a banning order. The notice must state when the banning order, or variation or cancellation of the banning order, came into force and:

(a) in the case of the making of a banning order—set out a copy of the banning order; or

(b) in the case of the variation of a banning order—set out a copy of the banning order as varied.

(4) However, if the banning order contains a provision of the kind referred to in subsection 81(3) and ASIC considers that the notice on its website would be unreasonably long if that provision were included, the notice may instead set out a summary of the provision's effect.

85 Statement of reasons

(1) A copy of a banning order given to a person must be accompanied by a statement of reasons for the order.

(2) If ASIC varies a banning order made against a person, ASIC must, on request by the person, give the person a statement of reasons for the variation.

Authorised Version C2021C00117 registered 17/02/2021

Division 3—Disqualification by the court

86 Disqualification by the court

(1) ASIC may apply to the court for one or more orders under subsection (2) in relation to a person if ASIC:

(a) cancels a licence of the person; or

(b) makes a banning order against the person that is to operate permanently.

(2) The court may make:

(a) one or more orders disqualifying the person, permanently or for a specified period, from doing one or more of the following:

(i) engaging in any credit activities;

(ii) engaging in specified credit activities in specified circumstances or capacities;

(iii) controlling, whether alone or in concert with one or more other entities (as defined by section 64A of the *Corporations Act 2001*), another person who engages in credit activities;

(iv) performing any function involved in the engaging in of credit activities (including as an officer (within the meaning of the *Corporations Act 2001*), manager, employee, contractor or in some other capacity);

(v) performing specified functions involved in the engaging in of credit activities; or

(b) any other order the court considers appropriate.

Note: A person against whom a disqualification order is in force cannot be granted a licence authorising the person to engage in a credit activity to which the disqualification order applies (see subsection 40(1)).

Authorised Version C2021C00117 registered 17/02/2021

Part 2-5—Financial records, trust accounts and audit reports

Division 1—Introduction

87 Guide to this Part

This Part is about financial records, trust accounts and matters relating to audit reports required under this Act.

Division 2 deals with the requirement for licensees to keep certain financial records, and provides for how those records must be kept.

Division 3 deals with trust accounts. Licensees that provide credit services and that receive money on behalf of others in the course of those services are required to maintain a trust account. Those licensees must also comply with requirements in relation to trust account money, trust account statements and trust account audit reports.

Division 4 has requirements relating to audit reports required by this Act, and the auditors that prepare those reports.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Financial records of licensees

88 Obligation to keep financial records

Requirement to keep financial records

(1) A licensee must:
  (a) keep financial records that correctly record and explain the transactions and financial position of any business of engaging in credit activities carried on by the licensee; and
  (b) keep those records in accordance with this Division; and
  (c) comply with subsection 90(2) in relation to the conversion of records into the English language; and
  (d) comply with section 91 in relation to the location and production of records and particulars.

Civil penalty: 5,000 penalty units.

*Meaning of **financial records***

(2) ***Financial records*** includes:
  (a) invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers; and
  (b) documents of prime entry; and
  (c) any trust account statement or trust account report required under section 100.

Offence

(3) A person commits an offence if:
  (a) the person is subject to a requirement in relation to financial records under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes subsection (1).

Criminal penalty: 5 years imprisonment.

Authorised Version C2021C00117 registered 17/02/2021

Financial records may be kept with other records

(4) A licensee does not contravene this Division merely because some or all of the financial records are prepared as a part of, or in conjunction with, the records relating to any other business that is carried on by the licensee.

Note: For the purposes of subsection (3), a defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

89 How financial records are to be kept

The financial records must be kept in a way that:

(a) enables true and fair profit and loss statements, and balance sheets, of the business referred to in paragraph 88(1)(a) to be prepared from time to time; and

(b) allows those statements and balance sheets to be conveniently and properly audited in accordance with the auditing standards (if any) prescribed by regulations made under section 106.

90 Language of financial records

(1) The financial records must be kept in writing in the English language, or in a manner that enables them to be readily accessible and readily converted into writing in the English language.

(2) If any of the financial records are not kept in writing in the English language, the licensee must, if required to convert the financial records concerned into writing in the English language by a person who is entitled to examine the financial records concerned, comply with the requirement within a reasonable time.

91 Location of financial records

If any of the financial records are kept outside this jurisdiction, the licensee must:

Authorised Version C2021C00117 registered 17/02/2021

(a) cause to be sent to and retained at a place in this jurisdiction such particulars in relation to the business dealt with in those financial records as will enable true and fair profit and loss statements and balance sheets to be prepared; and

(b) if required by ASIC to produce those financial records at a place in this jurisdiction, comply with the requirement not later than 28 days after the requirement is made.

92 Information to be shown in financial records

The financial records must be kept in sufficient detail to show particulars of:

(a) all money received or paid by the licensee; and

(b) for each credit contract under which the licensee is the credit provider:

(i) the amount and day of all payments made by or on behalf of the debtor under the credit contract; and

(ii) all amounts (including principal, interest, fees and charges) owed by the debtor under the credit contract; and

(c) for each consumer lease under which the licensee is the lessor—the amount and day of all payments made by or on behalf of the lessee under the consumer lease; and

(d) for each guarantee under which the licensee is the beneficiary of the guarantee—the amount and day of all payments made by or on behalf of the guarantor under the guarantee; and

(e) all income received by the licensee from indirect remuneration, interest, and other sources, and all expenses, indirect remuneration, and interest paid by the licensee; and

(f) all the assets and liabilities (including contingent liabilities) of the licensee; and

(g) any other matters prescribed by the regulations.

Authorised Version C2021C00117 registered 17/02/2021

93 Regulations may impose additional requirements

The regulations may impose additional requirements to be complied with in relation to the financial records including, for example:

(a) requirements for things to be contained in the records; and

(b) requirements relating to the level of detail to be shown in the records.

94 Financial records taken to be made with licensee's authority

An entry in the records is, unless the contrary is proved, to be taken to have been made by, or with the authority of, the licensee.

95 Obligation to retain financial records for 7 years

Requirement to retain financial records

(1) A licensee that is required by this Division to make a financial record must retain it for 7 years after the transactions covered by the record are completed.

Civil penalty: 5,000 penalty units.

Regulations

(2) The regulations may prescribe financial records to which subsection (1) does not apply.

Records to be kept even if person stops carrying on business

(3) Financial records must be retained in accordance with this section, even if the person stops carrying on any business to which they relate.

Offence

(4) A person commits an offence if:

Authorised Version C2021C00117 registered 17/02/2021

(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 6 months imprisonment.

96 Financial records are prima facie evidence of matters

(1) In proceedings in a court, a financial record kept under this Division is admissible as prima facie evidence of any matter in the financial record.

(2) A document purporting to be a financial record kept by a licensee under this Division is, unless the contrary is proved, presumed to be a financial record kept by the licensee under this Division.

(3) If:
(a) because of subsection (1) a financial record is prima facie evidence of a matter; and
(b) the financial record, or a part of the financial, is kept or prepared by recording or storing matters (including that matter) by means of a mechanical, electronic or other device;

a written reproduction of that matter as so recorded or stored is admissible as prima facie evidence of that matter in a proceeding in a court.

(4) A written document that purports to reproduce a matter recorded or stored by means of a mechanical, electronic or other device is, unless the contrary is proved, presumed to be a reproduction of that matter.

Authorised Version C2021C00117 registered 17/02/2021

Division 3—Trust accounts of credit service licensees

97 Application of this Division

This Division applies to a licensee (the ***credit service licensee***) that:

(a) holds a licence that authorises the licensee to provide a credit service; and

(b) in the course of providing the credit service, receives money on behalf of another person.

98 Obligation for credit service licensees to maintain trust account

Requirement to maintain trust account

(1) The credit service licensee must maintain one more trust accounts (the ***trust account***) in accordance with this section.

Civil penalty: 5,000 penalty units.

Requirements for trust accounts

(2) The trust account must be maintained with an Australian ADI (within the meaning of section 9 of the *Corporations Act 2001*).

(3) The trust account must be designated as the credit service licensee's trust account.

Offence

(4) The credit service licensee commits an offence if:

(a) the credit service licensee is subject to a requirement under subsection (1); and

(b) the credit service licensee engages in conduct; and

(c) the conduct contravenes the requirement.

Criminal penalty: 6 months imprisonment.

Authorised Version C2021C00117 registered 17/02/2021

99 Obligations in relation to trust account money

Requirement to pay money to credit of trust account

(1) The credit service licensee must pay to the credit of the trust account any money received by the credit service licensee on behalf of another person in relation to the credit service provided by the licensee.

Civil penalty: 5,000 penalty units.

Requirement in relation to withdrawal of money from trust account

(2) The credit service licensee must not withdraw any money paid into the trust account, other than for the purpose of paying the money in accordance with subsection (3).

Civil penalty: 5,000 penalty units.

Requirement in relation to payment of money from trust account

(3) The credit service licensee must pay any money withdrawn from the trust account to the person or persons lawfully entitled to receive that money.

Civil penalty: 5,000 penalty units.

Offence

(4) The credit service licensee commits an offence if:
  (a) the credit service licensee is subject to a requirement under subsection (1), (2) or (3); and
  (b) the credit service licensee engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 6 months imprisonment.

Authorised Version C2021C00117 registered 17/02/2021

Trust account money not available for payment of debts etc.

(5) Money paid into a trust account by the credit service licensee under this section:

(a) is not available for the payment of a debt of any other creditor of the credit service licensee; and

(b) is not liable to be attached or taken in execution under the order or process of a court at the instance of any such creditors.

100 Obligation to lodge trust account statement and trust account audit report

Requirement to prepare and lodge trust account statement

(1) The credit service licensee must, for each financial year of the credit service licensee:

(a) prepare a written statement in relation to the trust account (the ***trust account statement***) in accordance with this section; and

(b) lodge the trust account statement with ASIC in accordance with this section.

Civil penalty: 5,000 penalty units.

Requirement to prepare and lodge trust account audit report

(2) The credit service licensee must, with the trust account statement, lodge with ASIC an auditor's report (the ***trust account audit report***) in accordance with this section.

Civil penalty: 5,000 penalty units.

Requirements for statement and audit report

(3) Each of the trust account statement and trust account audit report must:

(a) be in the approved form; and

Authorised Version C2021C00117 registered 17/02/2021

(b) contain the information and matters prescribed by the regulations; and
(c) be lodged with ASIC in accordance with section 101.

(4) The trust account audit report must be prepared by a person who complies with any eligibility requirements prescribed by the regulations.

Offence

(5) The credit service licensee commits an offence if:
(a) the credit service licensee is subject to a requirement under subsection (1) or (2); and
(b) the credit service licensee engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 5 years imprisonment.

*Meaning of **financial year***

(6) A ***financial year*** of the credit service licensee means:
(a) if the credit service licensee is a body corporate to which section 323D of the *Corporations Act 2001* applies—a financial year of the body corporate (within the meaning of that section); and
(b) in any other case—a year ending on 30 June.

101 Time of lodgment of trust account statement and trust account audit report

(1) Unless an extension is granted under subsection (3), the trust account statement and trust account audit report must be lodged with ASIC before the day that is 3 months after the end of the financial year of the credit service licensee to which they relate.

(2) If an extension is granted under subsection (3), the trust account statement and trust account audit report must be lodged with ASIC before the end of the extended period.

Authorised Version C2021C00117 registered 17/02/2021

(3) ASIC may, on application made:

(a) by the credit service licensee and the auditor that is to prepare the trust account audit report; and

(b) before the end of the period that would otherwise apply;

approve an extension of the period for lodging the trust account statement and trust account audit report. The extension may be of the period originally applicable or the period applicable under a previous extension.

(4) An approval may be given subject to any conditions imposed by ASIC.

(5) If an approval is given subject to conditions, the licensee must comply with those conditions.

Authorised Version C2021C00117 registered 17/02/2021

Division 4—Matters relating to audit reports

102 Auditor's right of access to records, information etc.

Auditor is entitled to access and assistance etc. from licensee

(1) An auditor (the ***auditor***) who prepares one of the following audit reports (the ***audit report***):

(a) an audit report required under subsection 49(3) in relation to a licensee;

(b) a trust account audit report required under subsection 100(2) in relation to a licensee;

has a right of access at all reasonable times to the financial records or other credit books of the licensee for purposes relating to the audit report.

(2) The auditor is entitled to require:

(a) from the licensee; or

(b) if the licensee is a body corporate—from any director, secretary or senior manager of the licensee;

any assistance and explanations that the auditor desires for purposes relating to the audit report.

Requirement to give auditor access and assistance etc.

(3) The licensee, or a director, secretary or senior manager of the licensee if it is a body corporate, must not:

(a) refuse or fail to allow the auditor access, in accordance with subsection (1), to financial records or other credit books of the licensee; or

(b) refuse or fail to give assistance, or an explanation, to the auditor as and when required under subsection (2); or

(c) otherwise hinder, obstruct or delay the auditor in the performance or exercise of the auditor's duties or powers.

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Offence

(4) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (3); and
  (b) the person engages in conduct; and
  (c) the person's conduct contravenes the requirement.

Criminal penalty: 2 years imprisonment.

103 Auditor's fees and expenses

(1) The reasonable fees and expenses of the auditor for preparing the audit report are payable by the licensee.

(2) The auditor may recover those fees by action against the licensee.

104 Auditor to report on certain matters

Requirement for auditor to disclose maters

(1) If the auditor, in the performance of duties relating to the audit report, becomes aware of a matter referred to in subsection (2), the auditor must, within 7 days after becoming aware of the matter:
  (a) lodge a written report on the matter with ASIC; and
  (b) give a copy of the report to the licensee.

Civil penalty: 5,000 penalty units.

Matters that must be disclosed

(2) A report must be given in relation to any matter that, in the opinion of the auditor:
  (a) has adversely affected, is adversely affecting or may adversely affect the ability of the licensee to meet the licensee's obligations as a licensee; or
  (b) constitutes or may constitute a contravention of:

Authorised Version C2021C00117 registered 17/02/2021

(i) Division 2 or 3 (or regulations made under those Divisions); or

(ii) a condition of the licensee's licence; or

(c) constitutes an attempt to unduly influence, coerce, manipulate or mislead the auditor in the preparation of the audit report.

Offence

(3) The auditor commits an offence if:

(a) the auditor is subject to a requirement under subsection (1); and

(b) the auditor engages in conduct; and

(c) the auditor's conduct contravenes the requirement.

Criminal penalty: 1 year imprisonment.

105 Qualified privilege for auditor etc.

Qualified privilege for auditor

(1) The auditor has qualified privilege in relation to:

(a) a statement that the auditor makes, orally or in writing, in the course of its duties relating to the audit report; or

(b) the lodging of a report with ASIC under subsection 104(1); or

(c) the giving of a report to the licensee under subsection 104(1).

Note: If the auditor is a company, the company has qualified privilege under this subsection in relation to statements made, and reports lodged or sent, by natural persons on behalf of the company if those statements and notices can be properly attributed to the company.

Qualified privilege for registered company auditor acting on behalf of company

(2) If the auditor is a company registered under the *Corporations Act 2001*, a registered company auditor acting on behalf of the company has qualified privilege in relation to:

Authorised Version C2021C00117 registered 17/02/2021

(a) a statement that the registered company auditor makes (orally or in writing) in the course of the performance, on behalf of the company, of the company's duties relating to the audit report; or

(b) the lodging by the registered company auditor, on behalf of the company, of a report with ASIC under subsection 104(1); or

(c) the giving by the registered company auditor, on behalf of the company, of a report to the licensee under subsection 104(1).

Qualified privilege for subsequent publication

(3) A person has qualified privilege in relation to the publishing of a document prepared by the auditor in the course of the auditor's duties relating to the audit report.

(4) A person has qualified privilege in relation to the publishing of a statement:

(a) made by the auditor as referred to in subsection (1); or

(b) made by a registered company auditor as referred to in subsection (2).

106 Regulations in relation to audit reports etc.

The regulations may make provision in relation to:

(a) the audit reports referred to in subsection 102(1); and

(b) audit reports that persons who have applied for a licence may be requested to lodge under subsection 37(4) or 46A(3); and

(c) the auditors that prepare those reports; and

(d) auditing standards that must be complied with in relation to those reports.

Authorised Version C2021C00117 registered 17/02/2021

Part 2-6—Exemptions and modifications relating to this Chapter

Division 1—Introduction

107 Guide to this Part

This Part is about exemptions from, and modifications of, the provisions of this Chapter.

Division 2 deals with how exemptions and modifications may be made by ASIC or by the regulations.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Exemptions and modifications relating to this Chapter

108 Provisions to which this Part applies

The provisions to which this Part applies are:

(a) this Chapter; and

(b) definitions in this Act, as they apply to references in this Chapter; and

(c) instruments made for the purposes of this Chapter.

109 Exemptions and modifications by ASIC

Exemptions and modifications

(1) ASIC may:

(a) exempt:

(i) a person; or

(ii) a person and all of the person's credit representatives;

from all or specified provisions to which this Part applies; or

(b) exempt a credit activity that is engaged in in relation to a specified credit contract, mortgage, guarantee or consumer lease from all or specified provisions to which this Part applies; or

(c) declare that provisions to which this Part applies apply in relation to a person, or a credit activity referred to in paragraph (1)(b), as if specified provisions were omitted, modified or varied as specified in the declaration.

(2) An exemption or declaration under subsection (1) is not a legislative instrument.

(3) ASIC may, by legislative instrument:

(a) exempt a class of persons from all or specified provisions to which this Part applies; or

Authorised Version C2021C00117 registered 17/02/2021

(b) exempt a credit activity (other than a credit activity referred to in paragraph (1)(b)) from all or specified provisions to which this Part applies; or

(c) exempt a class of credit activities from all or specified provisions to which this Part applies; or

(d) declare that provisions to which this Part applies apply in relation to a credit activity (other than a credit activity referred to in paragraph (1)(b)), or a class of persons or credit activities, as if specified provisions were omitted, modified or varied as specified in the declaration.

Conditions on exemptions

(4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The court may order the person to comply with the condition in a specified way. Only ASIC may apply to the court for the order.

Publication of exemptions and declarations

(5) An exemption or declaration under subsection (1) must be in writing and ASIC must publish notice of it on its website.

Special rules in relation to offences

(6) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(c) or (3)(d) had not been made, that conduct does not constitute an offence unless, before the conduct occurred:

(a) the text of the declaration was published by ASIC on its website; or

(b) ASIC gave written notice setting out the text of the declaration to the person;

(in addition to complying with the requirements of the *Legislation Act 2003* if the declaration is made under subsection (3)).

Authorised Version C2021C00117 registered 17/02/2021

(7) In a prosecution for an offence to which subsection (6) applies, the prosecution must prove that paragraph (6)(a) or (b) was complied with before the conduct occurred.

110 Exemptions and modifications by the regulations

(1) The regulations may:

(a) exempt a person or class of persons from all or specified provisions to which this Part applies; or

(b) exempt a credit activity or a class of credit activities from all or specified provisions to which this Part applies; or

(c) provide that the provisions to which this Part applies apply as if specified provisions were omitted, modified or varied as specified in the regulations.

(2) An exemption that:

(a) is made for the purposes of paragraph (1)(a); and

(b) exempts a person or class of persons from subsection 29(1) to enable testing of particular credit activities;

may apply unconditionally or subject to specified conditions.

(3) A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.

(4) An exemption described in subsection (2) may empower ASIC to make decisions relating to how the exemption starts or ceases to apply to a person or class of persons.

Authorised Version C2021C00117 registered 17/02/2021

Chapter 3—Responsible lending conduct

Part 3-1—Licensees that provide credit assistance in relation to credit contracts

Division 1—Introduction

111 Guide to this Part

This Part has rules that apply to licensees that provide credit assistance in relation to credit contracts. These rules are aimed at better informing consumers and preventing them from being in unsuitable credit contracts. However, these rules do not apply to a licensee that will be the credit provider under the credit contract.

Division 2 requires a licensee to give its credit guide to a consumer. The credit guide has information about the licensee and some of the licensee's obligations under this Act.

Division 3 requires a licensee to give a quote before providing credit assistance to a consumer. The quote must set out the maximum amount the consumer will be required to pay to the licensee. The licensee must not charge more than that amount.

Division 4 requires a licensee, before providing credit assistance to a consumer in relation to a credit contract, to make a preliminary assessment as to whether the contract will be unsuitable for the consumer. To do this, the licensee must make inquiries and verifications about the consumer's requirements, objectives and financial situation. The licensee must give the consumer a copy of the assessment if requested.

Division 5 requires a licensee, when providing credit assistance to a consumer in relation to a credit contract, to give the consumer a document that discloses certain information (for example, the indirect remuneration the licensee is likely to receive).

Authorised Version C2021C00117 registered 17/02/2021

Division 6 prohibits a licensee from providing credit assistance to a consumer in relation to a credit contract if the contract will be unsuitable for the consumer.

Division 7 prohibits a licensee from providing credit assistance to a consumer in relation to short-term credit contracts. It also imposes requirements on a licensee who makes representations about providing credit assistance in relation to small amount credit contracts.

112 Application of this Part

This Part does not apply in relation to credit assistance provided by a licensee in relation to a credit contract if the licensee is or will be the credit provider under the contract.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Credit guide of credit assistance providers

113 Credit guide of credit assistance providers

Requirement to give credit guide

(1) A licensee must, as soon as practicable after it becomes apparent to the licensee that it is likely to provide credit assistance to a consumer in relation to a credit contract, give the consumer the licensee's credit guide in accordance with subsection (2).

Civil penalty: 5,000 penalty units.

(2) The licensee's credit guide must:
- (a) be in writing; and
- (b) be in the form (if any) prescribed by the regulations; and
- (c) specify the licensee's name and contact details; and
- (d) specify the licensee's Australian credit licence number; and
- (e) give information about:
  - (i) any fees that are payable by a consumer to the licensee for the licensee's credit assistance; and
  - (ii) any charges that are payable by a consumer to the licensee for matters associated with providing the credit assistance; and
  - (iii) the method for working out the amount of the fees and charges; and
- (f) give information about:
  - (i) if there are 6 or fewer credit providers that the licensee conducts business with when providing credit assistance in relation to credit contracts—the names of those credit providers; and
  - (ii) if there are more than 6 credit providers that the licensee conducts business with when providing credit assistance in relation to credit contracts—the names of the 6 credit providers with whom the licensee reasonably believes it conducts the most business; and

Authorised Version C2021C00117 registered 17/02/2021

(g) give information about:
  (i) any indirect remuneration that the licensee, or an employee, director or credit representative of the licensee, is likely to receive, directly or indirectly, from credit providers in relation to credit contracts for which the licensee has provided credit assistance; and
  (ii) a reasonable estimate of the amounts of that indirect remuneration or the range of those amounts; and
  (iii) the method for working out those amounts; and
(h) give information about the licensee's procedure for resolving disputes with a consumer, including contact details for a consumer to access:
  (i) the licensee's internal dispute resolution procedure; and
  (ii) the AFCA scheme; and
(i) give information about the licensee's obligations under sections 120 and 123; and
(j) comply with any other requirements prescribed by the regulations.

(3) The regulations may prescribe:
(a) information that need not be included in the credit guide, despite subsection (2); and
(b) for the purposes of paragraph (2)(g):
  (i) the method for working out amounts of indirect remuneration; and
  (ii) how indirect remuneration or amounts of indirect remuneration must be described.

Manner of giving credit guide

(4) The licensee must give the consumer the licensee's credit guide in the manner (if any) prescribed by the regulations.

Strict liability offence

(5) A person commits an offence if:

Authorised Version C2021C00117 registered 17/02/2021

(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

(6) Subsection (5) is an offence of strict liability.

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

Authorised Version C2021C00117 registered 17/02/2021

Division 3—Quote for providing credit assistance etc. in relation to credit contracts

114 Quote for providing credit assistance etc.

Requirement to give quote

(1) A licensee must not provide credit assistance to a consumer by:

(a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular credit contract with a particular credit provider; or

(b) suggesting that the consumer apply, or assisting the consumer to apply, for an increase to the credit limit of a particular credit contract with a particular credit provider; or

(c) suggesting that the consumer remain in a particular credit contract with a particular credit provider;

unless:

(d) the licensee has given the consumer a quote in accordance with subsection (2); and

(e) the consumer has signed and dated that quote or otherwise indicated the consumer's acceptance of it (and the day that happens) in the manner (if any) prescribed by the regulations; and

(f) the licensee has given the consumer a copy of the accepted quote.

Civil penalty: 5,000 penalty units.

(2) The quote must:

(a) be in writing; and

(b) give information about the credit assistance and other services that the quote covers; and

(c) specify the maximum amount that will be payable by the consumer to the licensee in relation to the licensee's credit assistance and other services; and

Authorised Version C2021C00117 registered 17/02/2021

(d) give information about what that amount relates to, including:
  (i) the maximum amount of the licensee's fee for providing the credit assistance and other services; and
  (ii) the maximum amount of charges that will be incurred by the licensee for matters associated with providing the credit assistance and other services; and
  (iii) the maximum amount of fees or charges that will be payable by the licensee to another person on the consumer's behalf; and
(e) state whether the maximum amount or any other amount will be payable by the consumer to the licensee if a credit contract is not entered or a credit limit is not increased; and
(f) comply with any other requirements prescribed by the regulations.

Manner of giving quote

(3) The licensee must give the quote to the consumer in the manner (if any) prescribed by the regulations.

No demanding payment of amount exceeding quoted amount

(4) The licensee must not request or demand payment of an amount that exceeds the maximum amount set out in the quote.

Civil penalty: 5,000 penalty units.

No demanding payment before credit assistance provided

(5) The licensee must not request or demand payment of an amount for the licensee's credit assistance before the licensee provides the assistance.

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Caveats

(6) The licensee must not lodge, or threaten to lodge, a caveat in relation to land to induce the consumer to pay an amount to the licensee for the licensee's credit assistance or other services.

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Division 4—Obligations of credit assistance providers before providing credit assistance for credit contracts

115 Obligations of credit assistance providers before providing credit assistance for credit contracts

(1) A licensee must not provide credit assistance to a consumer on a day (the ***assistance day***) by:

(a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular credit contract with a particular credit provider; or

(b) suggesting that the consumer apply, or assisting the consumer to apply, for an increase to the credit limit of a particular credit contract with a particular credit provider;

unless the licensee has, within 90 days (or other period prescribed by the regulations) before the assistance day:

(c) made a preliminary assessment that:

(i) is in accordance with subsection 116(1); and

(ii) covers the period proposed for the entering of the contract or the increase of the credit limit; and

(d) made the inquiries and verification in accordance with section 117.

Civil penalty: 5,000 penalty units.

(2) A licensee must not provide credit assistance to a consumer on a day (the ***assistance day***) by suggesting that the consumer remain in a particular credit contract with a particular credit provider unless the licensee has, within 90 days (or other period prescribed by the regulations) before the assistance day:

(a) made a preliminary assessment that:

(i) is in accordance with subsection 116(2); and

(ii) covers a period in which the assistance day occurs; and

Authorised Version C2021C00117 registered 17/02/2021

(b) made the inquiries and verification in accordance with section 117.

Civil penalty: 5,000 penalty units.

116 Preliminary assessment of unsuitability of the credit contract

(1) For the purposes of paragraph 115(1)(c), the licensee must make a preliminary assessment that:
   (a) specifies the period the assessment covers; and
   (b) assesses whether the credit contract will be unsuitable for the consumer if the contract is entered or the credit limit is increased in that period.

(2) For the purposes of paragraph 115(2)(a), the licensee must make a preliminary assessment that:
   (a) specifies the period the assessment covers; and
   (b) assesses whether the credit contract will be unsuitable for the consumer if the consumer remains in the contract in that period.

Note: The licensee is not required to make a preliminary assessment under this section if the credit assistance is not provided.

117 Reasonable inquiries etc. about the consumer

(1) For the purposes of paragraph 115(1)(d) or 115(2)(b), the licensee must, before making the preliminary assessment:
   (a) make reasonable inquiries about the consumer's requirements and objectives in relation to the credit contract; and
   (b) make reasonable inquiries about the consumer's financial situation; and
   (c) take reasonable steps to verify the consumer's financial situation; and
   (d) make any inquiries prescribed by the regulations about any matter prescribed by the regulations; and
   (e) take any steps prescribed by the regulations to verify any matter prescribed by the regulations.

Authorised Version C2021C00117 registered 17/02/2021

Civil penalty: 5,000 penalty units.

(1A) If:

(a) the credit contract is a small amount credit contract; and

(b) the consumer holds (whether alone or jointly with another person) an account with an ADI into which income payable to the consumer is credited;

the licensee must, in verifying the consumer's financial situation for the purposes of paragraph 115(1)(d), obtain and consider account statements that cover at least the immediately preceding period of 90 days.

(1B) Subsection (1A) does not limit paragraph (1)(c) of this section.

(2) The regulations may prescribe particular inquiries or steps that must be made or taken, or do not need to be made or taken, for the purposes of paragraph (1)(a), (b) or (c).

118 When the credit contract must be assessed as unsuitable—entering contract or increasing the credit limit

Requirement to assess the contract as unsuitable

(1) For a preliminary assessment under subsection 116(1) about entering a credit contract or increasing a credit limit of a credit contract, the licensee must assess that the contract will be unsuitable for the consumer if the contract will be unsuitable for the consumer under subsection (2).

Civil penalty: 5,000 penalty units.

Note: Even if the contract will not be unsuitable for the consumer under subsection (2), the licensee may still assess that the contract will be unsuitable for other reasons.

Particular circumstances when the contract will be unsuitable

(2) The contract will be unsuitable for the consumer if, at the time of the preliminary assessment, it is likely that:

Authorised Version C2021C00117 registered 17/02/2021

(a) the consumer will be unable to comply with the consumer's financial obligations under the contract, or could only comply with substantial hardship, or

(b) the contract will not meet the consumer's requirements or objectives; or

(c) if the regulations prescribe circumstances in which a credit contract is unsuitable—those circumstances will apply to the contract;

if the contract is entered in the period proposed for it to be entered or the credit limit is increased in the period proposed for it to be increased.

(3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the contract by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

(3AA) For the purposes of paragraph (2)(a), a consumer is taken to be able to comply with the consumer's financial obligations under a contract only with substantial hardship if:

(a) the contract is a credit card contract; and

(b) the consumer could not comply with an obligation to repay an amount equal to the credit limit of the contract within the period determined by ASIC under section 160F.

(3A) If the contract is a small amount credit contract (the ***relevant contract***) and either of the following apply:

(a) at the time of the preliminary assessment:

(i) the consumer is a debtor under another small amount credit contract; and

(ii) the consumer is in default in payment of an amount under that other contract;

(b) in the 90-day period before the time of the preliminary assessment, the consumer has been a debtor under 2 or more other small amount credit contracts;

Authorised Version C2021C00117 registered 17/02/2021

then, for the purposes of paragraph (2)(a), it is presumed that the consumer could only comply with the consumer's financial obligations under the relevant contract with substantial hardship, unless the contrary is proved.

Information to be used to determine if contract will be unsuitable

(4) For the purposes of determining under subsection (2) whether the contract will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:

(a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 117(1)(d) or (e);

(b) at the time of the preliminary assessment:

(i) the licensee had reason to believe that the information was true; or

(ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 117.

119 When the credit contract must be assessed as unsuitable—remaining in credit contract

Requirement to assess the contract as unsuitable

(1) For a preliminary assessment under subsection 116(2) about remaining in a credit contract, the licensee must assess that the contract will be unsuitable for the consumer if the contract will be unsuitable for the consumer under subsection (2).

Civil penalty: 5,000 penalty units.

Note: Even if the contract will not be unsuitable for the consumer under subsection (2), the licensee may still assess that the contract will be unsuitable for other reasons.

Authorised Version C2021C00117 registered 17/02/2021

Particular circumstances when the contract will be unsuitable

(2) The contract will be unsuitable for the consumer if, at the time of the preliminary assessment, it is likely that:

(a) the consumer will be unable to comply with the consumer's financial obligations under the contract, or could only comply with substantial hardship, if the consumer remains in the contract in the period covered by the preliminary assessment; or

(b) the contract will not meet the consumer's requirements or objectives if the consumer remains in the contract in the period covered by the preliminary assessment; or

(c) if the regulations prescribe circumstances in which a credit contract is unsuitable—those circumstances will apply to the contract if the consumer remains in the contract in the period covered by the preliminary assessment.

(3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the contract by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

(3A) For the purposes of paragraph (2)(a), a consumer is taken to be able to comply with the consumer's financial obligations under a contract only with substantial hardship if:

(a) the contract is a credit card contract; and

(b) the consumer could not comply with an obligation to repay an amount equal to the credit limit of the contract within the period determined by ASIC under section 160F.

Information to be used to determine if contract will be unsuitable

(4) For the purposes of determining under subsection (2) whether the contract will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:

Authorised Version C2021C00117 registered 17/02/2021

(a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 117(1)(d) or (e);

(b) at the time of the preliminary assessment:

(i) the licensee had reason to believe that the information was true; or

(ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 117.

120 Providing the consumer with the preliminary assessment

Requirement to give assessment if requested

(1) If the consumer requests the licensee for a copy of the preliminary assessment within 7 years of the date of the credit assistance quote under section 114, the licensee must give the consumer a written copy of the assessment:

(a) if the request is made within 2 years of the quote—before the end of 7 business days after the day the licensee receives the request; and

(b) otherwise—before the end of 21 business days after the day the licensee receives the request.

Note: The licensee is not required to give the consumer a copy of the preliminary assessment if the licensee does not provide credit assistance to the consumer.

Civil penalty: 5,000 penalty units.

Manner of giving assessment

(2) The licensee must give the consumer the copy of the assessment in the manner (if any) prescribed by the regulations.

No payment for assessment

(3) The licensee must not request or demand payment of an amount for giving the consumer a copy of the preliminary assessment.

Authorised Version C2021C00117 registered 17/02/2021

Civil penalty: 5,000 penalty units.

Strict liability offence

(4) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1) or (3); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

(5) Subsection (4) is an offence of strict liability.

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

Authorised Version C2021C00117 registered 17/02/2021

Division 5—Fees, indirect remuneration etc. relating to credit contracts

121 Fees, indirect remuneration etc. relating to credit contracts

Requirement for disclosure

(1) A licensee must, at the same time as providing credit assistance to a consumer by:

(a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular credit contract with a particular credit provider; or

(b) suggesting that the consumer apply, or assisting the consumer to apply, for an increase to the credit limit of a particular credit contract with a particular credit provider; or

(c) suggesting that the consumer remain in a particular credit contract with a particular credit provider;

give the consumer a credit proposal disclosure document in accordance with subsection (2).

Civil penalty: 5,000 penalty units.

(2) The credit proposal disclosure document must contain the following:

(a) the total amount of any fees or charges that the consumer is liable to pay to the licensee in relation to the credit contract and the method used for working out that amount;

(b) a reasonable estimate of the total amount of any indirect remuneration that the licensee, or an employee, director or credit representative of the licensee, is likely to receive in relation to the credit contract and the method used for working out that amount;

(c) a reasonable estimate of the total amount of any fees or charges that the consumer is likely to be liable to pay to the credit provider in relation to applying for the credit contract;

Authorised Version C2021C00117 registered 17/02/2021

(d) a reasonable estimate of the total amount of any fees or charges that the consumer is likely to be liable to pay to any other person in relation to applying for the credit contract;

(e) if the credit is to be applied to pay any of the amounts in the above paragraphs—a reasonable estimate of the likely amount of credit that will be available to the consumer after payments under paragraphs (a), (c) and (d) are made.

(3) For the purposes of paragraph (2)(b), the regulations may prescribe:

(a) the method for working out amounts of indirect remuneration; and

(b) how amounts of indirect remuneration must be described.

Manner of giving credit proposal disclosure document

(4) The licensee must give the credit proposal disclosure document to the consumer in the manner (if any) prescribed by the regulations.

122 No profiting from fees etc. paid to third parties

Requirement not to profit

(1) If, in the course of providing credit assistance to a consumer in relation to a credit contract, a licensee pays an amount (the ***third party amount***) to another person on behalf of the consumer, the licensee must not request or demand payment of an amount, as reimbursement for the third party amount, that exceeds the third party amount.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:

(a) the person is subject to a requirement under subsection (1); and

(b) the person engages in conduct; and

Authorised Version C2021C00117 registered 17/02/2021

(c) the conduct contravenes the requirement.

Criminal penalty: 6 months imprisonment.

Authorised Version C2021C00117 registered 17/02/2021

Division 6—Prohibition on suggesting, or assisting with, unsuitable credit contracts

123 Prohibition on suggesting or assisting consumers to enter, or increase the credit limit under, unsuitable credit contracts

Prohibition on suggesting, or assisting with, unsuitable contracts

(1) A licensee must not provide credit assistance to a consumer by:

(a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular credit contract with a particular credit provider; or

(b) suggesting that the consumer apply, or assisting the consumer to apply, for an increase to the credit limit of a particular credit contract with a particular credit provider;

if the contract will be unsuitable for the consumer under subsection (2).

Civil penalty: 5,000 penalty units.

When the contract will be unsuitable

(2) The contract will be unsuitable for the consumer if, at the time the licensee provides the credit assistance, it is likely that:

(a) the consumer will be unable to comply with the consumer's financial obligations under the contract, or could only comply with substantial hardship; or

(b) the contract will not meet the consumer's requirements or objectives; or

(c) if the regulations prescribe circumstances in which a credit contract is unsuitable—those circumstances will apply to the contract;

if the contract is entered in the period proposed for it to be entered or the credit limit is increased in the period proposed for it to be increased.

Authorised Version C2021C00117 registered 17/02/2021

(3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the contract by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

(3AA) For the purposes of paragraph (2)(a), a consumer is taken to be able to comply with the consumer's financial obligations under a contract only with substantial hardship if:

(a) the contract is a credit card contract; and

(b) the consumer could not comply with an obligation to repay an amount equal to the credit limit of the contract within the period determined by ASIC under section 160F.

(3A) If the contract is a small amount credit contract (the ***relevant contract***) and either of the following apply:

(a) at the time the licensee provides the credit assistance:

(i) the consumer is a debtor under another small amount credit contract; and

(ii) the consumer is in default in payment of an amount under that other contract;

(b) in the 90-day period before the time the licensee provides the credit assistance, the consumer has been a debtor under 2 or more other small amount credit contracts;

then, for the purposes of paragraph (2)(a), it is presumed that the consumer could only comply with the consumer's financial obligations under the relevant contract with substantial hardship, unless the contrary is proved.

Information to be used to determine if contract will be unsuitable

(4) For the purposes of determining under subsection (2) whether the contract will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:

(a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 117(1)(d) or (e);

(b) at the time the licensee provides the credit assistance:

Authorised Version C2021C00117 registered 17/02/2021

(i) the licensee had reason to believe that the information was true; or

(ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 117.

Credit contract not unsuitable under regulations

(5) The regulations may prescribe particular situations in which a credit contract is taken not to be unsuitable for a consumer, despite subsection (2).

Offence

(6) A person commits an offence if:

(a) the person is subject to a requirement under subsection (1); and

(b) the person engages in conduct; and

(c) the conduct contravenes the requirement.

Criminal penalty: 2 years imprisonment.

124 Prohibition on suggesting to consumers to remain in unsuitable credit contracts

Prohibition on suggesting to remain in unsuitable contracts

(1) A licensee must not provide credit assistance to a consumer by suggesting that the consumer remain in a particular credit contract with a particular credit provider if the contract is unsuitable for the consumer under subsection (2).

Civil penalty: 5,000 penalty units.

When the contract is unsuitable

(2) The credit contract is unsuitable for the consumer if, at that time the licensee provides the credit assistance:

Authorised Version C2021C00117 registered 17/02/2021

(a) the consumer is, or is likely to be, unable to comply with the consumer's financial obligations under the contract, or only able to comply with substantial hardship; or

(b) the contract does not meet the consumer's requirements or objectives; or

(c) if the regulations prescribe circumstances in which a credit contract is unsuitable—those circumstances apply to the contract.

(3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the contract by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

(3A) For the purposes of paragraph (2)(a), a consumer is taken to be able to comply with the consumer's financial obligations under a contract only with substantial hardship if:

(a) the contract is a credit card contract; and

(b) the consumer could not comply with an obligation to repay an amount equal to the credit limit of the contract within the period determined by ASIC under section 160F.

Information to be used to determine if contract is unsuitable

(4) For the purposes of determining under subsection (2) whether the contract is unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:

(a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 117(1)(d) or (e);

(b) at the time the licensee provides the credit assistance:

(i) the licensee had reason to believe that the information was true; or

(ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 117.

Authorised Version C2021C00117 registered 17/02/2021

Credit contract not unsuitable under regulations

(5) The regulations may prescribe particular situations in which a credit contract is taken not to be unsuitable for a consumer, despite subsection (2).

Offence

(6) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 2 years imprisonment.

Defence

(7) For the purposes of subsections (1) and (6), it is a defence if:
  (a) the licensee suggested that the consumer remain in the credit contract because, after making reasonable inquiries, the licensee reasonably believed that there was no other credit contract that was not unsuitable for the consumer; and
  (b) the licensee informed the consumer that there is a procedure under sections 72 and 94 of the National Credit Code for consumers in hardship.

Note: For the purposes of subsection (6), a defendant bears an evidential burden in relation to the matter in subsection (7) (see subsection 13.3(3) of the *Criminal Code*).

(8) The regulations may prescribe particular inquiries that must be made, or do not need to be made, for the purposes of paragraph (7)(a).

Authorised Version C2021C00117 registered 17/02/2021

Division 7—Special rules for short-term and small amount credit contracts

124A Prohibition on providing credit assistance in relation to short-term credit contracts

Prohibition

(1) A licensee must not provide credit assistance to a consumer by:
  (a) suggesting that the consumer apply, or assisting the consumer to apply, for a short-term credit contract; or
  (b) suggesting that the consumer apply, or assisting the consumer to apply, for an increase to the credit limit of a particular short-term credit contract with a particular credit provider.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

124B Licensee who makes representations about credit assistance in relation to small amount credit contracts must display information etc.

Requirement

(1) If a licensee represents that the licensee provides, or is able to provide, credit assistance to consumers in relation to small amount credit contracts:

Authorised Version C2021C00117 registered 17/02/2021

(a) the licensee must display information in accordance with the regulations at a place prescribed by the regulations; and
(b) the licensee must ensure that any website of the licensee complies with the requirements prescribed by the regulations.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:
(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Part 3-2—Licensees that are credit providers under credit contracts: general rules

Division 1—Introduction

125 Guide to this Part

This Part has rules that apply to licensees that are credit providers. These rules are aimed at better informing consumers and preventing them from being in unsuitable credit contracts.

Division 2 requires a licensee to give its credit guide to a consumer. The credit guide has information about the licensee and some of the licensee's obligations under this Act.

Division 3 requires a licensee, before doing particular things (such as entering a credit contract), to make an assessment as to whether the contract will be unsuitable. To do this, the licensee must make inquiries and verifications about the consumer's requirements, objectives and financial situation. The licensee must give the consumer a copy of the assessment if requested.

Division 4 prohibits a licensee from entering or increasing the credit limit of a credit contract that is unsuitable for a consumer.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Credit guide of credit providers

126 Credit guide of credit providers

Requirement to give credit guide

(1) A licensee must, as soon as practicable after it becomes apparent to the licensee that it is likely to enter a credit contract with a consumer who will be the debtor under the contract, give the consumer the licensee's credit guide in accordance with subsection (2).

Civil penalty: 5,000 penalty units.

(2) The licensee's credit guide must:
- (a) be in writing; and
- (b) be in the form (if any) prescribed by the regulations; and
- (c) specify the licensee's name and contact details; and
- (d) specify the licensee's Australian credit licence number; and
- (e) give information about the licensee's procedure for resolving disputes with a consumer, including contact details for a consumer to access:
  - (i) the licensee's internal dispute resolution procedure; and
  - (ii) the AFCA scheme; and
- (f) give information about the licensee's obligations under sections 132 and 133; and
- (g) comply with any other requirements prescribed by the regulations.

(3) The regulations may prescribe information that need not be included in the credit guide, despite subsection (2).

Manner of giving credit guide

(4) The licensee must give the consumer the licensee's credit guide in the manner (if any) prescribed by the regulations.

Authorised Version C2021C00117 registered 17/02/2021

Strict liability offence

(5) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

(6) Subsection (5) is an offence of strict liability.

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

127 Credit guide of credit providers who are assignees

Requirement to give credit guide

(1) A licensee must, as soon as practicable after it has been assigned any rights or obligations of a credit provider under a credit contract, give the debtor under the contract the licensee's credit guide in accordance with subsection (2).

Civil penalty: 5,000 penalty units.

(2) The licensee's credit guide must:
  (a) be in writing; and
  (b) be in the form (if any) prescribed by the regulations; and
  (c) specify the licensee's name and contact details; and
  (d) specify the licensee's Australian credit licence number; and
  (e) give information about the licensee's procedure for resolving disputes with a consumer, including contact details for a consumer to access:
    (i) the licensee's internal dispute resolution procedure; and
    (ii) the AFCA scheme; and
  (f) comply with any other requirements prescribed by the regulations.

Authorised Version C2021C00117 registered 17/02/2021

(3) The regulations may prescribe information that need not be included in the credit guide, despite subsection (2).

Manner of giving credit guide

(4) The licensee must give the consumer the licensee's credit guide in the manner (if any) prescribed by the regulations.

Strict liability offence

(5) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

(6) Subsection (5) is an offence of strict liability.

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

Authorised Version C2021C00117 registered 17/02/2021

Division 3—Obligation to assess unsuitability

128 Obligation to assess unsuitability

A licensee must not:

(a) enter a credit contract with a consumer who will be the debtor under the contract; or

(aa) make an unconditional representation to a consumer that the licensee considers that the consumer is eligible to enter a credit contract with the licensee; or

(b) increase the credit limit of a credit contract with a consumer who is the debtor under the contract; or

(ba) make an unconditional representation to a consumer that the licensee considers that the credit limit of credit contract between the consumer and the licensee will be able to be increased;

on a day (the ***credit day***) unless the licensee has, within 90 days (or other period prescribed by the regulations) before the credit day:

(c) made an assessment that:

(i) is in accordance with section 129; and

(ii) covers the period in which the credit day occurs; and

(d) made the inquiries and verification in accordance with section 130.

Civil penalty: 5,000 penalty units.

129 Assessment of unsuitability of the credit contract

For the purposes of paragraph 128(c), the licensee must make an assessment that:

(a) specifies the period the assessment covers; and

(b) assesses whether the credit contract will be unsuitable for the consumer if the contract is entered or the credit limit is increased in that period.

Authorised Version C2021C00117 registered 17/02/2021

Note: The licensee is not required to make the assessment under this section if the contract is not entered or the credit limit is not increased.

130 Reasonable inquiries etc. about the consumer

Requirement to make inquiries and take steps to verify

(1) For the purposes of paragraph 128(d), the licensee must, before making the assessment:

(a) make reasonable inquiries about the consumer's requirements and objectives in relation to the credit contract; and

(b) make reasonable inquiries about the consumer's financial situation; and

(c) take reasonable steps to verify the consumer's financial situation; and

(d) make any inquiries prescribed by the regulations about any matter prescribed by the regulations; and

(e) take any steps prescribed by the regulations to verify any matter prescribed by the regulations.

Civil penalty: 5,000 penalty units.

(1A) If:

(a) the credit contract is a small amount credit contract; and

(b) the consumer holds (whether alone or jointly with another person) an account with an ADI into which income payable to the consumer is credited;

the licensee must, in verifying the consumer's financial situation for the purposes of paragraph 128(d), obtain and consider account statements that cover at least the immediately preceding period of 90 days.

(1B) Subsection (1A) does not limit paragraph (1)(c) of this section.

(2) The regulations may prescribe particular inquiries or steps that must be made or taken, or do not need to be made or taken, for the purposes of paragraph (1)(a), (b) or (c).

Authorised Version C2021C00117 registered 17/02/2021

131 When credit contract must be assessed as unsuitable

Requirement to assess the contract as unsuitable

(1) The licensee must assess that the credit contract will be unsuitable for the consumer if the contract will be unsuitable for the consumer under subsection (2).

Civil penalty: 5,000 penalty units.

Note: Even if the contract will not be unsuitable for the consumer under subsection (2), the licensee may still assess that the contract will be unsuitable for other reasons.

Particular circumstances when the contract will be unsuitable

(2) The contract will be unsuitable for the consumer if, at the time of the assessment, it is likely that:

(a) the consumer will be unable to comply with the consumer's financial obligations under the contract, or could only comply with substantial hardship, if the contract is entered or the credit limit is increased in the period covered by the assessment; or

(b) the contract will not meet the consumer's requirements or objectives if the contract is entered or the credit limit is increased in the period covered by the assessment; or

(c) if the regulations prescribe circumstances in which a credit contract is unsuitable—those circumstances will apply to the contract if the contract is entered or the credit limit is increased in the period covered by the assessment.

(3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the contract by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

(3AA) For the purposes of paragraph (2)(a), a consumer is taken to be able to comply with the consumer's financial obligations under a contract only with substantial hardship if:

Authorised Version C2021C00117 registered 17/02/2021

(a) the contract is a credit card contract; and

(b) the consumer could not comply with an obligation to repay an amount equal to the credit limit of the contract within the period determined by ASIC under section 160F.

(3A) If the contract is a small amount credit contract (the ***relevant contract***) and either of the following apply:

(a) at the time of the assessment:

(i) the consumer is a debtor under another small amount credit contract; and

(ii) the consumer is in default in payment of an amount under that other contract;

(b) in the 90-day period before the time of the assessment, the consumer has been a debtor under 2 or more other small amount credit contracts;

then, for the purposes of paragraph (2)(a), it is presumed that the consumer could only comply with the consumer's financial obligations under the relevant contract with substantial hardship, unless the contrary is proved.

Information to be used to determine if contract will be unsuitable

(4) For the purposes of determining under subsection (2) whether the contract will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:

(a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 130(1)(d) or (e);

(b) at the time of the assessment:

(i) the licensee had reason to believe that the information was true; or

(ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 130.

Authorised Version C2021C00117 registered 17/02/2021

132 Giving the consumer the assessment

Requirement to give assessment if requested

(1) If, before entering the credit contract or increasing the credit limit, the consumer requests the licensee for a copy of the assessment, the licensee must give the consumer a written copy of the assessment before entering the contract or increasing the credit limit.

Note: The licensee is not required to give the consumer a copy of the assessment if the contract is not entered or the credit limit is not increased.

Civil penalty: 5,000 penalty units.

(2) If, during the period that:

(a) starts on the day (the ***credit day***) the credit contract is entered or the credit limit is increased; and

(b) ends 7 years after that day;

the consumer requests the licensee for a copy of the assessment, the licensee must give the consumer a written copy of the assessment:

(c) if the request is made within 2 years of the credit day—before the end of 7 business days after the day the licensee receives the request; and

(d) otherwise—before the end of 21 business days after the day the licensee receives the request.

Civil penalty: 5,000 penalty units.

Manner of giving assessment

(3) The licensee must give the consumer the copy of the assessment in the manner (if any) prescribed by the regulations.

No payment for assessment

(4) The licensee must not request or demand payment of an amount for giving the consumer a copy of the assessment.

Authorised Version C2021C00117 registered 17/02/2021

Civil penalty: 5,000 penalty units.

Strict liability offence

(5) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1), (2) or (4); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

(6) Subsection (5) is an offence of strict liability.

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

Authorised Version C2021C00117 registered 17/02/2021

Division 4—Prohibition on entering, or increasing the credit limit of, unsuitable credit contracts

133 Prohibition on entering, or increasing the credit limit of, unsuitable credit contracts

Prohibition on entering etc. unsuitable contracts

(1) A licensee must not:

(a) enter a credit contract with a consumer who will be the debtor under the contract; or

(b) increase the credit limit of a credit contract with a consumer who is the debtor under the contract;

if the contract is unsuitable for the consumer under subsection (2).

Civil penalty: 5,000 penalty units.

When the contract is unsuitable

(2) The contract is unsuitable for the consumer if, at the time it is entered or the credit limit is increased:

(a) it is likely that the consumer will be unable to comply with the consumer's financial obligations under the contract, or could only comply with substantial hardship; or

(b) the contract does not meet the consumer's requirements or objectives; or

(c) if the regulations prescribe circumstances in which a credit contract is unsuitable—those circumstances apply to the contract.

(3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the contract by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

Authorised Version C2021C00117 registered 17/02/2021

(3AA) For the purposes of paragraph (2)(a), a consumer is taken to be able to comply with the consumer's financial obligations under a contract only with substantial hardship if:

(a) the contract is a credit card contract; and

(b) the consumer could not comply with an obligation to repay an amount equal to the credit limit of the contract within the period determined by ASIC under section 160F.

(3A) If the contract is a small amount credit contract (the ***relevant contract***) and either of the following apply:

(a) at the time it is entered or the credit limit is increased:

(i) the consumer is a debtor under another small amount credit contract; and

(ii) the consumer is in default in payment of an amount under that other contract;

(b) in the 90-day period before the time it is entered or the credit limit is increased, the consumer has been a debtor under 2 or more other small amount credit contracts;

then, for the purposes of paragraph (2)(a), it is presumed that the consumer could only comply with the consumer's financial obligations under the relevant contract with substantial hardship, unless the contrary is proved.

Information to be used to determine if contract will be unsuitable

(4) For the purposes of determining under subsection (2) whether the contract will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:

(a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 130(1)(d) or (e);

(b) at the time of the contract is entered or the credit limit is increased, the information:

(i) the licensee had reason to believe that the information was true; or

Authorised Version C2021C00117 registered 17/02/2021

(ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 130.

Credit contract not unsuitable under regulations

(5) The regulations may prescribe particular situations in which a credit contract is taken not to be unsuitable for a consumer, despite subsection (2).

Offence

(6) A person commits an offence if:
(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 2 years imprisonment.

Note: Sections 178 and 179 provide for remedies for anyone who suffers, or is likely to suffer, loss or damage because of a breach of this section. For example, if a consumer makes an unsuitable credit contract with a licensee, rather than making a not unsuitable credit contract for a reverse mortgage, a person who suffered, or is likely to suffer, loss as a result may be able to get court orders under section 178 or 179 to put the person in a position like the one they would have been in had the consumer entered into the contract for the reverse mortgage.

Authorised Version C2021C00117 registered 17/02/2021

Part 3-2A—Licensees that are credit providers under credit contracts: additional rules relating to standard home loans

Division 1—Introduction

133A Guide to this Part

This Part has rules that apply to licensees that are credit providers under standard home loans. It applies in addition to the general rules in Part 3-2.

Division 2 imposes requirements aimed at ensuring a consumer can obtain a Key Facts Sheet for a standard home loan.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Key Facts Sheets for standard home loans

133AA What is a *standard home loan*?

(1) A ***standard home loan*** of a licensee is a standard form of credit contract under which the licensee provides credit:
  (a) to purchase residential property; or
  (b) to refinance credit that has been provided wholly or predominantly to purchase residential property.

(2) The regulations may make provisions that apply to determining, for the purpose of subsection (1), whether a credit contract is a standard form of credit contract.

133AB What is a *Key Facts Sheet* for a standard home loan?

(1) A ***Key Facts Sheet*** for a standard home loan is a document:
  (a) that contains the information relating to the standard home loan that is required by the regulations; and
  (b) that complies with any other requirements prescribed by the regulations.

(2) Without limiting paragraph (1)(a), regulations made for the purpose of that paragraph:
  (a) may require a Key Facts Sheet for a standard home loan to contain information:
    (i) that is specific to the consumer by whom the Key Facts Sheet is to be generated under section 133AC or to whom it is to be provided under section 133AD; and
    (ii) that relates to the cost or implications of the loan for the consumer; and
  (b) may require information contained in a Key Facts Sheet for a standard home loan to be based on either or both of the following:
    (i) information provided by the consumer;
    (ii) particular assumptions.

Authorised Version C2021C00117 registered 17/02/2021

133AC Credit provider's website to provide capacity to generate Key Facts Sheet

When this section applies

(1) This section applies if a licensee has a website that can be used by a consumer to apply for, or make an inquiry about, one or more standard home loans of the licensee.

Requirement

(2) The licensee must ensure that the website satisfies all of the following paragraphs:

(a) the website tells the consumer that the consumer may use the website to generate a Key Facts Sheet for the standard home loan, or for each of the standard home loans;

(b) the website:

(i) tells the consumer what information the consumer will need to enter in order to generate the Key Facts Sheet or Sheets; and

(ii) provides the consumer with instructions on how to generate the Key Facts Sheet or Sheets;

(c) if the consumer enters the information and follows those instructions, the consumer can use the website to generate the Key Facts Sheet or Sheets, containing up-to-date information, in a form that can be printed;

(d) the website complies with any other requirements prescribed by the regulations.

Civil penalty: 5,000 penalty units.

Offence

(3) A person commits an offence if:

(a) the person is subject to a requirement under subsection (2); and

(b) the person engages in conduct; and

Authorised Version C2021C00117 registered 17/02/2021

(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

133AD Credit provider to provide Key Facts Sheet in other situations

When this section applies

(1) This section applies if:
  (a) either:
    (i) a consumer makes a request to a licensee (otherwise than by using a website of the licensee) to be provided with a Key Facts Sheet for one or more standard home loans of the licensee that are specified in the request; or
    (ii) the regulations require a consumer, in circumstances prescribed by the regulations, to be provided with a Key Facts Sheet for one or more standard home loans of a licensee; and
  (b) the consumer has given the licensee the consumer's name, and the contact details required by the regulations.

Requirement

(2) The licensee must, in accordance with any requirements prescribed by the regulations:
  (a) provide the consumer with a Key Facts Sheet containing up-to-date information for the standard home loan, or for each of the standard home loans; and
  (b) provide the consumer with any other information relating to other standard home loans of the licensee that is required by the regulations.

Note: Subsection 133AE(4) and section 133AF provide defences to liability under this subsection.

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Offence

(3) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (2); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

Note: Subsection 133AE(4) and section 133AF provide defences to liability under this subsection.

133AE What if more information is needed from the consumer?

When this section applies

(1) This section applies if:
  (a) a licensee is required by section 133AD to provide a consumer with a Key Facts Sheet for a standard home loan; but
  (b) the licensee does not have all the information from the consumer that the licensee needs in order to be able to prepare the Key Facts Sheet.

Requirement

(2) The licensee must, in accordance with any requirements prescribed by the regulations, tell the consumer what information the licensee needs in order to be able to prepare the Key Facts Sheet.

Civil penalty: 5,000 penalty units.

Offence

(3) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (2); and
  (b) the person engages in conduct; and

Authorised Version C2021C00117 registered 17/02/2021

(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

Defence for subsections 133AD(2) and (3)

(4) For the purposes of applying subsections 133AD(2) and (3) to a failure by a licensee to provide a Key Facts Sheet to a consumer, it is a defence if:

(a) the licensee has, in accordance with subsection (2) of this section, told the consumer what information the licensee needs in order to be able to prepare the Key Facts Sheet; and

(b) the consumer has not provided that information to the licensee.

Note: For the purpose of subsection 133AD(3), a defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

133AF Defences to obligation to provide a Key Facts Sheet

(1) For the purpose of applying subsection 133AD(2) or (3) to a failure by a licensee to provide a consumer with a Key Facts Sheet (the ***new Key Facts Sheet***) for a standard home loan, it is a defence if:

(a) the following conditions are satisfied:

(i) the licensee has previously provided the consumer with a Key Facts Sheet (the ***previous Key Facts Sheet***) for the standard home loan;

(ii) the new Key Facts Sheet would be the same (except for its date) as the previous Key Facts Sheet; or

(b) the licensee reasonably believes that:

(i) another person has previously provided the consumer with a Key Facts Sheet (the ***previous Key Facts Sheet***) for the standard home loan; and

(ii) the new Key Facts Sheet would be the same (except for its date) as the previous Key Facts Sheet; or

(c) the licensee reasonably believes that the consumer would not be eligible for the standard home loan; or

Authorised Version C2021C00117 registered 17/02/2021

(d) under regulations made for the purpose of subsection (2), the licensee is not required to provide the consumer with the new Key Facts Sheet.

Note: For the purpose of subsection 133AD(3), a defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3) of the *Criminal Code*).

(2) The regulations may prescribe circumstances in which a licensee is not required to provide a consumer with a Key Facts Sheet for a standard home loan.

Authorised Version C2021C00117 registered 17/02/2021

Part 3-2B—Licensees that are credit providers under credit contracts: additional rules relating to credit card contracts

Division 1—Introduction

133B Guide to this Part

This Part has rules that apply to licensees that are credit providers under credit card contracts. It applies in addition to the general rules in Part 3-2.

Division 2 defines key concepts used in this Part (including credit card contract and credit card).

Division 3 imposes requirements aimed at ensuring a consumer obtains a Key Facts Sheet before entering into a credit card contract.

Division 4 imposes restrictions on a licensee making offers etc. to increase the credit limit of a credit card contract, and imposes requirements aimed at ensuring the consumer can reduce the credit limit of a credit card contract.

Division 5 provides for consumers to be notified if a credit card is used in excess of its credit limit, and restricts the charging of fees etc. for use of a credit card in excess of its credit limit.

Division 6 imposes requirements relating to the order of application of payments made under credit card contracts. Generally, a payment must be applied against higher interest rate debts first.

Division 7 imposes requirements relating to application of interest charges under credit card contracts.

Authorised Version C2021C00117 registered 17/02/2021

Division 8 imposes requirements aimed at ensuring the consumer can terminate a credit card contract.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Credit card contracts and related concepts

133BA Meaning of *credit card contract* etc.

*Meaning of **credit card contract***

(1) A ***credit card contract*** is a continuing credit contract under which credit is ordinarily obtained only by the use of a credit card.

*Meaning of **credit card***

(2) A ***credit card*** is:
  (a) a card of a kind commonly known as a credit card; or
  (b) a card 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; or
  (c) anything else that may be used as a card referred to in paragraph (a) or (b).

*Meaning of **linked** to a credit card contract*

(3) A credit card is ***linked*** to a credit card contract if:
  (a) the credit card is issued under or in relation to the contract; and
  (b) the credit card can be used to obtain credit under the contract as referred to in subsection (1).

*Meaning of **use** of a credit card*

(4) A reference to the ***use*** of a credit card to obtain cash, goods or services includes a reference to the use or provision of the number of the credit card to obtain cash, goods or services.

Articles that can be used as credit cards and in other ways

(5) If a credit card can also be used in other ways (for example, as a debit card, or to access other accounts):

Authorised Version C2021C00117 registered 17/02/2021

(a) the article is a credit card (despite the fact that it can also be used in those other ways); but

(b) the provisions of this Act that are expressed to apply in relation to credit cards do not apply to the article in so far as it can be used in those other ways.

Authorised Version C2021C00117 registered 17/02/2021

Division 3—Key Facts Sheets for credit card contract

133BB What is a *Key Facts Sheet* for a credit card contract?

A ***Key Facts Sheet*** for a credit card contract is a document:

(a) that contains the information relating to the contract that is required by the regulations; and

(b) that complies with any other requirements prescribed by the regulations.

133BC Application form for credit card contract to include up-to-date Key Facts Sheet

Requirement

(1) If a licensee makes available to consumers an application form that can be used to apply for a credit card contract under which the licensee would be the credit provider, the licensee must ensure that the application form includes a Key Facts Sheet for the contract that contains up-to-date information.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:

(a) the person is subject to a requirement under subsection (1); and

(b) the person engages in conduct; and

(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Circumstances in which application form may, for limited period, include out-of-date Key Facts Sheet

(3) The regulations may prescribe circumstances in which a licensee may, for a period prescribed by the regulations, make available an application form that includes a Key Facts Sheet containing information that has ceased to be up-to-date.

Note: If a consumer applies using such an application form, the consumer must be given the up-to-date information: see paragraph 133BD(1)(b).

(4) If a licensee makes available an application form that includes a Key Facts Sheet containing information that has ceased to be up-to-date, it is a defence for the purposes of subsections (1) and (2) if the application form was made available as permitted by regulations made for the purpose of subsection (3).

Note: For the purpose of subsection (2), a defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

133BD Credit provider not to enter into credit card contract unless Key Facts Sheet has been provided etc.

Requirement

(1) If a consumer applies to a licensee for a credit card contract under which the licensee would be the credit provider, the licensee must not enter into, or offer to enter into, the contract unless:

(a) the application is made using an application form that includes a Key Facts Sheet for the contract that contains up-to-date information; or

(b) the following conditions are satisfied:

(i) the application is made using an application form that includes a Key Facts Sheet for the contract that contains information that has ceased to be up-to-date;

(ii) the consumer has been provided with the up-to-date information in accordance with any requirements prescribed by the regulations; or

Authorised Version C2021C00117 registered 17/02/2021

(c) the consumer has otherwise been provided with a Key Facts Sheet for the contract that contains up-to-date information in accordance with any requirements prescribed by the regulations.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:
(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 100 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Division 4—Offers etc. to increase, and entitlement to reduce, credit limit of credit card contract

133BE Credit provider not to offer etc. to increase credit limit of credit card contract

Requirement

(1) A licensee who is the credit provider under a credit card contract must not make a credit limit increase invitation in relation to the contract.

Civil penalty: 5,000 penalty units.

Note: For other provisions that must be complied with in relation to increasing credit limits, see:
(a) Divisions 3 and 4 of Part 3-2; and
(b) subsection 67(4) of the National Credit Code.

Offence

(2) A person commits an offence if:
(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 100 penalty units.

Strict liability offence

(3) A person commits an offence if:
(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Authorised Version C2021C00117 registered 17/02/2021

Criminal penalty: 20 penalty units.

(4) Subsection (3) is an offence of strict liability.

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

Meaning of ***credit limit increase invitation***

(5) A licensee makes a ***credit limit increase invitation***, in relation to a credit card contract, if:

(a) the licensee gives any form of communication that relates to the contract to the consumer who is the debtor under the contract; and

(b) one or more of the following conditions is satisfied in relation to the communication:

(i) the communication offers to increase the credit limit of the contract;

(ii) the communication invites the consumer to apply for an increase of the credit limit of the contract;

(iii) the licensee gave the communication to the consumer for the purpose (or for purposes including the purpose) of encouraging the consumer to consider applying for an increase of the credit limit of the contract.

(6) The regulations may make provisions that apply to determining whether a communication is covered by the definition in subsection (5).

133BF Credit provider not to enter into credit card contract unless it allows credit limit to be reduced

Requirement

(1) A licensee must not enter into, or offer to enter into, a credit card contract under which the licensee would be the credit provider, if the consumer who would be the debtor under the contract would not have a credit limit reduction entitlement under the contract.

Authorised Version C2021C00117 registered 17/02/2021

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

*Meaning of **credit limit reduction entitlement***

(3) A consumer who is the debtor under a credit card contract has a ***credit limit reduction entitlement*** under the contract if:
  (a) for a contract that does not provide for a minimum credit limit—the consumer is entitled under the contract to reduce the credit limit of the contract to any amount (including nil); or
  (b) for a contract that provides for a minimum credit limit—the consumer is entitled under the contract to reduce the credit limit of the contract to any amount that equals, or exceeds, the minimum credit limit.

133BFA Credit provider to provide online capacity to request reduction of credit limit

When this section applies

(1) This section applies if a consumer who is the debtor under a credit card contract has a credit limit reduction entitlement under the contract on a day (the ***online reduction day***).

Authorised Version C2021C00117 registered 17/02/2021

Requirement

(2) The licensee who is the credit provider under the credit card contract must establish and maintain a website that satisfies all of the following paragraphs:

(a) the website tells the consumer that the consumer may use the website to request a reduction in the consumer's credit limit;

(b) the website:

(i) tells the consumer what information the consumer will need to enter in order to request a reduction in the consumer's credit limit; and

(ii) provides the consumer with instructions on how to request a reduction in the consumer's credit limit;

(c) if the consumer enters the information and follows those instructions, the consumer can use the website to request a reduction in the consumer's credit limit;

(d) the website is available on the online reduction day.

Civil penalty: 5,000 penalty units.

Defence

(3) For the purposes of subsection (2), it is a defence if the website is reasonably unavailable on the online reduction day.

133BFB Credit provider not to suggest the consumer not reduce the credit limit

When this section applies

(1) This section applies if:

(a) a consumer who is the debtor under a credit card contract has a credit limit reduction entitlement under the contract; and

(b) the consumer has requested to exercise the entitlement by reducing the credit limit of the contract.

Authorised Version C2021C00117 registered 17/02/2021

Requirement

(2) The licensee who is the credit provider under the credit card contract must not do any of the following:

(a) suggest that the consumer apply for an increase to the credit limit of the contract;

(b) suggest that the consumer not reduce the credit limit of the contract;

(c) if the consumer's request is to reduce the credit limit of the contract by a specified amount—suggest that the consumer instead reduce the credit limit by a smaller amount.

Civil penalty: 5,000 penalty units.

Offence

(3) A person commits an offence if:

(a) the person is subject to a requirement under subsection (2); and

(b) the person engages in conduct; and

(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

133BFC Credit provider to give effect to request to reduce credit limit

When this section applies

(1) This section applies if:

(a) a consumer who is the debtor under a credit card contract has a credit limit reduction entitlement under the contract; and

(b) the consumer has requested to exercise the entitlement by reducing the credit limit of the contract.

Authorised Version C2021C00117 registered 17/02/2021

Requirement

(2) The licensee who is the credit provider under the credit card contract must take reasonable steps to ensure that the request is given effect to as soon as practicable.

Civil penalty: 5,000 penalty units.

Offence

(3) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (2); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Division 5—Use of credit card in excess of credit limit

133BH Credit provider to notify consumer of use of credit card in excess of credit limit

Regulations may require licensee to notify consumer of use of credit card in excess of credit limit

(1) The regulations may require a licensee who is the credit provider under a credit card contract to notify the consumer who is the debtor under the contract if the licensee becomes aware that the debtor has used a credit card that is linked to the contract to obtain cash, goods or services in excess of the credit limit for the contract.

(2) Without limiting subsection (1), regulations made for the purpose of that subsection may deal with:
  (a) how and when the licensee must notify the consumer; and
  (b) the matters that must be included in the notification.

Requirement to comply with the regulations

(3) A licensee must comply with regulations made for the purpose of subsection (1).

Civil penalty: 5,000 penalty units.

Offence

(4) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (3); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Section 133BI

133BI Credit provider not to impose fees etc. because credit card used in excess of credit limit

(1) If a credit card is used to obtain cash, goods or services in excess of the credit limit for the credit card contract, the licensee who is the credit provider under the contract must not, because the credit limit was exceeded, impose any liability to pay fees or charges, or a higher rate of interest, on the consumer who is the debtor under the contract unless:

(a) the licensee has, in accordance with this section, obtained express consent from the consumer covering the imposition of the fees or charges, or the higher rate of interest; and

(b) the consent has not been withdrawn; and

(c) any other requirements prescribed by the regulations are complied with.

Note 1: The consent must be express, and cannot be implied from the actions of the consumer or from other circumstances.

Note 2: The licensee must keep records of consents and withdrawals: see section 133BJ.

(2) The consumer may consent to the licensee imposing a liability to pay fees or charges, or a higher rate of interest, if the credit card is used to obtain cash, goods or services in excess of the credit limit.

(3) Before obtaining the consumer's consent, the licensee must, in accordance with the regulations, inform the consumer of any matters prescribed by the regulations.

(4) The consent may be obtained before or after the credit card contract is entered into, but it does not cover any fees, charges or interest imposed before the consent is obtained.

(5) The consumer may withdraw the consent at any time.

(6) The regulations may prescribe requirements to be complied with in relation to giving consent under subsection (2), or withdrawing consent under subsection (5).

Authorised Version C2021C00117 registered 17/02/2021

(7) For the purpose of subsection 23(1) of the National Credit Code (and the other provisions of the Code that refer to, or apply in relation to, that subsection):

(a) a liability to pay a fee or charge that is imposed contrary to subsection (1) of this section is taken to be a credit fee or charge that is prohibited by the Code; and

(b) a liability to pay interest that is imposed contrary to subsection (1) of this section is taken to be an interest charge under the credit card contract exceeding the amount that may be charged consistently with the Code.

Note: For the civil and criminal consequences of contravening subsection 23(1) of the National Credit Code, see subsections 23(2) to (4), section 24, and Part 6, of the Code.

133BJ Records of consents and withdrawals to be kept

Requirement

(1) A licensee must, in accordance with the requirements prescribed by the regulations, keep a record of:

(a) consents the licensee obtains under section 133BI; and

(b) withdrawals of such consents.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:

(a) the person is subject to a requirement under subsection (1); and

(b) the person engages in conduct; and

(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Division 6—Order of application of payments made under credit card contracts

133BO Credit provider to apply payments in accordance with this Division

Requirement

(1) If a payment (the ***relevant payment***) is made under a credit card contract:
  (a) by or on behalf of the consumer who is the debtor under the contract; and
  (b) to the licensee who is the credit provider under the contract;
the licensee must apply the payment in accordance with this Division (despite any provision to the contrary in the contract, any other contract or instrument or any other law).

Civil penalty: 5,000 penalty units.

(2) To avoid doubt, an amount:
  (a) that is credited to the consumer's account by the licensee; and
  (b) that is, or is in the nature of:
    (i) a total or partial refund in relation to a transaction entered into using the credit card; or
    (ii) a total or partial reversal of such a transaction;
is not a payment to which subsection (1) applies.

Offence

(3) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Authorised Version C2021C00117 registered 17/02/2021

Criminal penalty: 100 penalty units.

Strict liability offence

(4) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 20 penalty units.

(5) Subsection (4) is an offence of strict liability.

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

133BP Agreement to apply payment against particular amount owed

(1) This section applies if, at the time when the licensee applies the relevant payment, the following conditions are satisfied:
  (a) the consumer has requested the licensee to apply certain payments made under the credit card contract against a particular amount:
    (i) owed by the consumer to the licensee under the contract; and
    (ii) in relation to which any other requirements prescribed by the regulations are satisfied;
  (b) the licensee has agreed to the request;
  (c) the relevant payment is a payment to which the request relates;
  (d) neither the request, nor the agreement to the request, has been withdrawn in accordance with this section.

(2) The licensee must apply the relevant payment against the amount referred to in paragraph (1)(a) in accordance with the request.

(3) The consumer may withdraw the request at any time.

Authorised Version C2021C00117 registered 17/02/2021

(4) The licensee may withdraw the agreement to the request, but only if the consumer has consented to the withdrawal.

(5) The regulations may prescribe requirements to be complied with in relation to any of the following:
  (a) making a request under paragraph (1)(a);
  (b) agreeing to a request under paragraph (1)(b);
  (c) withdrawing a request under subsection (3);
  (d) withdrawing agreement to a request under subsection (4);
  (e) consenting under subsection (4) to the withdrawal of agreement to a request.

133BQ Application of payment against last statement balance, with higher interest debts to be discharged first

(1) Subject to subsection (2), the licensee must apply the relevant payment (or any part of the relevant payment remaining after complying with section 133BP) against so much as remains owing of the closing balance shown in the last statement of account for the credit card contract that the licensee gave the consumer before the relevant payment was made.

(2) If different annual percentage rates apply to different parts of that closing balance, the licensee must apply the relevant payment (or any remaining part of the payment) first to the part of that balance to which the highest rate applies, next to the part of that balance to which the next highest rate applies, and so on.

133BR Application of any remaining part of the relevant payment

The licensee must apply any part of the relevant payment remaining after complying with sections 133BP and 133BQ in accordance with the terms of the credit card contract.

Authorised Version C2021C00117 registered 17/02/2021

Division 7—Calculation of interest under credit card contracts

133BS Credit provider not to impose retrospective interest charges

Requirement

(1) A licensee who is the credit card provider under a credit card contract must not, in relation to a statement period covered by a statement of account, impose on the consumer who is the debtor under the contract a liability to pay a rate of interest if the rate of interest would:

(a) be applied to the balance, or a part of the balance, of the credit card contract on a day in the statement period; and

(b) be applied because of facts or circumstances coming into existence after that day; and

(c) be higher than the rate of interest (including nil) that would have been applied to that balance, or that part of the balance, on that day if those facts and circumstances had not come into existence.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:

(a) the person is subject to a requirement under subsection (1); and

(b) the person engages in conduct; and

(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Division 8—Ending credit card contracts

133BT Credit provider not to enter into credit card contract unless it allows for termination of contracts

Requirement

(1) A licensee must not enter into, or offer to enter into, a credit card contract under which the licensee would be the credit provider, if the consumer who would be the debtor under the contract would not have a credit card termination entitlement under the contract.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

*Meaning of **credit card termination entitlement***

(3) A consumer who is the debtor under a credit card contract has a ***credit card termination entitlement*** under the contract if the consumer is entitled, under the contract, to terminate the credit card contract.

Authorised Version C2021C00117 registered 17/02/2021

133BU Credit provider to provide online capacity to request termination of credit card contract

When this section applies

(1) This section applies if a consumer who is the debtor under a credit card contract has a credit card termination entitlement under the contract on a day (the ***online termination day***).

Requirement

(2) The licensee who is the credit provider under the credit card contract must establish and maintain a website that satisfies all of the following paragraphs:

(a) the website tells the consumer that the consumer may use the website to request to terminate the credit card contract;

(b) the website:

(i) tells the consumer what information the consumer will need to enter in order to request to terminate the credit card contract; and

(ii) provides the consumer with instructions on how to request to terminate the credit card contract;

(c) if the consumer enters the information and follows those instructions, the consumer can use the website to request to terminate the credit card contract;

(d) the website is available on the online termination day.

Civil penalty: 5,000 penalty units.

Defence

(3) For the purposes of subsection (2), it is a defence if the website is reasonably unavailable on the online termination day.

Authorised Version C2021C00117 registered 17/02/2021

133BV Credit provider not to suggest the consumer not terminate the credit card contract

When this section applies

(1) This section applies if:
  (a) a consumer who is the debtor under a credit card contract has a credit card termination entitlement under the contract; and
  (b) the consumer has requested to terminate the credit card contract.

Requirement

(2) The licensee who is the credit provider under the credit card contract must not suggest that the consumer remain in the credit card contract.

Civil penalty: 5,000 penalty units.

Offence

(3) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (2); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

133BW Credit provider to give effect to request to terminate credit card contract

When this section applies

(1) This section applies if:
  (a) a consumer who is the debtor under a credit card contract has a credit card termination entitlement under the contract; and

Authorised Version C2021C00117 registered 17/02/2021

(b) the consumer has requested to terminate the consumer's credit card contract.

Requirement

(2) The licensee who is the credit provider under the credit card contract must take reasonable steps to ensure that the request is given effect to as soon as practicable.

Civil penalty: 5,000 penalty units.

Offence

(3) A person commits an offence if:
(a) the person is subject to a requirement under subsection (2); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Part 3-2C—Licensees that are credit providers under credit contracts: additional rules relating to short-term and small amount credit contracts

Division 1—Introduction

133C Guide to this Part

This Part has rules that apply to licensees who are, or are to be, credit providers under short-term credit contracts and small amount credit contracts. It applies in addition to the general rules in Part 3-2.

Division 2 prohibits a licensee from entering into, or increasing the credit limit of, short-term credit contracts. It also imposes requirements on a licensee who makes representations about entering into small amount credit contracts and prohibits a licensee from entering into, or offering to enter into, small amount credit contracts in certain circumstances.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Short-term and small amount credit contracts

133CA Prohibition on entering, or increasing the credit limit of, short-term credit contracts

Prohibition

(1) A licensee must not:

(a) enter a short-term credit contract with a consumer who will be the debtor under the contract; or

(b) increase the credit limit of a short-term credit contract with a consumer who is the debtor under the contract.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:

(a) the person is subject to a requirement under subsection (1); and

(b) the person engages in conduct; and

(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

133CB Licensee who makes representations about small amount credit contracts must display information etc.

Requirement

(1) If a licensee represents that the licensee enters into, or is able to enter into, small amount credit contracts with consumers under which the licensee would be the credit provider:

(a) the licensee must display information in accordance with the regulations at a place prescribed by the regulations; and

Authorised Version C2021C00117 registered 17/02/2021

(b) the licensee must ensure that any website of the licensee complies with the requirements prescribed by the regulations.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:
(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

133CC Licensee must not enter into a small amount credit contract if the repayments do not meet the prescribed requirements

Requirement

(1) A licensee must not enter into, or offer to enter into, a small amount credit contract with a consumer who will be the debtor under the contract if:
(a) the consumer is included in a class of consumers prescribed by the regulations; and
(b) the repayments that would be required under the contract would not meet the requirements prescribed by the regulations.

Civil penalty: 5,000 penalty units.

Note: For example, the regulations may provide that the amount of a repayment must not exceed a specified percentage of the consumer's income.

Offence

(2) A person commits an offence if:

Authorised Version C2021C00117 registered 17/02/2021

(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Part 3-2D—Licensees and reverse mortgages

133DA Guide to this Part

This Part has rules that apply to licensees that provide credit services or are credit providers.

Before providing credit assistance, or entering into a credit contract, for a reverse mortgage, licensees must provide projections of the debtor's equity in the property that may be covered by the reverse mortgage.

Licensees must also make reverse mortgage information statements available on their websites and on request.

Licensees must not inaccurately use terms like "reverse mortgage" in making representations about credit contracts and mortgages.

133DB Giving projections of equity before providing credit assistance or entering credit contract

Requirement to give projections

(1) Before a licensee makes a preliminary assessment for the purposes of paragraph 115(1)(c) or (2)(a), or an assessment for the purposes of paragraph 128(c), in connection with a credit contract with a consumer for a reverse mortgage, the licensee must:

(a) show the consumer in person, or give the consumer in a way prescribed by the regulations, projections that:

(i) relate to the value of the dwelling or land that may become reverse mortgaged property, and the consumer's indebtedness, over time if the consumer were to enter into a contract for a reverse mortgage; and

(ii) are made in accordance with the regulations by using a website approved by ASIC; and

Authorised Version C2021C00117 registered 17/02/2021

(b) give the consumer a printed copy of the projections; and
(c) tell the consumer in person the things (if any) that relate to reverse mortgages and are prescribed by the regulations; and
(d) give the consumer a reverse mortgage information statement.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:
(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the person's conduct breaches the requirement.

Criminal penalty: 50 penalty units.

Defences for not giving projections

(3) For the purposes of paragraphs (1)(a) and (b), and of subsection (2) so far as it relates to either of those paragraphs, it is a defence if the licensee reasonably believes that:
(a) another person has:
(i) shown the consumer in person projections described in paragraph (1)(a); and
(ii) given the consumer a printed copy of the projections; and
(b) the projections are the same, or substantially the same, as those paragraph (1)(a) requires the licensee to show the consumer.

Note: For the purposes of subsection (2), a defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

(4) For the purposes of paragraphs (1)(a) and (b), and of subsection (2) so far as it relates to either of those paragraphs, it is a defence if the circumstances prescribed by the regulations exist.

Authorised Version C2021C00117 registered 17/02/2021

Note: For the purposes of subsection (2), a defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

Defence for not giving reverse mortgage information statement

(5) For the purposes of paragraph (1)(d), and of subsection (2) so far as it relates to that paragraph, it is a defence if the licensee reasonably believes that another person has given the consumer a reverse mortgage information statement in the last 90 days.

Note: For the purposes of subsection (2), a defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3) of the *Criminal Code*).

133DC Making reverse mortgage information statement available on website of credit provider or credit assistance provider

When this section applies

(1) This section applies if a licensee:

(a) is:

(i) a person who provides, or holds himself or herself out as able to provide, credit assistance relating to credit contracts for reverse mortgages; or

(ii) a credit provider under one or more credit contracts for a reverse mortgages; and

(b) has a website that provides information about such contracts.

Requirement

(2) The licensee must make available through the website a reverse mortgage information statement.

Civil penalty: 5,000 penalty units.

Offence

(3) A person commits an offence if:

Authorised Version C2021C00117 registered 17/02/2021

(a) the person is subject to a requirement under subsection (2); and
(b) the person engages in conduct; and
(c) the person's conduct breaches the requirement.

Criminal penalty: 50 penalty units.

133DD Making reverse mortgage information statement available in other situations

When this section applies

(1) This section applies if:
(a) a licensee is:
(i) a person who provides, or holds himself or herself out as able to provide, credit assistance relating to credit contracts for reverse mortgages; or
(ii) a credit provider under one or more credit contracts for reverse mortgages; and
(b) either:
(i) a consumer asks the licensee (otherwise than by using a website of the licensee) for a reverse mortgage information statement; or
(ii) the regulations require a consumer, in circumstances prescribed by the regulations, to be given a reverse mortgage information statement; and
(c) the consumer gives the licensee the consumer's name, and the contact details required by the regulations.

Requirement

(2) The licensee must, in accordance with any requirements prescribed by the regulations, give the consumer a reverse mortgage information statement.

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Offence

(3) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (2); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

Defences

(4) For the purposes of subsections (2) and (3), it is a defence if:
  (a) the licensee has given the consumer, or reasonably believes that someone else has given the consumer, a reverse mortgage information statement; or
  (b) the licensee:
    (i) is a credit provider under one or more credit contracts for reverse mortgages; and
    (ii) reasonably believes that the consumer would not be eligible to make a credit contract with the licensee for a reverse mortgage; or
  (c) there exist circumstances prescribed by regulations as circumstances in which the licensee is not required to give the consumer a reverse mortgage information statement.

Note: For the purposes of subsection (3), a defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

133DE Representations that use the term "reverse mortgage" etc.

Credit service providers

(1) A licensee must not, in providing or offering to provide a credit service to a consumer, use either of the following terms (either alone or in combination with other words or letters) in a representation to the consumer about an actual or proposed credit contract or mortgage:

Authorised Version C2021C00117 registered 17/02/2021

(a) the phrase "reverse mortgage";
(b) another term (whether or not in English) of similar import to the phrase "reverse mortgage".

Civil penalty: 5,000 penalty units.

Credit providers

(2) A licensee that is a credit provider must not use either of the following terms (either alone or in combination with other words or letters) in a representation to a consumer about an actual or proposed credit contract or mortgage:
(a) the phrase "reverse mortgage";
(b) another term (whether or not in English) of similar import to the phrase "reverse mortgage".

Civil penalty: 5,000 penalty units.

Defence

(3) For the purposes of subsections (1) and (2), it is a defence if:
(a) the representation truly represents that a credit contract:
(i) is or will be a credit contract for a reverse mortgage; or
(ii) is not or will not be a credit contract for a reverse mortgage; or
(b) the representation truly represents that a mortgage:
(i) is or will be part of a reverse mortgage; or
(ii) is not or will not be part of a reverse mortgage.

Authorised Version C2021C00117 registered 17/02/2021

Part 3-3—Licensees that provide credit assistance in relation to consumer leases

Division 1—Introduction

134 Guide to this Part

This Part has rules that apply to licensees that provide credit assistance in relation to consumer leases. These rules are aimed at better informing consumers and preventing them from being in unsuitable consumer leases. However, these rules do not apply to a licensee that will be the lessor under the consumer lease.

Division 2 requires a licensee to give its credit guide to a consumer. The credit guide has information about the licensee and some of the licensee's obligations under this Act.

Division 3 requires a licensee to give a quote before providing credit assistance to a consumer. The quote must set out the maximum amount the consumer will be required to pay to the licensee. The licensee must not charge more than that amount.

Division 4 requires a licensee, before providing credit assistance to a consumer in relation to a consumer lease, to make a preliminary assessment as to whether the lease will be unsuitable for the consumer. To do this, the licensee must make inquiries and verifications about the consumer's requirements, objectives and financial situation. The licensee must give the consumer a copy of the assessment if requested.

Division 5 requires a licensee, when providing credit assistance to a consumer in relation to a consumer lease, to give the consumer a document that discloses certain information (for example, the indirect remuneration the licensee is likely to receive).

Authorised Version C2021C00117 registered 17/02/2021

Division 6 prohibits a licensee from providing credit assistance to a consumer in relation to a consumer lease if the lease will be unsuitable for the consumer.

135 Application of this Part

This Part does not apply in relation to credit assistance provided by a licensee in relation to a consumer lease if the licensee is or will be the lessor under the consumer lease.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Credit guide of credit assistance providers

136 Credit guide of credit assistance providers

Requirement to give credit guide

(1) A licensee must, as soon as practicable after it becomes apparent to the licensee that it is likely to provide credit assistance to a consumer in relation to a consumer lease, give the consumer the licensee's credit guide in accordance with subsection (2).

Civil penalty: 5,000 penalty units.

(2) The licensee's credit guide must:
- (a) be in writing; and
- (b) be in the form (if any) prescribed by the regulations; and
- (c) specify the licensee's name and contact details; and
- (d) specify the licensee's Australian credit licence number; and
- (e) give information about:
  - (i) any fees that are payable by a consumer to the licensee for the licensee's credit assistance; and
  - (ii) any charges that are payable by a consumer to the licensee for matters associated with providing the credit assistance; and
  - (iii) the method for working out the amount of the fees and charges; and
- (f) give information about:
  - (i) if there are 6 or fewer lessors that the licensee conducts business with when providing credit assistance in relation to consumer leases—the names of those lessors; and
  - (ii) if there are more than 6 lessors that the licensee conducts business with when providing credit assistance in relation to consumer leases—the names of the 6 lessors with whom the licensee reasonably believes it conducts the most business; and

Authorised Version C2021C00117 registered 17/02/2021

(g) give information about:
  (i) any indirect remuneration that the licensee, or an employee, director or credit representative of the licensee, is likely to receive, directly or indirectly, from lessors in relation to consumer leases for which the licensee has provided credit assistance; and
  (ii) a reasonable estimate of the amounts of that indirect remuneration or the range of those amounts; and
  (iii) the method for working out those amounts; and
(h) give information about the licensee's procedure for resolving disputes with a consumer, including contact details for a consumer to access:
  (i) the licensee's internal dispute resolution procedure; and
  (ii) the AFCA scheme; and
(i) give information about the licensee's obligations under sections 143 and 146; and
(j) comply with any other requirements prescribed by the regulations.

(3) The regulations may prescribe:
(a) information that need not be included in the credit guide, despite subsection (2); and
(b) for the purposes of paragraph (2)(g):
  (i) the method for working out amounts of indirect remuneration; and
  (ii) how indirect remuneration or amounts of indirect remuneration must be described.

Manner of giving credit guide

(4) The licensee must give the consumer the licensee's credit guide in the manner (if any) prescribed by the regulations.

Strict liability offence

(5) A person commits an offence if:

Authorised Version C2021C00117 registered 17/02/2021

(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

(6) Subsection (5) is an offence of strict liability.

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

Authorised Version C2021C00117 registered 17/02/2021

Division 3—Quote for providing credit assistance etc. in relation to consumer leases

137 Quote for providing credit assistance etc.

Requirement to give quote

(1) A licensee must not provide credit assistance to a consumer by:

(a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular consumer lease with a particular lessor; or

(b) suggesting that the consumer remain in a particular consumer lease with a particular lessor;

unless:

(c) the licensee has given the consumer a quote in accordance with subsection (2); and

(d) the consumer has signed and dated that quote or otherwise indicated the consumer's acceptance of it (and the day that happens) in the manner (if any) prescribed by the regulations; and

(e) the licensee has given the consumer a copy of the accepted quote.

Civil penalty: 5,000 penalty units.

(2) The quote must:

(a) be in writing; and

(b) give information about the credit assistance and other services that the quote covers; and

(c) specify the maximum amount that will be payable by the consumer to the licensee in relation to the licensee's credit assistance and other services; and

(d) give information about what that amount relates to, including:

(i) the maximum amount of the licensee's fee for providing the credit assistance and other services; and

Authorised Version C2021C00117 registered 17/02/2021

(ii) the maximum amount of charges that will be incurred by the licensee for matters associated with providing the credit assistance and other services; and

(iii) the maximum amount of fees or charges that will be payable by the licensee to another person on the consumer's behalf; and

(e) state whether the maximum amount or any other amount will be payable by the consumer to the licensee if a consumer lease is not entered; and

(f) comply with any other requirements prescribed by the regulations.

Manner of giving quote

(3) The licensee must give the quote to the consumer in the manner (if any) prescribed by the regulations.

No demanding payment of amount exceeding quoted amount

(4) The licensee must not request or demand payment of an amount that exceeds the maximum amount set out in the quote.

Civil penalty: 5,000 penalty units.

No demanding payment before credit assistance provided

(5) The licensee must not request or demand payment of an amount for the licensee's credit assistance before the licensee provides the assistance.

Civil penalty: 5,000 penalty units.

Caveats

(6) The licensee must not lodge, or threaten to lodge, a caveat in relation to land to induce the consumer to pay an amount to the licensee for the licensee's credit assistance or other services.

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Division 4—Obligations of credit assistance providers before providing credit assistance for consumer leases

138 Obligations of credit assistance providers before providing credit assistance for consumer leases

(1) A licensee must not provide credit assistance to a consumer on a day (the ***assistance day***) by:

(a) suggesting that the consumer apply for a particular consumer lease with a particular lessor; or

(b) assisting the consumer to apply for a particular consumer lease with a particular lessor;

unless the licensee has, within 90 days (or other period prescribed by the regulations) before the assistance day:

(c) made a preliminary assessment that:

(i) is in accordance with subsection 139(1); and

(ii) covers the period proposed for the entering of the lease; and

(d) made the inquiries and verification in accordance with section 140.

Civil penalty: 5,000 penalty units.

(2) A licensee must not provide credit assistance to a consumer on a day (the ***assistance day***) by suggesting that the consumer remain in a particular consumer lease with a particular lessor unless the licensee has, within 90 days (or other period prescribed by the regulations) before the assistance day:

(a) made a preliminary assessment that:

(i) is in accordance with subsection 139(2); and

(ii) covers a period in which the assistance day occurs; and

(b) made the inquiries and verification in accordance with section 140.

Authorised Version C2021C00117 registered 17/02/2021

Civil penalty: 5,000 penalty units.

139 Preliminary assessment of unsuitability of the consumer lease

(1) For the purposes of paragraph 138(1)(c), the licensee must make a preliminary assessment that:

(a) specifies the period the assessment covers; and

(b) assesses whether the consumer lease will be unsuitable for the consumer if the lease is entered in that period.

(2) For the purposes of paragraph 138(2)(a), the licensee must make a preliminary assessment that:

(a) specifies the period the assessment covers; and

(b) assesses whether the consumer lease will be unsuitable for the consumer if the consumer remains in the lease in that period.

Note: The licensee is not required to make a preliminary assessment under this section if the credit assistance is not provided.

140 Reasonable inquiries etc. about the consumer

(1) For the purposes of paragraph 138(1)(d) or 138(2)(b), the licensee must, before making the preliminary assessment:

(a) make reasonable inquiries about the consumer's requirements and objectives in relation to the consumer lease; and

(b) make reasonable inquiries about the consumer's financial situation; and

(c) take reasonable steps to verify the consumer's financial situation; and

(d) make any inquiries prescribed by the regulations about any matter prescribed by the regulations; and

(e) take any steps prescribed by the regulations to verify any matter prescribed by the regulations.

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

(2) The regulations may prescribe particular inquiries or steps that must be made or taken, or do not need to be made or taken, for the purposes of paragraph (1)(a), (b) or (c).

141 When the consumer lease must be assessed as unsuitable—entering lease

Requirement to assess the lease as unsuitable

(1) For a preliminary assessment under subsection 139(1) about entering a consumer lease, the licensee must assess that the lease will be unsuitable for the consumer if the lease will be unsuitable for the consumer under subsection (2).

Civil penalty: 5,000 penalty units.

Note: Even if the lease will not be unsuitable for the consumer under subsection (2), the licensee may still assess that the lease will be unsuitable for other reasons.

Particular circumstances when the lease will be unsuitable

(2) The lease will be unsuitable for the consumer if, at the time of the preliminary assessment, it is likely that:

(a) the consumer will be unable to comply with the consumer's financial obligations under the lease, or could only comply with substantial hardship, if the lease is entered in the period proposed for it to be entered; or

(b) the lease will not meet the consumer's requirements or objectives if the lease is entered in the period proposed for it to be entered; or

(c) if the regulations prescribe circumstances in which a consumer lease is unsuitable—those circumstances will apply to the lease if the lease is entered in the period proposed for it to be entered.

(3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the lease by selling the consumer's principal

Authorised Version C2021C00117 registered 17/02/2021

place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

Information to be used to determine if lease will be unsuitable

(4) For the purposes of determining under subsection (2) whether the lease will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:

(a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 140(1)(d) or (e);

(b) at the time of the preliminary assessment:

(i) the licensee had reason to believe that the information was true; or

(ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 140.

142 When the consumer lease must be assessed as unsuitable—remaining in lease

Requirement to assess the lease as unsuitable

(1) For a preliminary assessment under subsection 139(2) about remaining in a consumer lease, the licensee must assess that the lease will be unsuitable for the consumer if the lease will be unsuitable for the consumer under subsection (2).

Civil penalty: 5,000 penalty units.

Note: Even if the lease will not be unsuitable for the consumer under subsection (2), the licensee may still assess that the lease will be unsuitable for other reasons.

Particular circumstances when the lease will be unsuitable

(2) The lease will be unsuitable for the consumer if, at the time of the preliminary assessment, it is likely that:

Authorised Version C2021C00117 registered 17/02/2021

(a) the consumer will be unable to comply with the consumer's financial obligations under the lease, or could only comply with substantial hardship if the consumer remains in the lease in the period covered by the preliminary assessment; or

(b) the lease will not meet the consumer's requirements or objectives if the consumer remains in the lease in the period covered by the preliminary assessment; or

(c) if the regulations prescribe circumstances in which a consumer lease is unsuitable—those circumstances will apply to the lease if the consumer remains in the lease in the period covered by the preliminary assessment.

(3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the lease by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

Information to be used to determine if lease will be unsuitable

(4) For the purposes of determining under subsection (2) whether the lease will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:

(a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 140(1)(d) or (e);

(b) at the time of the preliminary assessment:

(i) the licensee had reason to believe that the information was true; or

(ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 140.

Authorised Version C2021C00117 registered 17/02/2021

Section 143

143 Providing the consumer with the preliminary assessment

Requirement to give assessment if requested

(1) If the consumer requests the licensee for a copy of the preliminary assessment within 7 years of the date of the credit assistance quote under section 137, the licensee must give the consumer a written copy of the assessment:
  (a) if the request is made within 2 years of the quote—before the end of 7 business days after the day the licensee receives the request; and
  (b) otherwise—before the end of 21 business days after the day the licensee receives the request.

Note: The licensee is not required to give the consumer a copy of the preliminary assessment if the licensee does not provide credit assistance to the consumer.

Civil penalty: 5,000 penalty units.

Manner of giving assessment

(2) The licensee must give the consumer the copy of the assessment in the manner (if any) prescribed by the regulations.

No payment for assessment

(3) The licensee must not request or demand payment of an amount for giving the consumer a copy of the preliminary assessment.

Civil penalty: 5,000 penalty units.

Strict liability offence

(4) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1) or (3); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Authorised Version C2021C00117 registered 17/02/2021

Criminal penalty: 50 penalty units.

(5) Subsection (4) is an offence of strict liability.

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

Authorised Version C2021C00117 registered 17/02/2021

Division 5—Fees, indirect remuneration etc. relating to consumer leases

144 Fees, indirect remuneration etc. relating to consumer leases

Requirement for disclosure

(1) A licensee must, at the same time as providing credit assistance to a consumer by:

(a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular consumer lease with a particular lessor; or

(b) suggesting that the consumer remain in a particular consumer lease with a particular lessor;

give the consumer a lease proposal disclosure document in accordance with subsection (2).

Civil penalty: 5,000 penalty units.

(2) The lease proposal disclosure document must contain the following:

(a) the total amount of any fees or charges that the consumer is liable to pay to the licensee in relation to the consumer lease and the method used for working out that amount;

(b) a reasonable estimate of the total amount of any indirect remuneration that the licensee, or an employee, director or credit representative of the licensee, is likely to receive in relation to the consumer lease and the method used for working out that amount;

(c) a reasonable estimate of the total amount of any fees or charges that the consumer is likely to be liable to pay to the lessor in relation to applying for the consumer lease;

(d) a reasonable estimate of the total amount of any fees or charges that the consumer is likely to be liable to pay to another person in relation to applying for the consumer lease.

Authorised Version C2021C00117 registered 17/02/2021

(3) For the purposes of paragraph (2)(b), the regulations may prescribe:
  (a) the method for working out amounts of indirect remuneration; and
  (b) how amounts of indirect remuneration must be described.

Manner of giving lease proposal disclosure document

(4) The licensee must give the lease proposal disclosure document to the consumer in the manner (if any) prescribed by the regulations.

145 No profiting from fees etc. paid to third parties

Requirement not to profit

(1) If, in the course of providing credit assistance to a consumer in relation to a consumer lease, a licensee pays an amount (the ***third party amount***) to another person on behalf of the consumer, the licensee must not request or demand payment of an amount, as reimbursement for the third party amount, that exceeds the third party amount.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 6 months imprisonment.

Authorised Version C2021C00117 registered 17/02/2021

Division 6—Prohibition on suggesting, or assisting with, unsuitable consumer leases

146 Prohibition on suggesting, or assisting with, unsuitable consumer leases

Prohibition on suggesting, or assisting with, unsuitable leases

(1) A licensee must not provide credit assistance to a consumer by:

(a) suggesting that the consumer apply for a particular consumer lease with a particular lessor; or

(b) assisting the consumer to apply for a particular consumer lease with a particular lessor;

if the lease will be unsuitable for the consumer under subsection (2).

Civil penalty: 5,000 penalty units.

When the lease will be unsuitable

(2) The lease will be unsuitable for the consumer if, at the time the licensee provides the credit assistance, it is likely that:

(a) the consumer will be unable to comply with the consumer's financial obligations under the lease, or could only comply with substantial hardship, if the lease is entered in the period proposed for it to be entered; or

(b) the lease will not meet the consumer's requirements or objectives if the lease is entered in the period proposed for it to be entered; or

(c) if the regulations prescribe circumstances in which a consumer lease is unsuitable—those circumstances will apply to the lease if the lease is entered in the period proposed for it to be entered.

(3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the lease by selling the consumer's principal

Authorised Version C2021C00117 registered 17/02/2021

place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

Information to be used to determine if lease will be unsuitable

(4) For the purposes of determining under subsection (2) whether the lease will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:

(a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 140(1)(d) or (e);

(b) at the time the licensee provides the credit assistance:

(i) the licensee had reason to believe that the information was true; or

(ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 140.

Consumer lease not unsuitable under regulations

(5) The regulations may prescribe particular situations in which a consumer lease is taken not to be unsuitable for a consumer, despite subsection (2).

Offence

(6) A person commits an offence if:

(a) the person is subject to a requirement under subsection (1); and

(b) the person engages in conduct; and

(c) the conduct contravenes the requirement.

Criminal penalty: 2 years imprisonment.

Authorised Version C2021C00117 registered 17/02/2021

147 Prohibition on suggesting to consumers to remain in unsuitable consumer leases

Prohibition on suggesting to remain in unsuitable lease

(1) A licensee must not provide credit assistance to a consumer by suggesting that the consumer remain in a particular consumer lease with a particular lessor if the lease is unsuitable for the consumer under subsection (2).

Civil penalty: 5,000 penalty units.

When the lease is unsuitable

(2) The lease is unsuitable for the consumer if, at that time the licensee provides the credit assistance:
  (a) the consumer is, or is likely to be, unable to comply with the consumer's financial obligations under the lease, or only able to comply with substantial hardship; or
  (b) the lease does not meet the consumer's requirements or objectives; or
  (c) if the regulations prescribe circumstances in which a consumer lease is unsuitable—those circumstances apply to the lease.

(3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the lease by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

Information to be used to determine if lease is unsuitable

(4) For the purposes of determining under subsection (2) whether the lease is unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:
  (a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 140(1)(d) or (e);

Authorised Version C2021C00117 registered 17/02/2021

(b) at the time the licensee provides the credit assistance:
(i) the licensee had reason to believe that the information was true; or
(ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 140.

Consumer lease not unsuitable under regulations

(5) The regulations may prescribe particular situations in which a consumer lease is taken not to be unsuitable for a consumer, despite subsection (2).

Offence

(6) A person commits an offence if:
(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 2 years imprisonment.

Defence

(7) For the purposes of subsections (1) and (6), it is a defence if:
(a) the licensee suggested that the consumer remain in the consumer lease because the licensee reasonably believed that there was no other consumer lease that was not unsuitable for the consumer; and
(b) the licensee informed the consumer that there is a procedure under sections 177B and 179H of the National Credit Code for consumers in hardship.

Note: For the purposes of subsection (6), a defendant bears an evidential burden in relation to the matter in subsection (7) (see subsection 13.3(3) of the *Criminal Code*).

Authorised Version C2021C00117 registered 17/02/2021

(8) The regulations may prescribe particular inquiries that must be made, or do not need to be made, for the purposes of paragraph (7)(a).

Authorised Version C2021C00117 registered 17/02/2021

Part 3-4—Licensees that are lessors under consumer leases

Division 1—Introduction

148 Guide to this Part

This Part has rules that apply to licensees that are lessors. These rules are aimed at better informing consumers and preventing them from being in unsuitable consumer leases.

Division 2 requires a licensee to give its credit guide to a consumer. The credit guide has information about the licensee and some of the licensee's obligations under this Act.

Division 3 requires a licensee, before doing particular things (such as entering a consumer lease), to make an assessment as to whether the lease will be unsuitable. To do this, the licensee must make inquiries and verifications about the consumer's requirements, objectives and financial situation. The licensee must give the consumer a copy of the assessment if requested.

Division 4 prohibits a licensee from entering a consumer lease that is unsuitable for a consumer.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Credit guide of lessors

149 Credit guide of lessors

Requirement to give credit guide

(1) A licensee must, as soon as practicable after it becomes apparent to the licensee that it is likely to enter a consumer lease with a consumer who will be the lessee under the lease, give the consumer the licensee's credit guide in accordance with subsection (2).

Civil penalty: 5,000 penalty units.

(2) The licensee's credit guide must:
- (a) be in writing; and
- (b) be in the form (if any) prescribed by the regulations; and
- (c) specify the licensee's name and contact details; and
- (d) specify the licensee's Australian credit licence number; and
- (e) give information about the licensee's procedure for resolving disputes with a consumer, including contact details for a consumer to access:
  - (i) the licensee's internal dispute resolution procedure; and
  - (ii) the AFCA scheme; and
- (f) give information about the licensee's obligations under sections 155 and 156; and
- (g) comply with any other requirements prescribed by the regulations.

(3) The regulations may prescribe information that need not be included in the credit guide, despite subsection (2).

Manner of giving credit guide

(4) The licensee must give the consumer the licensee's credit guide in the manner (if any) prescribed by the regulations.

Authorised Version C2021C00117 registered 17/02/2021

Strict liability offence

(5) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

(6) Subsection (5) is an offence of strict liability.

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

150 Credit guide of lessors who are assignees

Requirement to give credit guide

(1) A licensee must, as soon as practicable after it has been assigned any rights or obligations of a lessor under a consumer lease, give the lessee under the lease the licensee's credit guide in accordance with subsection (2).

Civil penalty: 5,000 penalty units.

(2) The licensee's credit guide must:
  (a) be in writing; and
  (b) be in the form (if any) prescribed by the regulations; and
  (c) specify the licensee's name and contact details; and
  (d) specify the licensee's Australian credit licence number; and
  (e) give information about the licensee's procedure for resolving disputes with a consumer, including contact details for a consumer to access:
    (i) the licensee's internal dispute resolution procedure; and
    (ii) the AFCA scheme; and
  (f) comply with any other requirements prescribed by the regulations.

Authorised Version C2021C00117 registered 17/02/2021

(3) The regulations may prescribe information that need not be included in the credit guide, despite subsection (2).

Manner of giving credit guide

(4) The licensee must give the consumer the licensee's credit guide in the manner (if any) prescribed by the regulations.

Strict liability offence

(5) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

(6) Subsection (5) is an offence of strict liability.

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

Authorised Version C2021C00117 registered 17/02/2021

Division 3—Obligation to assess unsuitability

151 Obligation to assess unsuitability

A licensee must not:

(a) enter a consumer lease with a consumer who will be the lessee under the lease; or

(b) make an unconditional representation to a consumer that the licensee considers that the consumer is eligible to enter a consumer lease with the licensee;

on a day (the ***lease day***) unless the licensee has, within 90 days (or other period prescribed by the regulations) before the lease day:

(c) made an assessment that:

(i) is in accordance with section 152; and

(ii) covers a period in which the lease day occurs; and

(d) made the inquiries and verification in accordance with section 153.

Civil penalty: 5,000 penalty units.

152 Assessment of unsuitability of the consumer lease

For the purposes of paragraph 151(c), the licensee must make an assessment that:

(a) specifies the period the assessment covers; and

(b) assesses whether the consumer lease will be unsuitable for the consumer if the lease is entered in that period.

Note: The licensee is not required to make the assessment under this section if the lease is not entered.

153 Reasonable inquiries etc. about the consumer

Requirement to make inquiries and take steps to verify

(1) For the purposes of paragraph 151(d), the licensee must, before making the assessment:

Authorised Version C2021C00117 registered 17/02/2021

(a) make reasonable inquiries about the consumer's requirements and objectives in relation to the consumer lease; and

(b) make reasonable inquiries about the consumer's financial situation; and

(c) take reasonable steps to verify the consumer's financial situation; and

(d) make any inquiries prescribed by the regulations about any matter prescribed by the regulations; and

(e) take any steps prescribed by the regulations to verify any matter prescribed by the regulations.

Civil penalty: 5,000 penalty units.

(2) The regulations may prescribe particular inquiries or steps that must be made or taken, or do not need to be made or taken, for the purposes of paragraph (1)(a), (b) or (c).

154 When consumer lease must be assessed as unsuitable

Requirement to assess the lease as unsuitable

(1) The licensee must assess that the consumer lease will be unsuitable for the consumer if the lease will be unsuitable for the consumer under subsection (2).

Note: Even if the lease will not be unsuitable for the consumer under subsection (2), the licensee may still assess that the lease will be unsuitable for other reasons.

Particular circumstances when the lease will be unsuitable

(2) The lease will be unsuitable for the consumer if, at the time of the assessment, it is likely that:

(a) the consumer will be unable to comply with the consumer's financial obligations under the lease, or could only comply with substantial hardship, if the lease is entered in the period covered by the assessment; or

Authorised Version C2021C00117 registered 17/02/2021

(b) the lease will not meet the consumer's requirements or objectives if the lease is entered in the period covered by the assessment; or

(c) if the regulations prescribe circumstances in which a consumer lease is unsuitable—those circumstances will apply to the lease if the lease is entered in the period covered by the assessment.

Civil penalty: 5,000 penalty units.

(3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the lease by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

Information to be used to determine if lease will be unsuitable

(4) For the purposes of determining under subsection (2) whether the lease will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:

(a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 153(1)(d) or (e);

(b) at the time of the preliminary assessment:

(i) the licensee had reason to believe that the information was true; or

(ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 153.

155 Giving the consumer the assessment

Requirement to give assessment if requested

(1) If, before entering the consumer lease, the consumer requests the licensee for a copy of the assessment, the licensee must give the

Authorised Version C2021C00117 registered 17/02/2021

consumer a written copy of the assessment before entering the lease.

Note: The licensee is not required to give the consumer a copy of the assessment if the lease is not entered.

Civil penalty: 5,000 penalty units.

(2) If, during the period that:

(a) starts on the day (the ***lease day***) the consumer lease is entered; and

(b) ends 7 years after that day;

the consumer requests the licensee for a copy of the assessment, the licensee must give the consumer a written copy of the assessment:

(c) if the request is made within 2 years of the lease day—before the end of 7 business days after the day the licensee receives the request; and

(d) otherwise—before the end of 21 business days after the day the licensee receives the request.

Civil penalty: 5,000 penalty units.

Manner of giving assessment

(3) The licensee must give the consumer the copy of the assessment in the manner (if any) prescribed by the regulations.

No payment for assessment

(4) The licensee must not request or demand payment of an amount for giving the consumer a copy of the assessment.

Civil penalty: 5,000 penalty units.

Strict liability offence

(5) A person commits an offence if:

(a) the person is subject to a requirement under subsection (1), (2) or (4); and

Authorised Version C2021C00117 registered 17/02/2021

(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

(6) Subsection (5) is an offence of strict liability.

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

Authorised Version C2021C00117 registered 17/02/2021

Division 4—Prohibition on entering unsuitable consumer leases

156 Prohibition on entering unsuitable consumer leases

Prohibition on entering unsuitable lease

(1) A licensee must not enter a consumer lease with a consumer who will be the lessee under the lease if the lease is unsuitable for the consumer under subsection (2).

Civil penalty: 5,000 penalty units.

When the lease is unsuitable

(2) The lease is unsuitable for the consumer if, at the time it is entered:
  (a) it is likely that the consumer will be unable to comply with the consumer's financial obligations under the lease, or could only comply with substantial hardship; or
  (b) the lease does not meet the consumer's requirements or objectives; or
  (c) if the regulations prescribe circumstances in which a consumer lease is unsuitable—those circumstances apply to the lease.

(3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the lease by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

Information to be used to determine if lease is unsuitable

(4) For the purposes of determining under subsection (2) whether the lease is unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:

Authorised Version C2021C00117 registered 17/02/2021

(a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 153(1)(d) or (e);

(b) at the time the lease is entered:

(i) the licensee had reason to believe that the information was true; or

(ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 153.

Consumer lease not unsuitable under regulations

(5) The regulations may prescribe particular situations in which a consumer lease is taken not to be unsuitable for a consumer, despite subsection (2).

Offence

(6) A person commits an offence if:

(a) the person is subject to a requirement under subsection (1); and

(b) the person engages in conduct; and

(c) the conduct contravenes the requirement.

Criminal penalty: 2 years imprisonment.

Authorised Version C2021C00117 registered 17/02/2021

Part 3-5—Credit representatives

Division 1—Introduction

157 Guide to this Part

This Part has rules that apply to credit representatives when they act on behalf of a licensee under Part 3-1, 3-2, 3-3 or 3-4. These rules are aimed at better informing consumers.

Division 2 requires a credit representative to give its credit guide to a consumer. The credit guide has information about the credit representative.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Credit guide of credit representatives

158 Credit guide of credit representatives

Requirement to give credit guide

(1) If a credit representative of a licensee gives a consumer the licensee's credit guide when acting on behalf of the licensee under Part 3-1, 3-2, 3-3 or 3-4, the credit representative must at the same time give the consumer the credit representative's credit guide in accordance with subsection (2).

Civil penalty: 5,000 penalty units.

(2) The credit representative's credit guide must:
  (a) be in writing; and
  (b) be in the form (if any) prescribed by the regulations; and
  (c) specify the credit representative's name and contact details; and
  (d) specify the credit representative's credit representative number; and
  (e) give information about:
    (i) any fees that are payable by a consumer to the credit representative for acting as a credit representative; and
    (ii) any charges that are payable by a consumer to the credit representative for matters associated with acting as a credit representative; and
    (iii) the method for working out the amount of the fees and charges; and
  (f) give information about:
    (i) if there are 6 or fewer licensees for whom the credit representative is a credit representative—the names of those licensees; and
    (ii) if there are more than 6 licensees for whom the credit representative is a credit representative—the names of

Authorised Version C2021C00117 registered 17/02/2021

the 6 licensees for whom the credit representative reasonably believes it conducts the most business; and

(iii) the credit activities the credit representative is authorised to engage in on behalf of the licensees referred to in subparagraph (i) or (ii); and

(g) give information about:

(i) any indirect remuneration the credit representative is likely to receive, directly or indirectly, from those licensees; and

(ii) a reasonable estimate of the amounts of that indirect remuneration or the range of those amounts; and

(iii) the method for working out those amounts; and

(h) give information about the credit representative's procedure for resolving disputes with a consumer, including contact details for a consumer to access the AFCA scheme; and

(i) comply with any other requirements prescribed by the regulations.

(3) The regulations may prescribe:

(a) information that need not be included in the credit guide, despite subsection (2); and

(b) for the purposes of paragraph (2)(g):

(i) the method for working out amounts of indirect remuneration; and

(ii) how indirect remuneration or amounts of indirect remuneration must be described.

Manner of giving credit guide

(4) The credit representative must give the consumer the credit representative's credit guide in the manner (if any) prescribed by the regulations.

Strict liability offence

(5) A person commits an offence if:

Authorised Version C2021C00117 registered 17/02/2021

(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

(6) Subsection (5) is an offence of strict liability.

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

Authorised Version C2021C00117 registered 17/02/2021

Part 3-5A—Mortgage brokers and mortgage intermediaries

Division 1—Introduction

Subdivision A—Guide to this Part

158K Guide to this Part

This Part imposes obligations on mortgage brokers and mortgage intermediaries.

Mortgage brokers must act in the best interests of consumers when providing credit assistance in relation to credit contracts.

Where there is a conflict of interest, mortgage brokers must give priority to consumers in providing credit assistance in relation to credit contracts.

Mortgage brokers and mortgage intermediaries must not accept conflicted remuneration.

Employers, credit providers and mortgage intermediaries must not give conflicted remuneration to mortgage brokers or mortgage intermediaries.

The circumstances in which these bans on conflicted remuneration apply are to be set out in the regulations.

Subdivision B—Interpretation

158KA Doing acts

A reference in this Part to doing an act or thing includes a reference to causing or authorising the act or thing to be done.

Authorised Version C2021C00117 registered 17/02/2021

158KB Circumstances in which a secondary representative is taken to be acting within actual or apparent authority

(1) This section applies if a person (the ***secondary representative***) is authorised as a credit representative of a licensee by a credit representative that is a body corporate (the ***primary representative***).

(2) For the purposes of this Part, the secondary representative is taken to be acting within the scope of the secondary representative's actual or apparent authority from the licensee if the secondary representative is acting within the actual or apparent scope of the authority given by the primary representative to engage in specified credit activities on behalf of the licensee.

158KC Obligations under this Part in addition to other obligations

The obligations imposed on a person under this Part are in addition to any other obligations to which the person is subject under this Act or any other law.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Best interests obligations

Subdivision A—Licensees that provide credit assistance in relation to credit contracts

158L Application of this Subdivision

(1) This Subdivision applies in relation to credit assistance provided by a licensee to a consumer in relation to a credit contract if the licensee is a mortgage broker.

(2) However, this Subdivision does not apply in relation to credit assistance provided to a consumer in relation to a credit contract by a credit representative acting within the scope of the credit representative's actual or apparent authority from the licensee.

Note 1: A credit representative in these circumstances is covered by Subdivision B of this Division.

Note 2: The conduct of any other representative, acting within the scope of actual or apparent authority from the licensee, is taken to have been engaged in also by the licensee: see sections 324 and 325.

158LA Licensee must act in the best interests of the consumer

The licensee must act in the best interests of the consumer in relation to the credit assistance.

Civil penalty: 5,000 penalty units.

158LB Conflict between consumer's interests and those of the licensee etc.

If the licensee knows, or reasonably ought to know, that there is a conflict between the interests of the consumer and the interests of:

(a) the licensee; or
(b) an associate of the licensee; or
(c) a representative of the licensee; or
(d) an associate of a representative of the licensee;

Authorised Version C2021C00117 registered 17/02/2021

the licensee must give priority to the consumer's interests when providing the credit assistance.

Civil penalty: 5,000 penalty units.

Subdivision B—Credit representatives that provide credit assistance in relation to credit contracts

158LD Application of this Subdivision

This Subdivision applies in relation to credit assistance provided to a consumer in relation to a credit contract by a credit representative acting within the scope of the credit representative's actual or apparent authority from a licensee, if either the credit representative or the licensee is a mortgage broker.

158LE Credit representative must act in the best interests of the consumer

(1) The credit representative must act in the best interests of the consumer in relation to the credit assistance.

Civil penalty: 5,000 penalty units.

(2) The licensee must take reasonable steps to ensure that the credit representative complies with subsection (1).

Civil penalty: 5,000 penalty units.

158LF Conflict between consumer's interests and those of the credit representative etc.

(1) If the credit representative knows, or reasonably ought to know, that there is a conflict between the interests of the consumer and the interests of:

(a) the licensee; or

(b) an associate of the licensee; or

(c) the credit representative; or

Authorised Version C2021C00117 registered 17/02/2021

(d) an associate of the credit representative; or

(e) another representative of the licensee; or

(f) an associate of another representative of the licensee;

the credit representative must give priority to the consumer's interests when providing the credit assistance.

Civil penalty: 5,000 penalty units.

(2) The licensee must take reasonable steps to ensure that the credit representative complies with subsection (1).

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Division 4—Conflicted remuneration

Subdivision A—What is conflicted remuneration?

158N *Conflicted remuneration*

Conflicted remuneration means:

(a) any benefit, whether monetary or non-monetary, that:
  (i) is given to a licensee, or a representative of a licensee, who provides credit assistance to consumers; and
  (ii) because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence the credit assistance provided to consumers; or

(b) any benefit, whether monetary or non-monetary, that:
  (i) is given to a licensee, or a representative of a licensee, who acts as an intermediary; and
  (ii) because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence whether the licensee or representative acts as an intermediary, or how the licensee or representative acts as an intermediary.

158NA Regulations may further define *conflicted remuneration*

The regulations may prescribe:

(a) circumstances, in addition to those set out in section 158N, in which a benefit given to a licensee or a representative of a licensee is ***conflicted remuneration***; and

(b) circumstances in which a benefit given to a licensee or a representative of a licensee is not ***conflicted remuneration***.

Authorised Version C2021C00117 registered 17/02/2021

Subdivision B—Ban on accepting conflicted remuneration

158NB Licensee must not accept conflicted remuneration

A licensee must not accept conflicted remuneration in circumstances prescribed by the regulations if:

(a) the licensee is a mortgage broker; or

(b) the licensee is a mortgage intermediary.

Civil penalty: 5,000 penalty units.

158NC Credit representative must not accept conflicted remuneration

(1) A credit representative of a licensee must not accept conflicted remuneration in circumstances prescribed by the regulations if the credit representative or the licensee is:

(a) a mortgage broker; or

(b) a mortgage intermediary.

Civil penalty: 5,000 penalty units.

(2) The licensee must take reasonable steps to ensure that the credit representative complies with subsection (1).

Civil penalty: 5,000 penalty units.

Subdivision C—Ban on giving conflicted remuneration

158ND Employer must not give employees conflicted remuneration

(1) An employer of a licensee must not give the licensee conflicted remuneration in circumstances prescribed by the regulations if the licensee is:

(a) a mortgage broker; or

(b) a mortgage intermediary.

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

(2) An employer of a representative of a licensee must not give the representative conflicted remuneration in circumstances prescribed by the regulations if the licensee or the representative is:
  (a) a mortgage broker; or
  (b) a mortgage intermediary.

  Civil penalty: 5,000 penalty units.

158NE Credit provider must not give conflicted remuneration

(1) A credit provider must not give a licensee conflicted remuneration in circumstances prescribed by the regulations if the licensee is:
  (a) a mortgage broker; or
  (b) a mortgage intermediary.

  Civil penalty: 5,000 penalty units.

(2) A credit provider must not give a representative of a licensee conflicted remuneration in circumstances prescribed by the regulations if the licensee or the representative is:
  (a) a mortgage broker; or
  (b) a mortgage intermediary.

  Civil penalty: 5,000 penalty units.

158NF Mortgage intermediary must not give conflicted remuneration

(1) A mortgage intermediary must not give a licensee conflicted remuneration in circumstances prescribed by the regulations if the licensee is:
  (a) a mortgage broker; or
  (b) a mortgage intermediary.

  Civil penalty: 5,000 penalty units.

(2) A mortgage intermediary must not give a representative of a licensee conflicted remuneration in circumstances prescribed by the regulations if the licensee or the representative is:

Authorised Version C2021C00117 registered 17/02/2021

(a) a mortgage broker; or
(b) a mortgage intermediary.

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Division 6—Miscellaneous

158T Anti-avoidance

A person must not, either alone or together with one or more other persons, enter into, begin to carry out or carry out a scheme if:

(a) it would be concluded that the person, or any of the persons, who entered into, began to carry out or carried out the scheme or any part of the scheme did so for the sole purpose or for a purpose (that is not incidental) of avoiding the application of any provision of this Part in relation to any person or persons (whether or not a person or persons who entered into, began to carry out or carried out the scheme or any part of the scheme); and

(b) the scheme or the part of the scheme has achieved, or apart from this section, would achieve, that purpose.

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Part 3-6—Debt collectors

Division 1—Introduction

159 Guide to this Part

This Part has rules that apply to a person who is authorised to collect payments under a credit contract or consumer lease from a debtor or lessee. These rules are aimed at better informing consumers.

Division 2 requires the person to give the person's credit guide to the consumer. The credit guide has information about the person.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Credit guide of debt collectors

160 Credit guide of debt collectors

Requirement to give credit guide

(1) A person who is a licensee or credit representative must, as soon as practicable after it becomes authorised by a credit provider to collect, on the credit provider's behalf, repayments made by a debtor under a credit contract, give the debtor the person's credit guide in accordance with subsection (3).

Civil penalty: 5,000 penalty units.

(2) A person who is a licensee or credit representative must, as soon as practicable after it becomes authorised by a lessor to collect, on the lessor's behalf, payments made by a lessee under a consumer lease, give the lessee the person's credit guide in accordance with subsection (3).

Civil penalty: 5,000 penalty units.

(3) The person's credit guide must:
  (a) be in writing; and
  (b) be in the form (if any) prescribed by the regulations; and
  (c) specify the person's name and contact details; and
  (d) if the person is a licensee—specify the person's Australian credit licence number; and
  (e) if the person is a credit representative—specify the person's credit representative number; and
  (f) give information about the person's procedure for resolving disputes with a consumer, including contact details for a consumer to access:
    (i) if the person is a licensee—the person's internal dispute resolution procedure; and
    (ii) in all cases—the AFCA scheme; and

Authorised Version C2021C00117 registered 17/02/2021

(g) comply with any other requirements prescribed by the regulations.

(4) The regulations may prescribe information that need not be included in the credit guide, despite subsection (3).

Manner of giving credit guide

(5) The person must give the consumer the person's credit guide in the manner (if any) prescribed by the regulations.

Strict liability offence

(6) A person commits an offence if:
(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

(7) Subsection (6) is an offence of strict liability.

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

Authorised Version C2021C00117 registered 17/02/2021

Part 3-6A—Miscellaneous rules

Division 1—Introduction

160A Guide to this Part

This Part has a number of miscellaneous rules that require responsible lending conduct when engaging in credit activities or particular types of credit activities. Some of these rules apply to a person even if the person is not required to be licensed.

Division 2 prohibits licensees from making particular representations when providing a credit service to a consumer.

Division 3 prohibits a person (whether licensed or not) from giving false or misleading information in the course of engaging in a credit activity.

Division 4 may require a credit provider or lessor (whether licensed or not) to give notice when, and in some cases before, giving an employer of a debtor or lessee an authorisation by the debtor or lessee to make deductions from amounts payable by the employer to the debtor or lessee.

Division 5 provides that ASIC may determine periods for the purpose of determining the unsuitability of credit card contracts.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Representations

160B "Independent", "impartial" or "unbiased" etc.

(1) A licensee must not, in providing or offering to provide a credit service to a consumer, use any of the following terms (either alone or in combination with other words or letters) in a representation to the consumer about the licensee, the service or the licensee's actions in providing the service:

(a) the word "independent";

(b) the word "impartial";

(c) the word "unbiased";

(d) another term (whether or not in English) that is of similar import to a word mentioned in paragraph (a), (b) or (c).

Civil penalty: 5,000 penalty units.

Defences

(2) For the purposes of subsection (1), it is a defence if:

(a) the licensee does not receive any of the following:

(i) indirect remuneration (apart from indirect remuneration that is rebated in full to the licensee's clients);

(ii) other gifts or benefits from a credit provider or a lessor that may reasonably be expected to influence the licensee; and

(b) in providing a credit service, the licensee operates free from direct or indirect restrictions relating to the credit contracts and consumer leases to which the service relates (except restrictions imposed on the licensee by this Act or by an Australian credit licence); and

(c) in providing a credit service, the licensee operates without any conflicts of interest that might:

(i) arise from the licensee's associations or relationships with credit providers and lessors; and

Authorised Version C2021C00117 registered 17/02/2021

(ii) reasonably be expected to influence the licensee in providing the service; and

(d) neither of the following persons receives any indirect remuneration, gift, or benefit, covered by paragraph (a):

(i) the licensee's employer (if any);

(ii) any other person prescribed (whether by reference to a class of person or otherwise) by the regulations.

(3) For the purposes of subsection (1), it is a defence if the representation uses any of the terms in the negative (for example, a representation that the licensee is not independent).

160C "Financial counsellor" etc.

(1) A licensee must not, in providing or offering to provide a credit service to a consumer, use any of the following terms (either alone or in combination with other words or letters) in a representation to the consumer about the licensee, the service or the licensee's actions in providing the service:

(a) the phrase "financial counsellor";

(b) the phrase "financial counselling";

(c) another term (whether or not in English) that:

(i) is of similar import to a phrase mentioned in paragraph (a) or (b); and

(ii) is prescribed by the regulations.

Civil penalty: 5,000 penalty units.

Defences

(2) For the purposes of subsection (1), it is a defence if regulations made for the purposes of paragraph 110(1)(a) exempt the licensee from section 29 in relation to a credit activity because the licensee engages in the activity as part of a financial counselling service.

(3) For the purposes of subsection (1), it is a defence if:

(a) the licensee is providing, or offering to provide, the credit service on behalf of another person (the ***principal***); and

Authorised Version C2021C00117 registered 17/02/2021

(b) the licensee is a representative of the principal; and

(c) regulations made for the purposes of paragraph 110(1)(a) exempt the principal from section 29 in relation to a credit activity because the principal engages in the activity as part of a financial counselling service; and

(d) the licensee's actions in providing or offering to provide the credit service are within the authority of the principal.

(4) For the purposes of subsection (1), it is a defence if the representation uses any of the terms in the negative (for example, a representation that the licensee is not a financial counsellor).

Authorised Version C2021C00117 registered 17/02/2021

Division 3—Giving misleading information

160D Prohibition on giving misleading information etc.

Prohibition on giving misleading information etc.

(1) A person (the ***giver***) must not, in the course of engaging in a credit activity, give information or a document to another person if the giver knows, or is reckless as to whether, the information or document is:

(a) false in a material particular; or

(b) materially misleading.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:

(a) the person gives information or a document to another person; and

(b) the person does so in the course of engaging in a credit activity; and

(c) the information or document is false in a material particular or materially misleading.

Criminal penalty: 5 years imprisonment.

Authorised Version C2021C00117 registered 17/02/2021

Division 4—Giving authorisation for deductions by employer of debtor or lessee

160E Requirements for giving authorisation to employer

(1) This section applies to a credit provider or lessor giving, or intending to give, an employer of a debtor or lessee who is party to a credit contract or consumer lease with the credit provider or lessor an instrument that:

(a) was made by the debtor or lessee; and

(b) authorises the employer to:

(i) make one or more deductions from one or more amounts payable by the employer in relation to the performance of work by the debtor or lessee; and

(ii) pay the deductions to the credit provider or lessor.

Credit provider or lessor must give statement to employer

(2) If the credit contract or consumer lease is of a kind prescribed by the regulations, the credit provider or lessor must give the employer a statement, in the form prescribed by the regulations for that kind of contract or lease, with the instrument.

Civil penalty: 5,000 penalty units.

Credit provider or lessor must give 7 days' notice to defaulting debtor or lessee

(3) If the debtor or lessee is in default under the credit contract or consumer lease, the credit provider or lessor must give the debtor or lessee at least 7 days' notice, in a form prescribed by the regulations, of the intention of the credit provider or lessor to give the instrument to the employer.

Civil penalty: 5,000 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

(4) To avoid doubt, subsection (3) does not apply if there are not regulations in force prescribing a form for the purposes of that subsection.

Subsections (2) and (3) do not apply to some credit contracts

(5) Subsections (2) and (3) do not apply in relation to a credit contract for the provision of credit relating to the provision of goods or services to the debtor in connection with the debtor's remuneration, or other benefits, for the debtor's employment.

Authorised Version C2021C00117 registered 17/02/2021

Division 5—Periods for determining unsuitability in respect of credit card contracts

160F Periods for determining unsuitability in respect of credit card contracts

(1) ASIC may, by legislative instrument, determine a period for the purposes of the following provisions:

(a) paragraph 118(3AA)(b);
(b) paragraph 119(3A)(b);
(c) paragraph 123(3AA)(b);
(d) paragraph 124(3A)(b);
(e) paragraph 131(3AA)(b);
(f) paragraph 133(3AA)(b).

(2) Without limiting subsection (1), a legislative instrument referred to in that subsection may determine different periods in relation to the following:

(a) different classes of credit card contracts;
(b) different credit limits;
(c) different rates of interest.

Authorised Version C2021C00117 registered 17/02/2021

Part 3-7—Exemptions and modifications relating to this Chapter

Division 1—Introduction

161 Guide to this Part

This Part is about exemptions from, and modifications of, the provisions of this Chapter.

Division 2 deals with how exemptions and modifications may be made by ASIC or by the regulations.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Exemptions and modifications relating to this Chapter

162 Provisions to which this Part applies

The provisions to which this Part applies are:

(a) this Chapter; and

(b) definitions in this Act, as they apply to references in this Chapter; and

(c) instruments made for the purposes of this Chapter.

163 Exemptions and modifications by ASIC

(1) ASIC may:

(a) exempt:

(i) a person; or

(ii) a person and all of the person's credit representatives;

from all or specified provisions to which this Part applies; or

(b) exempt a credit contract from all or specified provisions to which this Part applies; or

(c) exempt a consumer lease from all or specified provisions to which this Part applies; or

(d) declare that provisions to which this Part applies apply in relation to a person, credit contract or consumer lease as if specified provisions were omitted, modified or varied as specified in the declaration.

(2) An exemption or declaration under subsection (1) is not a legislative instrument.

(3) ASIC may, by legislative instrument:

(a) exempt a class of persons from all or specified provisions to which this Part applies; or

(b) exempt a class of credit contracts from all or specified provisions to which this Part applies; or

Authorised Version C2021C00117 registered 17/02/2021

(c) exempt a class of consumer leases from all or specified provisions to which this Part applies; or

(d) declare that provisions to which this Part applies apply in relation to a class of persons, credit contracts or consumer leases, as if specified provisions were omitted, modified or varied as specified in the declaration.

(4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The court may order the person to comply with the condition in a specified way. Only ASIC may apply to the court for the order.

(5) An exemption or declaration under subsection (1) must be in writing and ASIC must publish notice of it on its website.

(6) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(d) or (3)(d) had not been made, that conduct does not constitute an offence unless, before the conduct occurred:

(a) the text of the declaration was published by ASIC on its website; or

(b) ASIC gave written notice setting out the text of the declaration to the person;

(in addition to complying with the requirements of the *Legislation Act 2003* if the declaration is made under subsection (3)).

(7) In a prosecution for an offence to which subsection (6) applies, the prosecution must prove that paragraph (6)(a) or (b) was complied with before the conduct occurred.

164 Exemptions and modifications by the regulations

The regulations may:

(a) exempt a person or class of persons from all or specified provisions to which this Part applies; or

(b) exempt a credit contract or a class of credit contracts from all or specified provisions to which this Part applies; or

Authorised Version C2021C00117 registered 17/02/2021

(c) exempt a consumer lease or a class of consumer leases from all or specified provisions to which this Part applies; or

(d) provide that the provisions to which this Part applies apply as if specified provisions were omitted, modified or varied as specified in the regulations.

Authorised Version C2021C00117 registered 17/02/2021

Chapter 4—Remedies

Part 4-1—Civil penalty provisions

Division 1—Introduction

165 Guide to this Part

This Part is about civil penalty provisions. Civil penalty provisions impose obligations on certain persons. Civil remedies may be sought in relation to contraventions of these provisions.

Division 2 authorises the court to make a declaration that a person has contravened a civil penalty provision and order the person to pay a pecuniary penalty. Only ASIC may apply to the court for the declaration or order.

Division 3 has general provisions relating to civil penalty provisions, including rules about evidence and procedure.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Declarations and pecuniary penalty orders for contraventions of civil penalty provisions

166 Declaration of contravention of civil penalty provision

Application for declaration of contravention

(1) Within 6 years of a person contravening a civil penalty provision, ASIC may apply to the court for a declaration that the person contravened the provision.

Declaration of contravention

(2) The court must make the declaration if it is satisfied that the person has contravened the provision.

(3) 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

(4) The declaration is conclusive evidence of the matters referred to in subsection (3).

167 Court may order person to pay pecuniary penalty for contravening civil penalty provision

Application for order

(1) Within 6 years of a person contravening a civil penalty provision, ASIC may apply to the court for an order that the person pay the Commonwealth a pecuniary penalty.

Authorised Version C2021C00117 registered 17/02/2021

Court may order person to pay pecuniary penalty

(2) If a declaration has been made under section 166 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 167A).

Determining pecuniary penalty

(3) 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 similar conduct.

Civil enforcement of penalty

(4) A pecuniary penalty is a debt payable to the Commonwealth.

(5) 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 judgement debt.

167A Maximum pecuniary penalty

The pecuniary penalty must not be more than the pecuniary penalty applicable to the contravention of the civil penalty provision.

Authorised Version C2021C00117 registered 17/02/2021

Section 167B

167B 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) the penalty specified for the civil penalty provision; and
  (b) if the court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3.

Note: See section 14 in relation to contraventions by partners in a partnership and section 15 in relation to contraventions by multiple trustees.

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) the penalty specified for the civil penalty provision, multiplied by 10; 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.

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

Authorised Version C2021C00117 registered 17/02/2021

contrary intention under this Act in relation to the pecuniary penalty applicable to the contravention. In that case, the ***pecuniary penalty applicable*** is the penalty specified for the civil penalty provision.

167C Relinquishing the benefit derived from contravening a civil penalty provision

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 if a declaration of contravention by the person has been made under section 166. 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 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 171, 172, 173 and 174.

Civil enforcement of relinquishment order

(4) The amount payable under a relinquishment order is a debt payable to ASIC on behalf of the Commonwealth.

(5) ASIC or the Commonwealth may enforce a relinquishment order as if it were an order made in civil proceedings against the person

Authorised Version C2021C00117 registered 17/02/2021

to recover a debt due by the person. The debt arising from the order is taken to be a judgment debt.

167D 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 that one or more persons obtained that are reasonably attributable to the contravention; and

(b) the total value of all detriments that one or more persons avoided that are reasonably attributable to the contravention.

Authorised Version C2021C00117 registered 17/02/2021

Division 3—General provisions relating to civil penalty provisions

168 Contravening a civil penalty provision is not an offence

A contravention of a civil penalty provision is not an offence.

169 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.

170 Civil evidence and procedure rules for proceedings relating to civil penalty provisions

The court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention, or proposed contravention, of a civil penalty provision.

171 Criminal proceedings before civil proceedings

The 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 substantially the same as the conduct constituting the contravention.

172 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:

Authorised Version C2021C00117 registered 17/02/2021

(a) criminal proceedings are brought or have already been brought against the person for an offence; and
(b) the offence is constituted by conduct that is substantially the same as the conduct in relation to which the declaration or order would be made.

(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.

173 Criminal proceedings after civil proceedings

Criminal proceedings may be brought against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether a declaration of contravention, a pecuniary penalty order or a relinquishment order has been made against the person under this Division.

174 Evidence given in proceedings for pecuniary penalty not admissible in criminal proceedings

(1) Evidence of information given, or evidence of production of documents, by a natural person is not admissible in criminal proceedings against the natural person if:
(a) the natural person 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 natural person for a contravention of a civil penalty provision (whether or not the declaration or order was made); and
(b) the conduct alleged to constitute the offence is substantially the same as the conduct in relation to which the declaration or order was sought.

Authorised Version C2021C00117 registered 17/02/2021

(2) However, this does not apply to criminal proceedings in relation to the falsity of the evidence given by the natural person in the proceedings for the declaration or order.

175 Civil double jeopardy

(1) If a person is ordered to pay a pecuniary penalty under a civil penalty provision in relation to particular conduct, the person is not liable to be ordered to pay a pecuniary penalty under some other provision of a law of the Commonwealth in relation to that conduct.

Note: A court may make other orders, such as an order for compensation, in relation to particular conduct even if the court has made a pecuniary penalty order in relation to that conduct (see section 184).

(2) If a relinquishment order is made against a person under section 167C in relation to particular conduct, the person is not liable to a relinquishment order under the *Corporations Act 2001* or the *Australian Securities and Investments Commission Act 2001* in relation to that conduct.

175A 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;

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).

Authorised Version C2021C00117 registered 17/02/2021

175B 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 175C (which is about mistake of fact).

(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.

175C Mistake of fact

(1) A person is not liable to have a declaration of contravention, a pecuniary penalty order, a relinquishment order or any other order made against the person for a contravention of a civil penalty provision if:
  (a) at or before the time of the conduct constituting the contravention, the person:
    (i) considered whether or not facts existed; and
    (ii) was under a mistaken but reasonable belief about those facts; and
  (b) had those facts existed, the conduct would not have constituted a contravention of the civil penalty provision.

Authorised Version C2021C00117 registered 17/02/2021

(2) For the purposes of subsection (1), a person may be regarded as having considered whether or not facts existed if:

(a) the person had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and

(b) the person honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.

(3) A person who wishes to rely on subsection (1) or (2) in proceedings bears an evidential burden in relation to that matter.

(4) In subsection (3), ***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.

175D 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.

175E Civil penalty provisions contravened by employees, agents or officers

If an element of a civil penalty provision is done by an employee, agent or officer of a body corporate acting:

(a) within the actual or apparent scope of the employee's, agent's, or officer's employment; or

Authorised Version C2021C00117 registered 17/02/2021

(b) within the employee's, agent's, or officer's actual or apparent authority;

the element must also be attributed to the body corporate.

Authorised Version C2021C00117 registered 17/02/2021

Part 4-2—Power of the court to grant remedies

Division 1—Introduction

176 Guide to this Part

This Part is about the remedies the court may grant.

Division 2 authorises the court to grant a range of remedies, including injunctions, compensation orders and other orders against those who engage in credit activities unlawfully.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Power of the court to grant remedies

177 Injunctions

(1) If, on the application of 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 this Act; or

(b) attempting to contravene this Act; or

(c) aiding, abetting, counselling or procuring a person to contravene this Act; or

(d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or

(f) conspiring with others to contravene this Act;

the court may grant an injunction on such terms as the court considers appropriate.

(2) If an application for an injunction under subsection (1) has been made, the court may, if the court considers it appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the court is satisfied that the person has engaged, or is proposing to engage, in conduct of a kind referred to in subsection (1).

(3) The court may, if the court considers it appropriate, grant an interim injunction pending determination of an application under subsection (1).

(4) The court may revoke or vary an injunction granted under subsection (1) or (3).

(5) The power of the court to grant an injunction restraining a person from engaging in conduct may be exercised:

Authorised Version C2021C00117 registered 17/02/2021

(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 another person if the 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 another person if the person refuses or fails to do that act or thing.

(7) If ASIC applies to the court for the grant of an injunction under this section, the court must not require ASIC or another person, as a condition of granting an interim injunction, to give an undertaking as to damages.

(8) If the court has power under this section to grant an injunction against a person, the court may, either in addition to or in substitution for the grant of the injunction, order the person to pay damages to another person.

178 Compensation orders

Court may order person to pay compensation

(1) The court may order a person (the ***defendant***) to compensate another person (the ***plaintiff***) for loss or damage suffered by the plaintiff if:

Authorised Version C2021C00117 registered 17/02/2021

(a) the defendant has contravened a civil penalty provision or has committed an offence against this Act (other than the National Credit Code); and

(b) the loss or damage resulted from the contravention or commission of the offence.

The order must specify the amount of compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 166.

When order may be made

(2) The court may make the order only if:

(a) the plaintiff or ASIC (on behalf of the plaintiff) applies for an order under this section; and

(b) the application is made within 6 years of the day the cause of action that relates to the contravention or commission of the offence accrued.

Applications for order

(3) For the purposes of paragraph (2)(a), ASIC may make an application on behalf of the plaintiff, but only if the plaintiff has given consent in writing before the application is made.

Recovery of compensation as a debt

(4) If the court makes the order, the amount of compensation specified in the order that is to be paid to the plaintiff may be recovered as a debt due to the plaintiff.

179 Other orders to compensate loss or damage

Court may make other orders to compensate loss or damage

(1) If:

(a) a person (the ***defendant***) has contravened a civil penalty provision or has committed an offence against this Act (other than the National Credit Code); and

Authorised Version C2021C00117 registered 17/02/2021

(b) another person (the ***plaintiff***) has suffered, or is likely to suffer, loss or damage as a result of the contravention or commission of the offence;

the court may make such order as the court considers appropriate against the defendant to:

(c) compensate the plaintiff, 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 the plaintiff.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 166.

(2) Without limiting subsection (1), examples of orders the court may make include:

(a) an order declaring the whole or any part of a contract, deed or arrangement made between the defendant and the plaintiff to be void and, if the court considers it appropriate, to have been void from the time it was entered or at all times on and after a specified day before the order is made; and

(b) an order varying such a contract, deed or arrangement in such manner as is specified in the order and, if the court considers it appropriate, declaring the contract, deed or arrangement to have had effect as so varied on and after a specified day before the order is made; and

(c) an order refusing to enforce any or all of the terms of such a contract, deed or arrangement; and

(d) an order directing the defendant to refund money or return property to the plaintiff; and

(e) an order directing the defendant to pay to the plaintiff the amount of loss or damage the plaintiff suffered; and

(f) an order directing the defendant, at the defendant's own expense, to supply specified services to the plaintiff.

When order may be made

(3) The court may make the order only if:

Authorised Version C2021C00117 registered 17/02/2021

(a) the plaintiff or ASIC (on behalf of the plaintiff) applies for an order under this section; and

(b) the application is made within 6 years of the day the cause of action that relates to the contravention or commission of the offence accrued.

Applications for order

(4) For the purposes of paragraph (3)(a), ASIC may make an application on behalf of the plaintiff, but only if the plaintiff has given consent in writing before the application is made.

Recovery of amount as a debt

(5) If the court makes an order that the defendant pay an amount specified in the order to the plaintiff, the plaintiff may recover the amount as a debt due to the plaintiff.

Presumption in favour of certain orders

(6) Subsection (7) applies if:

(a) the defendant is a credit provider who has contravened section 133 by entering into, or increasing the credit limit of, a credit contract (the ***illegal contract***) that is not a credit contract for a reverse mortgage; and

(b) the debtor's obligations under the illegal contract are secured by a mortgage over the debtor's principal place of residence; and

(c) the court is satisfied that, at any time in the period in which an assessment needed to be made to comply with section 128 in relation to the illegal contract:

(i) there was a credit provider (whether the defendant or not) offering credit through a reverse mortgage (whether or not the credit provider actually made such an offer to the debtor); and

(ii) the debtor would have been eligible to enter into a credit contract for the reverse mortgage; and

Authorised Version C2021C00117 registered 17/02/2021

(iii) the credit contract for the reverse mortgage would not have been unsuitable for the debtor under section 133; and

(d) the plaintiff, or ASIC on behalf of the plaintiff, applies for an order under this section to let the plaintiff reside in the place to prevent or reduce loss or damage suffered or likely to be suffered by the plaintiff vacating the place.

(7) The court must consider the order appropriate to prevent or reduce the loss or damage and make the order unless the court is satisfied that the order would adversely affect a person other than the debtor and the defendant.

180 Orders in relation to unlawful credit activities

Court may make orders in relation to unlawful credit activities

(1) If:

(a) a person (the ***defendant***) engages in a credit activity in relation to another person (the ***plaintiff***); and

(b) the engaging in the activity contravenes any of the following:

(i) section 29 (which requires the holding of a licence);

(ii) section 124A (which prohibits the provision of credit assistance in relation to short-term credit contracts);

(iii) section 133CA (which prohibits credit providers from entering into short-term credit contracts etc.);

the court may make such order as the court considers appropriate against the defendant:

(c) to prevent the defendant from profiting from the plaintiff by engaging in that activity; or

(d) to compensate the plaintiff, in whole or in part, for any loss or damage suffered as a result of the defendant engaging in that activity; or

(e) to prevent or reduce the loss or damage suffered, or likely to be suffered, by the plaintiff as a result of the defendant engaging in that activity.

Authorised Version C2021C00117 registered 17/02/2021

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 166.

(2) Without limiting subsection (1), examples of orders the court may make include:

(a) an order declaring the whole or any part of a contract, deed or arrangement made between the defendant and the plaintiff to be void and, if the court considers it appropriate, to have been void from the time it was entered or at all times on and after a specified day before the order is made; and

(b) an order varying such a contract, deed or arrangement in such manner as is specified in the order and, if the court considers it appropriate, declaring the contract, deed or arrangement to have had effect as so varied on and after a specified day before the order is made; and

(c) an order refusing to enforce any or all of the terms of such a contract, deed or arrangement; and

(d) an order directing the defendant to refund money or return property to the plaintiff; and

(e) an order directing the defendant to pay to the plaintiff the amount of loss or damage the plaintiff suffered; and

(f) an order directing the defendant, at the defendant's own expense, to supply specified services to the plaintiff.

When order may be made

(3) The court may make the order only if:

(a) the plaintiff or ASIC (on behalf of the plaintiff) applies for an order under this section; and

(b) the application is made within 6 years of the day the cause of action that relates to the contravention or commission of the offence accrued.

Applications for order

(4) For the purposes of paragraph (3)(a), ASIC may make an application on behalf of the plaintiff, but only if the plaintiff has given consent in writing before the application is made.

Authorised Version C2021C00117 registered 17/02/2021

Recovery of amount as a debt

(5) If the court makes an order that the defendant pay an amount specified in the order to the plaintiff, the plaintiff may recover the amount as a debt due to the plaintiff.

180A Orders to remedy unfair or dishonest conduct by credit service providers

(1) The court may make one or more of the orders described in subsection (2) if the court is satisfied that:

(a) a person (the ***defendant***) provided a credit service to a consumer (the ***plaintiff***); and

(b) the defendant engaged in conduct that:

(i) was connected with the provision of the service; and

(ii) was unfair or dishonest; and

(c) the conduct had one or more of the following results:

(i) the plaintiff entered a credit contract, consumer lease, mortgage or guarantee that the plaintiff would not have entered apart from the conduct;

(ii) the plaintiff entered a credit contract, consumer lease, mortgage or guarantee whose terms were different from a credit contract, consumer lease, mortgage or guarantee the plaintiff would have entered apart from the conduct;

(iii) the plaintiff became liable to pay fees, costs or charges to the defendant or someone else.

(2) The orders are as follows:

(a) an order that the defendant take, or refrain from taking, specified action;

(b) an order that the defendant pay the plaintiff a specified amount;

(c) an order that a specified amount is not due or owing by the plaintiff to the defendant;

(d) any other order the court considers appropriate to:

(i) redress the unfairness or dishonesty; or

Authorised Version C2021C00117 registered 17/02/2021

(ii) prevent the defendant from profiting from the plaintiff by engaging in the conduct;

except an order that affects a credit contract, consumer lease, mortgage or guarantee to which the conduct related.

Determining whether conduct was unfair or dishonest

(3) In determining whether conduct was unfair or dishonest, the court:

(a) must have regard to the extent (if any) to which one or more of the circumstances described in subsection (4) existed; and

(b) must consider it more likely that the conduct was unfair or dishonest the more any of those circumstances existed and the more any of them affected the plaintiff's interests.

This does not limit the matters to which the court may have regard.

(4) The circumstances are as follows:

(a) the plaintiff was at a special disadvantage in dealing with the defendant in relation to the transaction involving:

(i) the conduct; and

(ii) a credit contract, consumer lease, mortgage or guarantee to which the conduct related; and

(iii) any other contract requiring the plaintiff to make payments for the purposes of which it is reasonable to expect the plaintiff would or did enter such a credit contract, consumer lease, mortgage or guarantee;

(b) the plaintiff was a member of a class whose members were more likely than people who were not members of the class to be at such a disadvantage;

(c) if the plaintiff was a member of a class referred to in paragraph (b)—a reasonable person would consider that the conduct was directed at that class;

(d) the plaintiff was unable, or considered himself or herself unable, to make:

(i) a credit contract with a credit provider other than the credit provider to which the conduct related; or

(ii) a consumer lease with a lessor other than the lessor to which the conduct related; or

Authorised Version C2021C00117 registered 17/02/2021

(iii) a mortgage with a mortgagee other than the mortgagee to which the conduct related; or

(iv) a guarantee with a beneficiary other than the beneficiary to which the conduct related;

(e) the conduct involved a technique that:

(i) should not in good conscience have been used; or

(ii) manipulated the plaintiff;

(f) the defendant could determine or significantly influence the terms of a contract covered by subparagraph (a)(ii) or (iii);

(g) the terms of the transaction described in paragraph (a) were less favourable to the plaintiff than the terms of a comparable transaction.

When order may be made

(5) The court may make the order only if:

(a) the plaintiff or ASIC (on behalf of the plaintiff) applies for an order under this section; and

(b) the application is made within 6 years of the day the defendant first started engaging in the conduct.

Applications for order

(6) For the purposes of paragraph (5)(a), ASIC may make an application on behalf of the plaintiff, but only if the plaintiff has given consent in writing before the application is made.

Recovery of amount as a debt

(7) If the court makes an order that the defendant pay an amount specified in the order to the plaintiff, the plaintiff may recover the amount as a debt due to the plaintiff.

When this section does not apply

(8) This section does not apply to the provision of credit assistance by a person who is (or after the provision of the assistance becomes):

Authorised Version C2021C00117 registered 17/02/2021

(a) a credit provider under the credit contract to which the assistance relates; or
(b) a lessor under the consumer lease to which the assistance relates; or
(c) a mortgagee under a mortgage in relation to the credit contract to which the assistance relates; or
(d) a beneficiary of a guarantee in relation to the credit contract to which the assistance relates.

181 Preference must be given to compensate consumers

(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 a contravention of a civil penalty provision; or
(b) make a relinquishment order against a person in relation to a 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 the contravention of the pecuniary penalty order.

(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 which persons might reasonably be expected to be entitled under section 178, 179 or 180; and
(b) give preference to making an appropriate amount available for compensation under those sections.

(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 ensuring that the amount remains available for the payment of compensation under section 178, 179 or 180.

Authorised Version C2021C00117 registered 17/02/2021

182 Adverse publicity orders

(1) The court may, on application by ASIC, make an adverse publicity order against a person who has:

(a) contravened a civil penalty provision; or

(b) committed an offence against this Act.

(2) An ***adverse publicity order*** is an order that:

(a) requires a 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; or

(b) requires a 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) The court may make the order only if:

(a) ASIC applies for an order under this section; and

(b) the application is made within 6 years of the contravention or the commission of the offence.

183 Relief from liability for contravention of civil penalty provision

(1) If:

(a) proceedings for a contravention of a civil penalty provision are brought against a person; and

(b) in the proceedings it appears to the court that the person has, or may have, contravened a civil penalty provision but that:

(i) the person has acted honestly; and

(ii) having regard to all the circumstances of the case, the person ought fairly to be excused for the contravention;

the court may relieve the person either wholly or partly from a liability to which the person would otherwise be subject, or that might otherwise be imposed on the person, because of the contravention.

Authorised Version C2021C00117 registered 17/02/2021

(2) If a person considers that proceedings for a contravention of a civil penalty provision will or may be brought against the person, the person may apply to the court for relief.

(3) On an application under subsection (2), the court may grant relief under subsection (1) as if the proceedings had been begun in the court.

184 Multiple remedies may be granted

To avoid doubt, the court may make an order under a provision of this Act in addition to one or more orders under another provision of this Act or another Act.

Authorised Version C2021C00117 registered 17/02/2021

Part 4-3—Jurisdiction and procedure of courts

Division 1—Introduction

185 Guide to this Part

This Part is about court jurisdiction and procedure.

Division 2 deals with civil proceedings. It confers jurisdiction on the Federal Court, the Federal Circuit Court and State and Territory courts, subject to specified limits. It also contains rules about the transfer of civil proceedings between courts and other matters (such as when proceedings may be dealt with as small claims proceedings and when adverse cost orders can be made).

Division 3 deals with criminal proceedings. It confers criminal jurisdiction on the State and Territory courts and sets out the laws that are to be applied in relation to criminal proceedings.

Division 4 contains rules about proceedings generally (such as ASIC's power to intervene in proceedings and the power of courts to punish for contempt).

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Civil proceedings

Subdivision A—Application of this Division

186 Application of this Division

(1) This Division applies to the exclusion of:
  (a) the *Jurisdiction of Courts (Cross-vesting) Act 1987*; and
  (b) section 39B of the *Judiciary Act 1903*.

(2) This Division does not limit the application of the provisions of the *Judiciary Act 1903* (other than section 39B). In particular, it does not limit the application of subsection 39(2) of that Act in relation to matters arising under this Act.

(3) Nothing in this Division affects any other jurisdiction of any court.

(4) Despite anything else in this Division, jurisdiction is conferred on the courts of a Territory only to the extent that the Constitution permits.

Subdivision B—Conferral of civil jurisdiction

187 Civil jurisdiction of courts

(1) Jurisdiction is conferred on a court referred to in an item in the following table in relation to civil matters arising under this Act, subject to the limits on the court's jurisdiction (if any) specified in the item:

Civil jurisdiction of courts

Item	Court on which civil jurisdiction is conferred	Limits of jurisdiction
1	The Federal Court	No specified limits.

Authorised Version C2021C00117 registered 17/02/2021

Civil jurisdiction of courts		
Item	**Court on which civil jurisdiction is conferred**	**Limits of jurisdiction**
2	The Federal Circuit Court	The court does not have jurisdiction to award an amount for loss or damage that exceeds: (a) $750,000; or (b) if another amount is prescribed by the regulations—that other amount.
3	A superior court, or lower court, of a State or Territory	The court's general jurisdictional limits, including limits as to locality and subject matter.

(2) This section has effect subject to section 188.

188 Jurisdiction—decisions to prosecute and related criminal justice process decisions made by Commonwealth officers

(1) If a decision to prosecute a person for an offence against this Act has been made by an officer of the Commonwealth, and the prosecution is proposed to be brought in a court of a State or Territory:

(a) the Federal Court does not have jurisdiction in relation to any matter in which a person seeks a writ of mandamus or prohibition, or an injunction, against the officer in relation to that decision; and

(b) jurisdiction in relation to any such matter is conferred on the Supreme Court of the State or Territory in which the prosecution is proposed to be brought.

(2) Subject to subsection (4), at any time when:

(a) a prosecution for an offence against this Act is before a court of a State or Territory; or

(b) an appeal arising out of such a prosecution is before a court of a State or Territory;

Authorised Version C2021C00117 registered 17/02/2021

the following apply:

(c) the Federal Court does not have jurisdiction in relation to any matter in which the person who is or was the defendant in the prosecution seeks a writ of mandamus or prohibition, or an injunction, against an officer of the Commonwealth in relation to a related criminal justice process decision;

(d) jurisdiction in relation to any such matter is conferred on the Supreme Court of the State or Territory in which the prosecution or appeal is before a court.

(3) A ***related criminal justice process decision***, in relation to an offence, means a decision (other than a decision to prosecute) made in the criminal justice process in relation to the offence, including:

(a) a decision in connection with the investigation, committal for trial or prosecution of the defendant; and

(b) a decision in connection with the appointment of investigators or inspectors for the purposes of such an investigation; and

(c) a decision in connection with the issue of a warrant, including a search warrant or a seizure warrant; and

(d) a decision requiring the production of documents, the giving of information or the summoning of persons as witnesses; and

(e) a decision in connection with an appeal arising out of the prosecution.

(4) Subsection (2) does not apply if a person has applied for a writ of mandamus or prohibition, or an injunction, against an officer of the Commonwealth in relation to a related criminal justice process decision before the commencement of a prosecution for an offence against a law of the Commonwealth, or of a State or a Territory.

(5) If subsection (4) applies, the prosecutor may apply to the court for a permanent stay of the proceedings referred to in that subsection and the court may grant such a stay if the court determines that:

(a) the matters that are the subject of the proceedings are more appropriately dealt with in the criminal justice process; and

Authorised Version C2021C00117 registered 17/02/2021

(b) a stay of proceedings will not substantially prejudice the person.

(6) Subsections (1), (2), (4) and (5) have effect despite anything in this Act or in any other law. In particular:

(a) neither this Act, nor any other law, has the effect of giving the Federal Court jurisdiction contrary to subsection (1) or (2); and

(b) neither section 9 of the *Administrative Decisions (Judicial Review) Act 1977*, nor any other law, has the effect of removing from the Supreme Court of a State or Territory the jurisdiction given to that court by subsection (1) or (2).

189 Cross-jurisdictional appeals

The following table has effect:

Cross-jurisdictional appeals

Item	Despite any other law of the Commonwealth, an appeal in relation to a matter arising under this Act does not lie from a decision of ...	to any of the following courts:
1	the Federal Court	(a) a court of a State; (b) a court of a Territory; (c) the Federal Circuit Court.
2	the Federal Circuit Court	(a) a court of a State; (b) a court of a Territory.
3	a court of a State	(a) the Federal Court; (b) the Federal Circuit Court; (c) a court of another State; (d) a court of a Territory.
4	a court of the Australian Capital Territory	(a) the Federal Court; (b) the Federal Circuit Court; (c) a court of a State;

Authorised Version C2021C00117 registered 17/02/2021

Cross-jurisdictional appeals		
Item	**Despite any other law of the Commonwealth, an appeal in relation to a matter arising under this Act does not lie from a decision of ...**	**to any of the following courts:**
		(d) a court of another Territory.
5	a court of the Northern Territory	(a) the Federal Court; (b) the Federal Circuit Court; (c) a court of a State; (d) a court of another Territory.

190 Courts to act in aid of each other

All of the following must severally act in aid of, and be auxiliary to, each other in civil matters arising under this Act:

(a) courts on which jurisdiction is conferred under this Division;

(b) officers of, or under the control of, those courts.

Subdivision C—Transfers between courts

191 Transfers—application of Subdivision

Scope of Subdivision

(1) This Subdivision applies if all the following conditions are satisfied:

(a) proceedings in relation to a civil matter arising under this Act are pending, or have come, before a court (the ***transferring court***) on which jurisdiction is conferred under this Division in relation to the matter;

(b) jurisdiction is also conferred on another court (the ***receiving court***) under this Division in relation to either of the following (the ***transfer matter***):

(i) the entire proceedings;

(ii) an application in the proceedings;

Authorised Version C2021C00117 registered 17/02/2021

(c) the receiving court has the power to grant the remedies sought before the transferring court in relation to the transfer matter.

Transfers to which other legislation applies

(2) This Subdivision does not apply to a transfer between the Federal Court and the Federal Circuit Court, except as provided by paragraph 192(2)(b).

Note 1: Paragraph 192(2)(b) gives the Federal Circuit Court the power to transfer a matter to the Federal Court with a recommendation that the Federal Court transfer the matter to another superior court.

Note 2: Transfers from the Federal Court are covered by section 32AB of the *Federal Court of Australia Act 1976* and transfers from the Federal Circuit Court are covered by section 39 of the *Federal Circuit Court of Australia Act 1999*.

192 Transfers—exercise of transfer power

General rule

(1) If section 193 (which deals with the criteria for transfers) is satisfied, the transferring court may transfer to the receiving court:

(a) the transfer matter; and

(b) if the transferring court considers it necessary or convenient—any related application (or all related applications) in the proceedings.

Cross-jurisdictional transfers between lower courts and superior courts

(2) However, if the transferring court is a lower court, and the transferring court considers that section 193 is satisfied in relation to the transfer of a matter referred to in subsection (1) of this section to a receiving court that is a superior court other than the relevant superior court:

(a) the transferring court does not have the power to transfer the matter to that receiving court; but

(b) the transferring court may:

Authorised Version C2021C00117 registered 17/02/2021

(i) transfer the matter to the relevant superior court; and
(ii) give the relevant superior court a recommendation that the matter be transferred to that receiving court by the relevant superior court.

193 Transfers—criteria for transfer

General

(1) The transferring court may make a transfer under section 192 only if it appears to the transferring court, taking into account the considerations covered by subsection (2) of this section, that:
(a) the transfer matter arises out of, or is related to, other proceedings pending, or that have come, before the receiving court; or
(b) it is otherwise in the interests of justice that the transfer matter be determined by the receiving court.

Relevant considerations

(2) The considerations covered by this subsection include the following:
(a) the principal location, or place of business, of the parties in relation to the transfer matter;
(b) where the event (or events) that are the subject of the transfer matter took place;
(c) if the transfer matter involves secured real property—the jurisdiction in which the real property is located;
(d) the desirability of related proceedings being heard in the same State or Territory;
(e) any relevant recommendation received under subsection 192(2);
(f) the suitability (taking into account the considerations referred to in paragraphs (a) to (e) and any other consideration) of having the transfer matter determined by the receiving court.

Authorised Version C2021C00117 registered 17/02/2021

194 Transfers—how initiated

A court may make a transfer under section 192:

(a) on the application of a party made at any stage; or

(b) at the court's own initiative.

195 Transfers—documents and procedure

If the transferring court transfers proceedings or an application to the receiving court under section 192:

(a) the Registrar (or other proper officer) of the transferring court must give the Registrar (or other proper officer) of the receiving court all documents filed in the transferring court in relation to the proceedings or application; and

(b) the receiving court must proceed as if:

(i) the proceedings or application had been originally brought or made in the receiving court; and

(ii) the same proceedings had been taken in the receiving court as were taken in the transferring court.

196 Transfers—conduct of proceedings

(1) Subject to any applicable rules of court, in dealing with the transfer matter transferred to the court under section 192, the receiving court must apply rules of evidence and procedure that:

(a) are applied in any superior court; and

(b) the court considers appropriate to be applied in the circumstances.

(2) If proceedings are transferred under section 192 from the transferring court to the receiving court, the receiving court must deal with the proceedings as if, subject to any order of the transferring court, the steps that had been taken for the purposes of the proceedings in the transferring court (including the making of an order), or similar steps, had been taken in the receiving court.

Authorised Version C2021C00117 registered 17/02/2021

197 Transfers—entitlement to practise as a lawyer

(1) If proceedings (the ***transferred proceedings***) in the transferring court are transferred to the receiving court under section 192, a person who is entitled to practise as a lawyer (however described) in the transferring court has the same entitlements to practise in relation to the matters covered by subsection (2) in the receiving court that the person would have if the receiving court were a federal court exercising federal jurisdiction.

(2) This subsection covers the following matters:
  (a) the transferred proceedings;
  (b) any other proceedings out of which the transferred proceedings arise or to which the transferred proceedings are related, if the other proceedings are to be determined together with the transferred proceedings.

198 Transfers—limitation on appeals

An appeal does not lie from a decision of a court:
  (a) in relation to the transfer of proceedings under section 192; or
  (b) as to which rules of evidence and procedure are to be applied under subsection 196(1).

Subdivision D—Other matters

199 Plaintiffs may choose small claims procedure

Application for small claims procedure

(1) Proceedings are to be dealt with as small claims proceedings under this section if:
  (a) a person applies to a magistrates court, local court or the Federal Circuit Court for an order covered by subsection (2); and

Authorised Version C2021C00117 registered 17/02/2021

(b) the person indicates, in the manner (if any) prescribed by the regulations or by the rules of the court, that the person wants the small claims procedure to apply to the proceedings.

Orders for which small claims procedure triggered

(2) The following table sets out when an order is covered by this subsection:

Orders for which small claims procedure triggered

Item	An order is covered by this subsection if it is made under ...	but only if (if applicable) ...
1	Section 178	the order is for an amount that is not more than: (a) $40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
2	Section 37 of the National Credit Code	the value of the credit contract, mortgage or guarantee to which the order relates is not more than: (a) $40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
3	Subsection 38(7) of the National Credit Code	the value of the credit contract, mortgage or guarantee to which the order relates is not more than: (a) $40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
4	Section 74 of the National Credit Code	not applicable.
5	Section 75 of the National Credit Code	not applicable.

Authorised Version C2021C00117 registered 17/02/2021

Orders for which small claims procedure triggered		
Item	**An order is covered by this subsection if it is made under ...**	**but only if (if applicable) ...**
6	Section 76 of the National Credit Code	the value of the credit contract, mortgage or guarantee to which the order relates is not more than: (a) $40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
7	Section 78 of the National Credit Code	the value of the credit contract, mortgage or guarantee to which the order relates is not more than: (a) $40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
8	Section 96 of the National Credit Code	not applicable.
9	Section 101 of the National Credit Code	the value of the credit contract, mortgage or guarantee to which the order relates is not more than: (a) $40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
10	Section 106 of the National Credit Code	the order is for an amount that is not more than: (a) $40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
11	Subsection 107(3) of the National Credit Code	the order is for an amount that is not more than: (a) $40,000; or (b) if a higher amount is prescribed

Authorised Version C2021C00117 registered 17/02/2021

Orders for which small claims procedure triggered		
Item	**An order is covered by this subsection if it is made under ...**	**but only if (if applicable) ...**
		by the regulations—that higher amount.
12	Section 108 of the National Credit Code	the value of the credit contract, mortgage or guarantee to which the order relates is not more than: (a) $40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
13	Section 118 of the National Credit Code	the order is for an amount that is not more than: (a) $40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
14	Section 175F of the National Credit Code	the value of the consumer lease to which the order relates is not more than: (a) $40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
15	Subsection 175G(6) of the National Credit Code	the value of the consumer lease to which the order relates is not more than: (a) $40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
16	Section 177D of the National Credit Code	not applicable.
17	Section 177E of the National Credit Code	not applicable.

Authorised Version C2021C00117 registered 17/02/2021

Orders for which small claims procedure triggered		
Item	**An order is covered by this subsection if it is made under ...**	**but only if (if applicable) ...**
18	Section 177F of the National Credit Code	the value of the consumer lease to which the order relates is not more than: (a) $40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
19	Section 179K of the National Credit Code	not applicable.
20	Section 179Q of the National Credit Code	the value of the consumer lease to which the order relates is not more than: (a) $40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
21	Subsection 179R(3) of the National Credit Code	the order is for an amount that is not more than: (a) $40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.

(3) The ***value*** of a credit contract, mortgage, guarantee or consumer lease is:

(a) worked out in accordance with the regulations; or

(b) if there are no regulations in force for the purposes of paragraph (a):

(i) for a credit contract—the amount of credit that has been, or may be, provided under the contract; and

(ii) for a mortgage—the amount of credit that has been, or may be, provided under the credit contract to which the mortgage relates; and

Authorised Version C2021C00117 registered 17/02/2021

(iii) for a guarantee—the amount of credit that has been, or may be, provided under the credit contract to which the guarantee relates; and

(iv) for a consumer lease—the amount payable under the consumer lease, as referred to in paragraph 170(1)(b) of the National Credit Code.

Court may make ancillary or consequential orders

(4) To avoid doubt, the court may make any ancillary or consequential orders it considers appropriate in relation to the orders made under the provisions referred to in subsection (2). The limits referred to in column 3 of the table do not apply to those ancillary or consequential orders.

Procedure

(5) In small claims proceedings, the court is not bound by any rules of evidence and procedure and may act:

(a) in an informal manner; and

(b) without regard to legal forms and technicalities.

(6) At any stage of the small claims proceedings, the court may amend the papers commencing the proceedings if sufficient notice is given to any party adversely affected by the amendment.

Legal representation

(7) A party to small claims proceedings may be represented in the proceedings by a lawyer only with the leave of the court.

(8) If the court grants leave for a party to the proceedings to be represented by a lawyer, the court may, if it considers appropriate, do so subject to conditions designed to ensure that no other party is unfairly disadvantaged.

(9) For the purposes of this section, a person is taken not to be represented by a lawyer if the lawyer is an employee or officer of the person.

Authorised Version C2021C00117 registered 17/02/2021

200 Costs only if proceedings brought vexatiously etc.

(1) In proceedings that:

(a) are dealt with as small claims proceedings (see section 199); or

(b) relate to section 74, 96, 177D or 179K of the National Credit Code (which deal with hardship and postponement orders);

a party to the proceedings may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2).

(2) The party may be ordered to pay the costs only if:

(a) the court is satisfied that the party brought the proceedings vexatiously or without reasonable cause; or

(b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs.

201 Civil proceedings not to be stayed

No civil proceedings under this Act are to be stayed merely because the proceedings disclose, or arise out of, the commission of an offence.

202 Standard of proof in civil proceedings

If, in proceedings (other than proceedings for an offence), it is necessary to establish, or for the court to be satisfied, for any purpose relating to a matter arising under this Act, that:

(a) a person has contravened a provision of this Act; or

(b) default has been made in complying with a provision of this Act; or

(c) an act or omission was unlawful because of a provision of this Act; or

(d) a person has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to a contravention, or a default in complying with, a provision of this Act;

Authorised Version C2021C00117 registered 17/02/2021

it is sufficient if the matter referred to in paragraph (a), (b), (c) or (d) is established, or the court is so satisfied on the balance of probabilities.

Authorised Version C2021C00117 registered 17/02/2021

Division 3—Criminal proceedings

Subdivision A—Application of this Division

203 Application of this Division

(1) This Division applies to the exclusion of sections 68, 70 and 70A of the *Judiciary Act 1903*.

(2) However, this Division does not limit the application of the provisions of the *Judiciary Act 1903* (other than sections 68, 70 and 70A). In particular, it does not limit the application of subsection 39(2) of that Act in relation to criminal matters arising under this Act.

(3) Despite anything else in this Division, jurisdiction is conferred on the courts of a Territory only to the extent that the Constitution permits.

Subdivision B—Conferral of criminal jurisdiction

204 Criminal jurisdiction of courts

Cross-vesting of criminal jurisdiction of courts

(1) Subject to this section, if a court of a State or Territory exercises jurisdiction in relation to a matter covered by subsection (2) in relation to offenders or persons (***State offenders***) charged with offences against the laws of the State or Territory, the court has the equivalent jurisdiction in relation to offenders or persons charged with offences against this Act.

(2) The matters covered by this subsection are as follows:
  (a) the summary conviction of State offenders;
  (b) their examination and commitment for trial on indictment;
  (c) their trial and conviction on indictment;
  (d) their sentencing, punishment and release;

Authorised Version C2021C00117 registered 17/02/2021

(e) the liability to make reparation in connection with their offences;
(f) the forfeiture of property in connection with their offences;
(g) the proceeds of their crimes;
(h) the hearing and determination of:
(i) proceedings connected with; or
(ii) appeals arising out of; or
(iii) appeals arising out of proceedings connected with;
any trial or conviction referred to in paragraph (a), (b) or (c), or any matter of a kind referred to in paragraph (d), (e), (f) or (g).

Certain aspects of jurisdiction to be exercised only by magistrate

(3) Only a magistrate may exercise the jurisdiction conferred by subsection (1) in relation to the summary conviction, or examination and commitment for trial, of any person.

Person who pleads guilty to an indictable offence may be sentenced or otherwise dealt with without trial

(4) The jurisdiction conferred by subsection (1) includes jurisdiction in accordance with provisions of a relevant criminal law of a State or Territory, and:
(a) the reference in paragraph (2)(h) to "any trial or conviction" includes a reference to any conviction or sentencing in accordance with the provisions of a relevant criminal law; and
(b) unless the contrary intention appears, a reference to jurisdiction conferred by subsection (1) includes a reference to such included jurisdiction.

(5) ***Relevant criminal law*** means a law providing that if, in proceedings before a court, a person pleads guilty to a charge for which the person could be prosecuted on indictment, the person may be committed, to a court having jurisdiction to try offences on indictment, to be sentenced or otherwise dealt with without being tried in that last-mentioned court.

Authorised Version C2021C00117 registered 17/02/2021

(6) A person may be dealt with in accordance with a relevant criminal law even if, apart from this section, the offence concerned:
  (a) would be required to be prosecuted on indictment; or
  (b) would be required to be prosecuted either summarily or on indictment.

(7) For the purposes of the application of a relevant criminal law as provided by subsection (4):
  (a) a reference in that law to an indictable offence is taken to include a reference to an offence that may be prosecuted on indictment; and
  (b) in order to determine the sentence that may be imposed on a person by a court pursuant to the relevant criminal law, the person is taken to have been prosecuted and convicted on indictment in that court.

Jurisdiction in relation to summary offences is unlimited

(8) Subject to subsection (10), the jurisdiction conferred on a court of a State or Territory by subsection (1) is conferred despite any limits as to locality of the jurisdiction of that court under the law of that State or Territory.

Court may decline to exercise jurisdiction in relation to summary offences

(9) If:
  (a) jurisdiction is conferred on a court of a State or Territory in relation to the summary conviction of persons charged with offences against this Act by subsection (1); and
  (b) the court is satisfied that it is appropriate to do so, having regard to all the circumstances (including the public interest);

the court may decline to exercise that jurisdiction in relation to an offence committed in another State or Territory.

Authorised Version C2021C00117 registered 17/02/2021

Limits on jurisdiction in relation to indictable offences

(10) The jurisdiction conferred on a court of a State or Territory by subsection (1) in relation to:

(a) the examination and commitment for trial on indictment; and

(b) the trial and conviction on indictment;

of offenders or persons charged with offences against this Act is conferred only in relation to:

(c) offences committed outside Australia (not including the coastal sea); and

(d) offences committed, begun or completed in the State or the Territory concerned.

205 Criminal proceedings—laws to be applied

Laws to be applied

(1) Subject to this Division, the laws of a State or Territory in relation to:

(a) the arrest and custody in the State or Territory of offenders or persons charged with offences; and

(b) criminal procedure in the State or Territory in relation to such persons; and

(c) the rules of evidence applied in criminal procedure in the State or Territory in relation to such persons;

apply in the State or Territory, so far as they are applicable, to persons who are charged with offences against this Act.

Meaning of criminal procedure

(2) ***Criminal procedure*** means the procedure for:

(a) the summary conviction; and

(b) the examination and commitment for trial on indictment; and

(c) the trial and conviction on indictment; and

Authorised Version C2021C00117 registered 17/02/2021

(d) the hearing and determination of appeals arising out of any such trial or conviction or out of any related proceedings;

of offenders or persons charged with offences, and includes the procedure for holding accused persons to bail.

206 Criminal proceedings—how taken

(1) In any proceedings for an offence against this Act, any information, charge, complaint or application may be laid or made by:

(a) ASIC; or

(b) a delegate of ASIC; or

(c) another person authorised in writing by the Minister to bring the proceedings.

(2) A delegation for the purposes of paragraph (1)(b), or an authorisation for the purposes of paragraph (1)(c), may relate to all offences, or to specified offences, against this Act.

(3) Nothing in this section affects the operation of the *Director of Public Prosecutions Act 1983*.

207 Certain persons to assist in prosecutions

(1) If a prosecution in relation to an offence against this Act has been brought, or ASIC is of the opinion that a prosecution in relation to an offence against this Act ought to be brought, against a person (the ***defendant***), ASIC may:

(a) if the defendant is a natural person—require any person who is or was a partner, employee or agent of the defendant; or

(b) if the defendant is a body corporate—require any person who is or was an officer (within the meaning of the *Corporations Act 2001*), employee or agent of the defendant;

to assist in the prosecution, and the person who is so required must give all assistance in connection with the prosecution that that person is reasonably able to give.

(2) A person commits an offence if:

Authorised Version C2021C00117 registered 17/02/2021

(a) the person is subject to a requirement under subsection (1); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 20 penalty units.

(3) Subsection (2) is an offence of strict liability.

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

(4) For the purposes of subsection (2), it is a defence if the person:
(a) is the defendant; or
(b) is or has been the defendant's lawyer.

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) If a person (other than the defendant or a person who is, or has been, the defendant's lawyer) does not comply with a requirement under subsection (1), the court may, on the application of ASIC, order the person to comply with the requirement within such time, and in such manner, as the court orders.

(6) If ASIC makes a requirement under subsection (1) in writing, the requirement is not a legislative instrument.

208 Privilege against self-incrimination not available to bodies corporate in criminal proceedings

(1) In proceedings in a court when exercising jurisdiction in relation to a criminal matter arising under this Act, a body corporate is not entitled to refuse or fail to comply with a requirement:
(a) to answer a question or give information; or
(b) to produce a book or any other thing; or
(c) to do any other act whatever;
on the ground that the answer or information, production of the book or other thing, or doing that other act might tend:
(d) to incriminate the body (whether in relation to an offence to which the proceedings relate or otherwise); or

Authorised Version C2021C00117 registered 17/02/2021

(e) to make the body liable to a penalty (whether in relation to anything to which the proceedings relate or otherwise).

(2) Subsection (1) applies whether or not the body concerned is a defendant in the proceedings or in any other proceedings.

Authorised Version C2021C00117 registered 17/02/2021

Division 4—Proceedings generally

209 ASIC's power to intervene in proceedings

(1) ASIC may intervene in any proceedings relating to a matter arising under this Act.

(2) If ASIC intervenes in proceedings referred to in subsection (1), ASIC is taken to be a party to the proceedings and, subject to this Act, has all the rights, duties and liabilities of such a party.

(3) Without limiting subsection (2), ASIC may appear and be represented in any proceedings in which it wishes to intervene pursuant to subsection (1):
  (a) by an ASIC staff member; or
  (b) by a natural person to whom, or by an officer or employee of a person or body to whom or to which, ASIC has delegated its functions and powers under this Act or such of those functions and powers as relate to a matter to which the proceedings relate; or
  (c) by a lawyer.

210 Evidence of contravention

For the purposes of this Act, a certificate that:
  (a) purports to be signed by the Registrar or other proper officer of an Australian court; and
  (b) states:
    (i) that a person was convicted by that court on a specified day of a specified offence; or
    (ii) that a person charged before that court with a specified offence was, on a specified day, found in that court to have committed the offence but that the court did not proceed to convict the person of the offence;

Authorised Version C2021C00117 registered 17/02/2021

is, unless it is proved that the conviction was quashed or set aside, or that the finding was set aside or reversed, as the case may be, conclusive evidence:

(c) if subparagraph (b)(i) applies—that the person was convicted of the offence on that day; and

(d) if the offence was constituted by a contravention of a provision of a law—that the person contravened that provision.

211 Power of court to punish for contempt of court

Nothing in a provision of this Act that provides:

(a) that a person must not contravene an order of the court; or

(b) that a person who contravenes an order of the court contravenes a provision of this Act or commits an offence;

affects the powers of the court in relation to the punishment of contempts of the court.

Authorised Version C2021C00117 registered 17/02/2021

Chapter 5—Administration

Part 5-1—Registers relating to credit activities

Division 1—Introduction

212 Guide to this Part

This Part is about registers relating to credit activities that must be established and maintained by ASIC.

Division 2 requires ASIC to establish and maintain one or more registers relating to credit activities. It also deals with how those registers are to be maintained, and the inspection and public availability of those registers.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Registers relating to credit activities

213 Credit registers

ASIC must establish and maintain credit registers

(1) ASIC must establish and maintain one or more registers (the ***credit registers***) relating to credit activities.

How credit registers are to be maintained

(2) The regulations may prescribe the way in which the credit registers must be established or maintained, including the details that ASIC must enter in the credit registers in relation to the following persons:
   (a) licensees;
   (b) persons registered to engage in credit activities under the Transitional Act;
   (c) credit representatives of licensees or persons registered to engage in credit activities under the Transitional Act;
   (d) persons against whom a banning order or disqualification order is made under Part 2-4;
   (e) persons who are banned from engaging in a credit activity under a law of a State or Territory;
   (f) any other persons prescribed by the regulations.

(3) Without limiting subsection (2), the credit registers:
   (a) may be maintained in an electronic form; and
   (b) may be maintained as part of, or together with, any register in relation to financial services maintained under section 922A of the *Corporations Act 2001*.

Credit register is not a legislative instrument

(4) A credit register established under this section is not a legislative instrument.

Authorised Version C2021C00117 registered 17/02/2021

214 Inspection and public availability of credit registers

(1) A person may inspect the credit registers and may make copies of, or take extracts from, them.

(2) ASIC may make the credit registers, or any part of them, available to the public on its website or by other means.

(3) Any disclosure necessary for the purposes of this section is authorised by this section.

Authorised Version C2021C00117 registered 17/02/2021

Part 5-2—Documents lodged with ASIC or required by this Act

Division 1—Introduction

215 Guide to this Part

This Part deals with the lodging of documents with ASIC. It also has offences relating to making false statements in documents.

Division 2 deals with how documents are lodged with ASIC and the approved forms in which the documents must be lodged. It also deals with ASIC's power to refuse to receive documents (in which case, the documents will not be treated as having been lodged with ASIC).

Division 3 deals with ASIC's register of documents that have been lodged with ASIC.

Division 4 has other provisions relating to documents (such as offences for making false statements in documents lodged with ASIC or required for the purposes of this Act).

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Lodgment of documents with ASIC

216 When documents are lodged with ASIC

(1) A document is ***lodged with ASIC*** under this Act if the document:

(a) is transmitted to ASIC in an electronic format approved by ASIC; or

(b) if ASIC approves another manner for the lodgment of a document with ASIC—is given to ASIC in that manner.

(2) However, a document is not ***lodged with ASIC*** under this Act if ASIC refuses to receive the document under subsection 218(1).

Note: Subsection 232(3) provides for when a compliance certificate under section 53 is taken not to be lodged with ASIC.

(3) If a document is lodged with ASIC, then any other material that is lodged with the document as required by this Act or an approved form is taken to be included in that document.

Note: For example, this subsection means that a person will contravene section 225 if the person makes a false or misleading statement in the other material.

217 Approved forms for documents to be lodged with ASIC

(1) A document that this Act requires to be lodged with ASIC in an approved form must, if ASIC has approved a form for the document:

(a) be in the approved form; and

(b) include the information, statements, explanations or other matters required by the form; and

(c) be accompanied by any other material required by the form.

(2) If:

(a) this Act requires a document to be lodged with ASIC in an approved form; and

(b) a provision of this Act either specifies, or provides for regulations to prescribe, information, statements,

Authorised Version C2021C00117 registered 17/02/2021

explanations or other matters that must be included in the document, or other material that must accompany the document;

that other provision is not taken to exclude or limit the operation of subsection (1) in relation to the approved form (and so the approved form may also require information etc. to be included in the form or material to accompany the form).

218 ASIC may refuse to receive document etc.

ASIC may refuse to receive document etc.

(1) If ASIC considers that a document submitted to ASIC for lodgment under this Act:

(a) contains matter contrary to law; or

(b) contains matter that, in a material particular, is false or misleading in the form or context in which it is included; or

(c) is incomplete; or

(d) contravenes this Act; or

(e) contains an error, alteration or erasure;

ASIC may refuse to receive the document and may make a request under subsection (2).

Note: The effect of ASIC refusing to receive the document is that the document is not lodged with ASIC (see subsection 216(2)).

(2) For the purposes of subsection (1), ASIC may request:

(a) that the document be appropriately amended or completed and resubmitted; or

(b) that a fresh document be submitted in its place; or

(c) if the document is incomplete—that a supplementary document in the approved form be lodged.

Notice to provide further document or information

(3) ASIC may give a written notice to a person who submits a document (the ***first document***) for lodgment under this Act, requiring the person to:

Authorised Version C2021C00117 registered 17/02/2021

(a) give to ASIC any other document; or
(b) give to ASIC any information;

that ASIC considers necessary in order to form an opinion as to whether it may refuse to receive the first document.

Notice must specify day by which person must comply

(4) The notice must specify the day by which the person must comply with the notice (which must be a reasonable period after the notice is given). ASIC may extend the day by giving a written notice to the person.

Requirement to comply with notice

(5) The person must comply with the notice within the time specified in the notice.

Civil penalty: 5,000 penalty units.

Strict liability offence

(6) A person commits an offence if:
(a) the person is subject to a requirement under subsection (5); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 120 penalty units.

(7) Subsection (6) is an offence of strict liability.

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

Authorised Version C2021C00117 registered 17/02/2021

Division 3—ASIC's register of documents

219 Register of documents lodged with ASIC

ASIC may maintain document registers

(1) ASIC may establish and maintain one or more registers (the ***document registers***) of documents that have been lodged with ASIC under this Act.

How document registers to be maintained

(2) ASIC may establish and maintain the document registers in any form it considers appropriate.

(3) Without limiting subsection (2), the document registers may be maintained in an electronic form.

No entitlement to inspect document registers

(4) ASIC is not required to:
  (a) permit persons to inspect the document registers, or make copies of, or take extracts from, the document registers; or
  (b) make any part of the document registers available to the public.

Document register is not a legislative instrument

(5) A document register established under this section is not a legislative instrument.

220 ASIC may require person to give information for document registers

Notice to person to give information

(1) If information about a person is included on the document registers, ASIC may, at any time, give the person a written notice

Authorised Version C2021C00117 registered 17/02/2021

requiring the person to give to ASIC specified information about the person, being information of the kind included on the document registers.

Notice must specify day by which person must comply

(2) The notice must specify the day by which the person must comply with the notice (which must be a reasonable period after the notice is given). ASIC may extend the day by giving a written notice to the person.

Requirement to comply with notice

(3) The person must comply with the notice within the time specified in the notice.

Civil penalty: 5,000 penalty units.

Strict liability offence

(4) A person commits an offence if:
(a) the person is subject to a requirement under subsection (3); and
(b) the person engages in conduct; and
(c) the conduct contravenes the requirement.

Criminal penalty: 120 penalty units.

(5) Subsection (4) is an offence of strict liability.

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

221 Written document setting out information from document registers is prima facie evidence of matters

(1) ASIC may, by using a mechanical, electronic or other device for processing data, prepare a written document that sets out information obtained by ASIC from the document registers.

Authorised Version C2021C00117 registered 17/02/2021

(2) In proceedings in a court, a written document that purports to be a document prepared by ASIC under subsection (1) is admissible as prima facie evidence of the matters in the document.

(3) A written document need not be certified by ASIC, or signed, in order to be taken to purport to have been prepared by ASIC.

Authorised Version C2021C00117 registered 17/02/2021

Division 4—Other provisions relating to documents lodged with ASIC or required under this Act

222 Certified copy or extract of document lodged with ASIC is admissible in evidence

(1) In proceedings in a court, a copy of, or extract from, any document lodged with ASIC under this Act, and certified by ASIC, is admissible in evidence as of equal validity with the original document.

(2) The reference in subsection (1) to a document includes, if a copy of that document has been included in the document register by ASIC, a reference to that copy.

223 ASIC may destroy or dispose of certain documents

ASIC may destroy or otherwise dispose of any document that is lodged with ASIC under this Act if:

(a) ASIC considers that it is no longer necessary or desirable to retain it; and

(b) either of the following apply:

(i) it has been in ASIC's possession for the period prescribed by the regulations;

(ii) a copy of the document has been included in the document register.

224 Court may order lodgment of document etc.

(1) If a person has failed to comply with:

(a) any provision of this Act that requires the lodgment of any document with ASIC; or

(b) any request of ASIC under subsection 218(2) (which deals with requests to resubmit documents etc.);

ASIC may give the person a written notice requiring the person to comply with the requirement or request within 14 days.

Authorised Version C2021C00117 registered 17/02/2021

(2) If the person does not comply with the notice within 14 days, the court may, on an application by ASIC, make an order directing the person to comply with the requirement or request.

(3) The order may provide that all costs of and incidental to the application are to be borne by one or more of the following:
  (a) the person;
  (b) if the person is a body corporate—a director, secretary or senior manager of the body corporate who is responsible for the failure to comply;
  (c) if the person is a partnership or the trustees of a trust—a partner or trustee who is responsible for the failure to comply.

225 False or misleading documents

Fault-based offence

(1) A person commits an offence if:
  (a) a document:
    (i) is required under or for the purposes of this Act; or
    (ii) is lodged with or submitted to ASIC under or for the purposes of this Act; and
  (b) the person:
    (i) makes, or authorises the making of, a statement in the document; or
    (ii) omits, or authorises the omission of, a matter or thing from the document; and
  (c) the person knows that the document is materially false or misleading because of the statement or omission.

Criminal penalty: 5 years imprisonment.

Note: For when a document is ***materially false or misleading***, see subsection (5).

Authorised Version C2021C00117 registered 17/02/2021

Strict liability offence—failure to take reasonable steps

(2) A person commits an offence of strict liability if:

(a) a document:

(i) is required under or for the purposes of this Act; or

(ii) is lodged with or submitted to ASIC under or for the purposes of this Act; and

(b) the person:

(i) makes, or authorises the making of, a statement in the document; or

(ii) omits, or authorises the omission of, a matter or thing from the document; and

(c) the document is materially false or misleading because of the statement or omission; and

(d) the person did not take all reasonable steps to ensure that the document was not materially false or misleading because of the statement or omission.

Criminal penalty: 20 penalty units.

Note 1: For when a document is ***materially false or misleading***, see subsection (5).

Note 2: For strict liability, see section 6.1 of the *Criminal Code*.

Civil penalty—knowledge or recklessness

(3) A person contravenes this subsection if:

(a) a document:

(i) is required under or for the purposes of this Act; or

(ii) is lodged with or submitted to ASIC under or for the purposes of this Act; and

(b) the person:

(i) makes, or authorises the making of, a statement in the document; or

(ii) omits, or authorises the omission of, a matter or thing from the document; and

Authorised Version C2021C00117 registered 17/02/2021

(c) the person knows that, or is reckless as to whether, the document is materially false or misleading because of the statement or omission.

Civil penalty: 5,000 penalty units.

Note: For when a document is ***materially false or misleading***, see subsection (5).

Civil penalty—failure to take reasonable steps

(4) A person contravenes this subsection if:

(a) a document:

(i) is required under or for the purposes of this Act; or

(ii) is lodged with or submitted to ASIC under or for the purposes of this Act; and

(b) the person:

(i) makes, or authorises the making of, a statement in a document; or

(ii) omits, or authorises the omission of, a matter or thing from a document; and

(c) the document is materially false or misleading because of the statement or omission; and

(d) the person did not take all reasonable steps to ensure that the document was not materially false or misleading because of the statement or omission.

Civil penalty: 5,000 penalty units.

Note: For when a document is ***materially false or misleading***, see subsection (5).

When a document is materially false or misleading

(5) For the purposes of this section, a document is ***materially false or misleading*** if:

(a) the document includes a statement that:

(i) is false in a material particular or materially misleading; or

Authorised Version C2021C00117 registered 17/02/2021

(ii) is based on information that is false in a material particular or materially misleading, or has omitted from it a matter or thing the omission of which renders the document materially misleading; or

(b) a matter or thing is omitted from the document and, without the matter or thing, the document is false in a material particular or materially misleading.

Authorisations

(6) For the purposes of this section, a person who votes in favour of a resolution approving, or who otherwise approves, a document is taken to have authorised:

(a) the making of any statement in the document; and

(b) the omission of any matter or thing from the document.

Authorised Version C2021C00117 registered 17/02/2021

Part 5-3—Concealment or falsification of credit books

Division 1—Introduction

226 Guide to this Part

This Part deals with the concealment or falsification of credit books.

Division 2 includes requirements not to conceal or falsify credit books, and a requirement to take precautions against the falsification of credit books.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Prohibitions relating to the concealment or falsification of credit books

227 Concealing etc. of credit books

Prohibition on concealing credit books etc.

(1) A person must not:
  (a) conceal, destroy, mutilate or alter a credit book; or
  (b) send a credit book out of this jurisdiction.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 6 months imprisonment.

Defence

(3) For the purposes of subsections (1) and (2), it is a defence if the person did not act with intent to:
  (a) defraud; or
  (b) prevent, delay or obstruct the carrying out of an examination, investigation or audit, or the exercise of a power, under this Act.

Note: For the purposes of subsection (2), a defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

Authorised Version C2021C00117 registered 17/02/2021

*Meaning of **credit book***

(4) ***Credit book*** means:

(a) a book (by whatever name it is known) that this Act requires to be kept; or

(b) a document that is:

(i) prepared; or

(ii) lodged with or submitted to ASIC; or

(iii) given to a person;

under, or for the purposes of, this Act; or

(c) a book relating to the credit activities engaged in by a licensee or a credit representative; or

(d) a financial record.

228 Falsification of credit books

Requirements in relation to falsification of credit books

(1) A person must not engage in conduct that results in the falsification of a credit book.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:

(a) the person engages in conduct; and

(b) the conduct results in the falsification of a credit book.

Criminal penalty: 6 months imprisonment.

Defence

(3) For the purposes of subsections (1) and (2), it is a defence if:

(a) the person acted honestly; and

(b) in all the circumstances, the act or omission constituting the offence should be excused.

Authorised Version C2021C00117 registered 17/02/2021

Note: For the purposes of subsection (2), a defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

229 Precautions against falsification of credit books

Requirement to take precautions against falsification

(1) A person who is required by this Act to keep a credit book must take reasonable steps to:
  (a) guard against the falsification of the credit book; and
  (b) facilitate the discovery of any falsification of the credit book.

Civil penalty: 5,000 penalty units.

Offence

(2) A person commits an offence if:
  (a) the person is subject to a requirement under subsection (1); and
  (b) the person engages in conduct; and
  (c) the conduct contravenes the requirement.

Criminal penalty: 6 months imprisonment.

Authorised Version C2021C00117 registered 17/02/2021

Part 5-4—Fees imposed by the National Consumer Credit Protection (Fees) Act 2009

Division 1—Introduction

230 Guide to this Part

This Part deals with fees imposed by the *National Consumer Credit Protection (Fees) Act 2009*.

Division 2 includes provisions relating to fees, including the payment of fees, the lodgment of documents or doing of acts without the payment of fees, and the waiver or refund of fees.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Fees imposed by the National Consumer Credit Protection (Fees) Act 2009

231 Fees are payable to the Commonwealth

The fees imposed under the *National Consumer Credit Protection (Fees) Act 2009* in relation to this Act are payable to the Commonwealth.

232 Lodgment of document without payment of fee

(1) This section applies where:
  (a) a fee is payable under section 231 for the lodgment of a document under this Act; and
  (b) the document was submitted for lodgment without payment of the fee.

(2) The document is not taken not to have been lodged merely because of non-payment of the fee.

(3) Despite subsection (2), a compliance certificate that is required to be lodged under section 53 is taken not to have been lodged until the fee is paid.

233 Doing act without payment of fee

If a fee is payable under section 231 for a matter involving the doing of an act by the Minister or ASIC under this Act, the Minister or ASIC may refuse to do that act until the fee is paid.

234 Effect of sections 232 and 233

Sections 232 and 233 have effect despite anything in another Part of this Act.

Authorised Version C2021C00117 registered 17/02/2021

235 Waiver and refund of fees

Nothing in this Division or the *National Consumer Credit Protection (Fees) Act 2009* prevents the Commonwealth from:

(a) waiving or reducing, in a particular case or in particular classes of cases, fees that would otherwise be payable under this Act; or

(b) refunding, in whole or in part, in a particular case or in particular classes of cases, fees paid under this Act.

236 Debts due to the Commonwealth

ASIC may, on behalf of the Commonwealth, recover a debt due under this Division.

237 Payment of fee does not give right to inspect or search

To avoid doubt, nothing in this Division, and nothing done under this Division:

(a) imposes on ASIC a duty to allow the inspection or search of a register or document, or to make available information; or

(b) confers a right to inspect or search a register or document or to have information made available;

under this Act except so far as such a duty or right would, but for the effect of section 233, exist under a provision of another Part of this Act or under some other law.

Authorised Version C2021C00117 registered 17/02/2021

Part 5-5—Other administrative matters

Division 1—Introduction

238 Guide to this Part

This Part includes miscellaneous provisions relating to administrative matters.

Authorised Version C2021C00117 registered 17/02/2021

Division 1A—Codes of conduct

Subdivision A—Approved codes of conduct

238A Approved codes of conduct

Applications

(1) If an application is made to approve a code of conduct, ASIC may, by legislative instrument, approve the code of conduct.

Identifying enforceable code provisions

(2) In the approval, ASIC may identify a provision of the code of conduct as an enforceable code provision if ASIC considers that:
  (a) the provision represents a commitment to a person by a subscriber to the code relating to transactions or dealings performed for, on behalf of or in relation to the person; and
  (b) a breach of the provision is likely to result in significant and direct detriment to the person; and
  (c) additional criteria prescribed by the regulations for the purposes of this paragraph (if any) are satisfied; and
  (d) it is appropriate to identify the provision of the code as an enforceable code provision, having regard to the matters prescribed by the regulations for the purposes of this paragraph (if any).

Note: See also section 238E.

ASIC to be satisfied of certain matters before making approval

(3) ASIC must not approve a code of conduct unless it is satisfied that:
  (a) to the extent that the code is inconsistent with this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities—the code imposes an obligation on a subscriber that is more onerous than that imposed by

Authorised Version C2021C00117 registered 17/02/2021

this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities; and

(b) each enforceable code provision:
  (i) has been agreed with the applicant; and
  (ii) is legally effective; and

(c) it is appropriate to approve the code, having regard to the following matters:
  (i) whether the obligations of subscribers to the code are capable of being enforced;
  (ii) whether the applicant has effective administrative systems for monitoring compliance with the code and making information obtained as a result of monitoring publicly available;
  (iii) whether the applicant has effective administrative systems for maintaining, and making publicly available, an accurate list of subscribers to the code.

Revocation

(4) ASIC may, by legislative instrument, revoke an approval of an approved code of conduct:
  (a) on application by the applicant for the approval; or
  (b) if ASIC ceases to be satisfied of the matters mentioned in subsection (3); or
  (c) if a review of the operation of the code is not completed by the applicant within the timeframe required by section 238C.

(5) Subsection (4) does not, by implication, limit the application of subsection 33(3) of the *Acts Interpretation Act 1901*.

238B Variations to approved codes of conduct

(1) If an application is made to vary an approved code of conduct, ASIC may, by legislative instrument, approve the variation.

Authorised Version C2021C00117 registered 17/02/2021

(2) Subsections 238A(2) and (3) apply in relation to an application under subsection (1) as if it were an application to approve a code of conduct.

238C Review of approved codes of conduct

(1) The applicant, in relation to an approved code of conduct, must ensure that, every 5 years, an independent review is undertaken of the operation of the approved code of conduct.

(2) A review under subsection (1) must make provision for public consultation.

(3) A review of an approved code of conduct must be completed:
  (a) for the first review—before the end of the 5 year period beginning on the day the code of conduct was approved; and
  (b) for a subsequent review—within 5 years after the completion of the previous review.

(4) For the purposes of this section, a review is completed when a report of the review is given to ASIC.

(5) Within 10 business days of completing a review, the applicant must publish the report of the review on its website.

238D Obligation to comply with enforceable code provisions

If a person holds out that they comply with an approved code of conduct, the person must not breach an enforceable code provision of the approved code of conduct.

Civil penalty: 300 penalty units.

238E Regulations

The regulations may:
  (a) prescribe criteria of which ASIC must be satisfied before it identifies a provision of a code of conduct as an enforceable code provision; or

Authorised Version C2021C00117 registered 17/02/2021

(b) prescribe matters to which ASIC must have regard before it identifies a provision of a code of conduct as an enforceable code provision.

Subdivision B—Mandatory codes of conduct

238F Mandatory codes of conduct

(1) The regulations may prescribe a code of conduct for the purposes of this Division and declare it to be a mandatory code of conduct.

(2) Regulations declaring a code of conduct a mandatory code of conduct may also:
  (a) confer functions and powers on a person or body for the purposes of:
    (i) monitoring compliance with the code of conduct; and
    (ii) dealing with disputes or complaints arising under, or in relation to, the code of conduct; and
    (iii) dealing with other associated administrative matters; or
  (b) provide for and in relation to:
    (i) the keeping of records by persons bound by the code of conduct; and
    (ii) reporting obligations of such persons.

(3) If regulations prescribe a code of conduct, the code of conduct may prescribe pecuniary penalties not exceeding 1,000 penalty units for civil penalty provisions of the code of conduct.

(4) To avoid doubt, subsections 167B(1) and (2) do not apply in relation to the contravention of a civil penalty provision of a mandatory code of conduct.

238G Obligation to comply with mandatory code of conduct

A person must not contravene a mandatory code of conduct.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Other administrative matters

239 ASIC has general administration of this Act

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

240 Obstructing or hindering ASIC etc.

(1) A person must not engage in conduct that results in the obstruction or hindering of ASIC, or any other person, in the performance of a function or the exercise of a power under this Act.

Civil penalty: 5,000 penalty units.

(2) A person commits an offence if:
(a) the person engages in conduct; and
(b) the conduct results in the obstruction or hindering of ASIC, or any other person, in the performance of a function or the exercise of a power under this Act.

Criminal penalty: 2 years imprisonment.

(3) For the purposes of subsections (1) and (2), it is a defence if the person has a reasonable excuse.

Note: For the purposes of subsection (2), a defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

242 ASIC may arrange for use of computer programs to make decisions

(1) ASIC may arrange for the use, under ASIC's control, of computer programs for any purposes for which ASIC may make decisions under this Act.

Authorised Version C2021C00117 registered 17/02/2021

(2) A decision made by the operation of a computer program under an arrangement made under subsection (1) is taken to be a decision made by ASIC.

243 Qualified privilege for information given to ASIC

(1) A person has qualified privilege in relation to the giving of any information to ASIC:

(a) that the person is required or expressly permitted to give under this Act; or

(b) that relates to a contravention, or possible contravention, of the credit legislation; or

(c) that relates to a matter that is relevant to a decision of ASIC under:

(i) section 37 (which deals with when ASIC must grant a licence); or

(ia) section 46A (which deals with when ASIC may grant an application for a variation of the conditions on a licence); or

(ii) section 54 or 55 (which deal with ASIC's powers to suspend or cancel licences); or

(iii) subsection 80(1) (which deals with ASIC's power to make banning orders).

(2) A person who has qualified privilege under subsection (1) in relation to conduct is also not liable for any action based on breach of confidence in relation to that conduct.

(3) The protections given by this section to a person in relation to conduct extend to representatives of the person.

244 ASIC certificate is prima facie evidence of matters

(1) ASIC may issue a certificate stating that a requirement of this Act specified in the certificate:

(a) had or had not been complied with at a date or within a period specified in the certificate; or

Authorised Version C2021C00117 registered 17/02/2021

(b) had been complied with at a date specified in the certificate but not before that date.

(2) In proceedings in a court, a certificate issued by ASIC under subsection (1) is admissible as prima facie evidence of the matters stated in the certificate.

245 Operator of AFCA scheme may give information to ASIC

The operator of the AFCA scheme may give information to ASIC about:

(a) a person becoming a member of the scheme; or

(b) a person ceasing to be a member of the scheme.

Authorised Version C2021C00117 registered 17/02/2021

Chapter 6—Compliance and enforcement

Part 6-1—Investigations

Division 1—Introduction

246 Guide to this Part

This Part is about investigations made by ASIC.

Division 2 includes powers of ASIC to make investigations. ASIC may make investigations in certain circumstances for the due administration of the Commonwealth credit legislation. The Minister may also direct ASIC to investigate matters in certain circumstances.

Division 2 also deals with reports about investigations.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Investigations

247 General powers of investigation

(1) ASIC may make such investigation as it considers expedient for the due administration of the Commonwealth credit legislation if it has reason to suspect that there may have been committed:

(a) a contravention of the credit legislation; or

(b) a contravention of a law of the Commonwealth, or of a law of a referring State or a Territory, being a contravention that:

(i) concerns the management, conduct or affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity; or

(ii) involves fraud or dishonesty and relates to a credit activity engaged in by a person, or a credit contract, mortgage, guarantee or consumer lease.

248 Minister may direct investigations

(1) If, in the Minister's opinion, it is in the public interest in relation to this jurisdiction for a particular matter to which subsection (2) applies to be investigated, he or she 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 Commonwealth credit legislation;

(b) an alleged or suspected contravention of a law of the Commonwealth, or a law of a referring State or a Territory, being a contravention that:

(i) concerns the management, conduct or affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity; or

(ii) involves fraud or dishonesty and relates to a credit activity engaged in by a person, or a credit contract, mortgage, guarantee or consumer lease;

Authorised Version C2021C00117 registered 17/02/2021

(c) a credit activity engaged in by a person.

(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.

(5) A direction under subsection (1) is not a legislative instrument.

249 Interim report on investigation

(1) If, in the course of an investigation under this Part, ASIC forms the opinion that:

(a) a serious contravention of a law of the Commonwealth, or a law of a referring State or a Territory, 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 Commonwealth credit legislation to be amended;

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 considers appropriate.

(2) ASIC may prepare an interim report about an investigation under this Part 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 considers appropriate or the Minister directs.

Authorised Version C2021C00117 registered 17/02/2021

(4) An interim report prepared under this section is not a legislative instrument.

250 Final report on investigation

(1) At the end of an investigation under section 247, 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 248, 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 considers appropriate or the Minister directs.

(4) A direction under subsection (1) is not a legislative instrument.

(5) A report prepared under this section is not a legislative instrument.

251 Distribution of report

(1) As soon as practicable after preparing a report under this Part, ASIC must give a copy of the report to the Minister.

(2) If a report, or part of a report, under this Part relates to a serious contravention of a law of the Commonwealth, or a law of a referring State or a Territory, 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

Authorised Version C2021C00117 registered 17/02/2021

(d) an agency, authority, body or person prescribed by the regulations.

(3) If a report, or part of a report, under this Part 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 Part to be printed and published.

Authorised Version C2021C00117 registered 17/02/2021

Part 6-2—Examination of persons

Division 1—Introduction

252 Guide to this Part

This Part is about the examination of persons by ASIC.

Division 2 allows ASIC to examine a person if ASIC suspects or believes, on reasonable grounds, that the person can give information relevant to an investigation under Part 6-1.

Division 2 also includes rules relating to the procedure for examination of persons by ASIC.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Examination of persons

253 Notice requiring appearance for examination

(1) This section applies if 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 Part 6-1.

(2) ASIC may, by written notice given to the person in the form prescribed by the regulations, require the person:

(a) to give to ASIC all reasonable assistance in connection with the investigation; and

(b) to appear before a specified ASIC member or ASIC staff member for examination on oath and to answer questions.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

(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 257(1) and section 295.

254 Proceedings at examination

The remaining provisions of this Part apply if, pursuant to a requirement made under section 253 for the purposes of an investigation under Part 6-1, a person (the ***examinee***) appears before another person (the ***inspector***) for examination.

255 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

(b) administer an oath or affirmation to the examinee.

Authorised Version C2021C00117 registered 17/02/2021

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

(2) An offence under subsection 290(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*.

(3) 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.

(4) 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 Part 6-1.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

256 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 an ASIC member; or
(b) is an ASIC staff member approved by ASIC; or
(c) is entitled to be present by virtue of:
(i) a direction under subsection (1); or
(ii) subsection 257(1).

Criminal 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*.

257 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:

Authorised Version C2021C00117 registered 17/02/2021

(a) address the inspector; and
(b) examine the examinee;

about matters about which the inspector has examined the examinee.

(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 290).

(3) An offence under subsection 290(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*.

258 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 290).

(3) An offence under subsection 290(2) 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*.

Authorised Version C2021C00117 registered 17/02/2021

259 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, or is contemplating in good faith, proceedings in relation to 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, proceedings:

(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.

Criminal 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*.

(4) 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.

260 Copies given subject to conditions

(1) If a copy is given to a person under subsection 258(2) or 259(4) 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.

Criminal 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*.

Authorised Version C2021C00117 registered 17/02/2021

261 Record to accompany report

(1) If a report about the investigation referred to in section 254 is prepared under section 250, each record (if any) of the examination must accompany the report.

(2) If:

(a) in ASIC's opinion, a statement made at an examination is relevant to any other investigation under Part 6-1; and

(b) a record of the statement was made under section 258; and

(c) a report about the other investigation is prepared under section 250;

a copy of the record must accompany the report.

Authorised Version C2021C00117 registered 17/02/2021

Part 6-3—Inspection of books and audit information-gathering powers

Division 1—Introduction

262 Guide to this Part

This Part is about powers of ASIC in relation to the inspection of books and gathering of information about audits.

Division 2 includes powers of ASIC to inspect books, and to require persons to produce books or documents, or give information, in some circumstances.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Inspection of books and audit information-gathering powers

263 When certain powers may be exercised

A power conferred by this Part (other than sections 264, and 265) may only be exercised:

(a) for the purposes of the performance or exercise of any of ASIC's functions and powers under the Commonwealth credit legislation; or

(b) for the purposes of ensuring compliance with the Commonwealth credit legislation; or

(c) in relation to an alleged or suspected contravention of the credit legislation; or

(d) in relation to an alleged or suspected contravention of a law of the Commonwealth, or of a law of a referring State or a Territory, being a contravention that:

(i) concerns the management, conduct or affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity; or

(ii) involves fraud or dishonesty and relates to a credit activity engaged in by a person, or a credit contract, mortgage, guarantee or consumer lease; or

(e) for the purposes of an investigation under Part 6-1.

264 ASIC may inspect books without charge

(1) A book that the Commonwealth credit legislation requires a person to keep must be open for inspection (without charge) by a person authorised in writing by ASIC.

(2) A person (the ***authorised person***) authorised under this section may require a person in whose possession, custody or control the book is to make the book available for inspection by the authorised person.

Authorised Version C2021C00117 registered 17/02/2021

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

(3) An offence under subsection 290(2) 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*.

(4) An authorisation under this section may be of general application or may be limited by reference to the books to be inspected.

265 Notice to auditors concerning information and books

(1) Subject to subsection (2), ASIC may give an auditor who prepares an audit report required under the Commonwealth credit legislation a written notice requiring the auditor:

(a) to give specified information; or

(b) to produce specified books;

to a specified ASIC member or ASIC staff member at a specified place and time.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

(2) The power in subsection (1) may only be exercised:

(a) for the purposes of ascertaining compliance with audit requirements under the Commonwealth credit legislation; or

(b) in relation to an alleged or suspected contravention of audit requirements under the Commonwealth credit legislation; or

(c) in relation to an alleged or suspected contravention of a law of the Commonwealth, or of a law of a referring State or a Territory, being a contravention that:

(i) concerns the management, conduct or affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity; or

(ii) involves fraud or dishonesty and relates to a credit activity engaged in by a person, or a credit contract, mortgage, guarantee or consumer lease; or

(d) for the purposes of an investigation under Part 6-1 relating to a contravention referred to in paragraph (b) or (c).

Authorised Version C2021C00117 registered 17/02/2021

(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;

(c) any other matter pertaining to audit that is prescribed by the regulations for the purposes of this paragraph.

(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 person.

(5) ASIC may, by written notice to an 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.

266 Notice to produce books about credit activities

ASIC may give to:

(a) a person who engages in a credit activity (either alone or together with any other person or persons); or

(b) a person who ASIC, on reasonable grounds, suspects has been a party to engaging in a credit activity; or

(c) a representative, banker, lawyer or auditor of a person referred to in paragraph (a) or (b);

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

(d) a credit activity engaged in by a person; or

(e) the character or financial situation of, or a business carried on by, a person who engages, or has engaged, in a credit activity.

Authorised Version C2021C00117 registered 17/02/2021

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

267 Notice to produce documents in person's possession

(1) ASIC may give to a person (the ***recipient***) a written notice requiring the production to a specified ASIC member or ASIC staff member, at a specified place and time, of specified books that are in the recipient's possession, custody or control and relate to:

(a) affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity; or

(b) a matter referred to in paragraph 266(1)(d) or (e).

(2) ASIC may give to a person (the ***recipient***) a written notice requiring the production to a specified ASIC member or ASIC staff member, at a specified place and time, of specified books that are in the recipient's possession, custody or control and that relate to the question whether an auditor has complied with audit requirements under the Commonwealth credit legislation.

Note: Failure to comply with a requirement made under this section is an offence (see section 290).

268 ASIC may authorise persons to require production of books, giving of information etc.

(1) ASIC may by writing authorise an ASIC member or ASIC staff member (an ***authorised person***) to make a requirement of a kind that this Part empowers ASIC to make.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

(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.

Authorised Version C2021C00117 registered 17/02/2021

(3) If an authorisation of an authorised person is in force under this section, the authorised person may make a requirement in accordance with the authorisation as if, in sections 265, 266 and 267:

(a) a reference to ASIC were a reference to the authorised person; and

(b) a reference to specified books were a reference to books that the authorised 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 authorised person specifies, whether in the requirement or not and whether orally or in writing, to the person of whom the requirement is made; and

(d) a reference to giving or producing to a specified person were a reference to giving or producing to the authorised person.

271 Powers if books produced or seized

(1) This section applies if:

(a) books are produced to a person under a requirement made under this Part; or

(b) under a warrant issued under Division 2 of Part IAA of the *Crimes Act 1914*, as applied under section 272B 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.

Authorised Version C2021C00117 registered 17/02/2021

(4) The person may use, or permit the use of, any of the books for the purposes of proceedings.

(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 263(a), (b) and (e) or 265(2)(a) and (d), as the case requires; or

(c) for a decision to be made about whether or not proceedings (including proceedings under a law of the Commonwealth, or a law of a referring State or a Territory) to which the books concerned would be relevant should be begun; or

(d) for such proceedings 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 possession of a person (the ***possessor***), the possessor:

(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 possessor'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.

Authorised Version C2021C00117 registered 17/02/2021

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

272 Powers if books not produced

If a person (the ***first person***) fails or refuses to produce particular books in compliance with a requirement made by another person under this Part, the other person may require the first person to state:

(a) if the books may be found; and

(b) who last had possession, custody or control of the books and if that person may be found.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

Authorised Version C2021C00117 registered 17/02/2021

Part 6-3A—Search warrants

Division 1—Introduction

272A Guide to this Part

This Part allows the grant of search warrants in respect of indictable offences under the credit legislation, etc.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Extra application of Crimes Act search warrant provisions

Subdivision A—Basic extra application

272B 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 credit legislation;
  (b) a provision of a law of the Commonwealth, or of a law of a referring State or a Territory, a contravention of which:
    (i) concerns the management, conduct or affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity; or
    (ii) involves fraud or dishonesty and relates to a credit activity engaged in by a person, or a credit contract, mortgage, guarantee or consumer lease.

(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).

Authorised Version C2021C00117 registered 17/02/2021

272C 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

272D Major modifications—evidential material

For the purposes of subsection 272B(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".

272E Major modifications—who may apply for a warrant etc.

(1) For the purposes of subsection 272B(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 272B(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 272B(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 272B(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,".

Authorised Version C2021C00117 registered 17/02/2021

272F Major modifications—purposes for which things may be used and shared

For the purposes of subsection 272B(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;

Authorised Version C2021C00117 registered 17/02/2021

(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) investigating or inquiring into a corruption issue under the *Law Enforcement Integrity Commissioner Act 2006*;

(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);

Authorised Version C2021C00117 registered 17/02/2021

(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

Authorised Version C2021C00117 registered 17/02/2021

(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.

Authorised Version C2021C00117 registered 17/02/2021

(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*.

272G Minor modifications

(1) For the purposes of subsection 272B(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:

Authorised Version C2021C00117 registered 17/02/2021

(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.

Authorised Version C2021C00117 registered 17/02/2021

Part 6-4—Proceedings after an investigation

Division 1—Introduction

273 Guide to this Part

This Part is about criminal and civil proceedings that ASIC may bring after it has conducted an investigation under this Chapter.

Division 2 deals with criminal proceedings. After an investigation of a person under this Chapter, ASIC may prosecute the person for an offence against the Commonwealth credit legislation (i.e. this Act or the National Credit Transitional Act). It may also require others to provide it with reasonable assistance in connection with the prosecution.

Division 2 also deals with civil proceedings. After an investigation of a person under this Chapter, ASIC may bring civil proceedings against a person in particular circumstances. However, under this Division, ASIC cannot bring civil proceedings under the Commonwealth credit legislation. This is because Part 4-2 (which deals with remedies) and the National Credit Code deal with when ASIC can bring those proceedings.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Proceedings after an investigation

274 ASIC may prosecute

(1) This section applies if:

(a) as a result of an investigation; or

(b) from a record of an examination;

conducted under this Chapter, it appears to ASIC that a person:

(c) may have committed an offence against the Commonwealth credit legislation; and

(d) ought to be prosecuted for the offence.

(2) ASIC may cause a prosecution of the person for the offence to be brought and carried on.

(3) ASIC may make a requirement under subsection (4) 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 licensee, credit representative or other person who engages, or has engaged, in a credit activity, or to matters including such matters.

(4) ASIC may, whether before or after a prosecution for the offence is begun, by writing given to any of the following persons:

(a) the person referred to in paragraph (3)(a);

(b) a representative, banker, lawyer or auditor of a person referred to in paragraph (3)(b);

require the 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 290).

(5) An offence under subsection 290(2) relating to subsection (4) of this section is an offence of strict liability.

Authorised Version C2021C00117 registered 17/02/2021

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

(6) Subsection (4) 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.

Note: A defendant bears an evidential burden in relation to the matter in subsection (6), see subsection 13.3(3) of the *Criminal Code*.

(7) A requirement made by ASIC under subsection (4) is not a legislative instrument.

(8) Nothing in this section affects the operation of the *Director of Public Prosecutions Act 1983*.

275 ASIC may bring civil proceedings

If, as a result of an investigation or from a record of an examination (being an investigation or examination conducted under this Chapter), it appears to ASIC to be in the public interest for a person to bring and carry on proceedings (other than proceedings under the Commonwealth credit legislation) 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 (within the meaning of the *Corporations Act 2001*)—may cause; or

(d) otherwise—may, with the person's written consent, cause;

such proceedings to be begun and carried on in the person's name.

Authorised Version C2021C00117 registered 17/02/2021

Part 6-5—Hearings

Division 1—Introduction

276 Guide to this Part

This Part is about hearings held by ASIC.

Division 2 gives ASIC the power to hold hearings for the purpose of the performance of its functions and powers under the Commonwealth credit legislation (other than Part 6-1).

Division 2 also includes rules and procedures for the conduct of hearings, including rules in relation to whether the hearing is conducted in private, and rules in relation to evidence and proceedings at hearings.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Hearings

277 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 Commonwealth credit legislation, other than a function or power conferred on it by Part 6-1 (which deals with investigations).

278 General discretion to hold hearing in public or private

(1) Subject to sections 279 and 280, 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 against a law of the Commonwealth, a State or a Territory; 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.

279 Request by person appearing at hearing that it take place in public

(1) Subject to section 280, if:

(a) the Commonwealth credit legislation 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;

the hearing or part must take place in public.

Authorised Version C2021C00117 registered 17/02/2021

(2) Despite subsection (1), if ASIC is satisfied, having regard to the matters referred to in subsection 278(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.

(3) If a direction given under subsection (2) is in writing, it is not a legislative instrument.

280 Certain hearings to take place in private

If the Commonwealth credit legislation (other than this section) requires a hearing to take place in private, the hearing must take place in private.

281 ASIC may restrict publication of certain material

(1) If, 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.

Note: Failure to comply with a direction given under this subsection is an offence (see section 293).

(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 a law of the Commonwealth, a State or a Territory; 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.

Authorised Version C2021C00117 registered 17/02/2021

(3) If a direction given under subsection (1) is in writing, it is not a legislative instrument.

282 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 Commonwealth credit legislation requires to be given the opportunity to appear at a hearing; or

(b) a person representing under section 285:

(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) If ASIC directs that a hearing take place in private, a person must not be present at the hearing unless he or she:

(a) is an ASIC member; or

(b) is an ASIC 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).

Criminal 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*.

(5) If a direction given under subsection (1) is in writing, it is not a legislative instrument.

Authorised Version C2021C00117 registered 17/02/2021

283 Involvement of person entitled to appear at hearing

(1) This section applies if the Commonwealth credit legislation requires ASIC to give a person an opportunity to appear at a hearing and to make submissions and give evidence to it.

(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.

284 Power to summon witnesses and take evidence

(1) An ASIC member may, by written summons given to a person in the form prescribed by the regulations:

(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 an ASIC member.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

(2) At a hearing, ASIC may take evidence on oath or affirmation, and for that purpose an ASIC 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 290).

(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 ASIC member presiding at a hearing:

Authorised Version C2021C00117 registered 17/02/2021

(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.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

(5) An offence under subsection 290(2) 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*.

(6) ASIC may permit a witness at a hearing to give evidence by tendering, and if ASIC so requires, verifying by oath, a written statement.

285 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 Commonwealth credit legislation 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 considers appropriate, permit a person to intervene; and

(c) must observe the rules of natural justice.

(3) Subject to subsection (4), Division 4 of Part 4 of the ASIC Act (other than section 104 of that Act) 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 (established under section 97 of the ASIC Act), 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.

Authorised Version C2021C00117 registered 17/02/2021

(6) A body corporate may be represented at a hearing by an officer (within the meaning of section 5 of the ASIC Act) or employee of the body corporate approved by ASIC.

(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 (within the meaning of section 5 of the ASIC Act) or employee of the association approved by ASIC.

(8) Any person may be represented at a hearing by a lawyer.

286 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 283;

in making a decision on a matter to which the evidence or submission relates.

287 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.

(2) If 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.

(3) If 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 proceedings in the court in relation to the reference, the court must cause the documents to be returned to ASIC.

Authorised Version C2021C00117 registered 17/02/2021

288 Protection of ASIC members etc.

(1) An ASIC member has, in the performance or exercise of any of his or her functions and powers as an ASIC member in relation to a hearing, the same protection and immunity as a Justice of the High Court.

(2) A delegate of an ASIC 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.

(3) A lawyer 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 proceedings in the High Court.

(4) Subject to this Act, a person who is required by a summons under section 284 to appear at a hearing, or a witness at a hearing, has the same protection as a witness in proceedings in the High Court.

Authorised Version C2021C00117 registered 17/02/2021

Part 6-5A—Penalties for offences

Division 1—Introduction

288A Guide to this Part

This Part is about the penalties applicable to offences against this Act.

Division 2 includes rules about the penalties applicable to offences committed by individuals or bodies corporate. These penalties are worked out in relation to the penalty specified for the offence.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Penalty for committing an offence

288B Penalty for committing an offence

A person who commits an offence against this Act is punishable on conviction by a penalty not exceeding the penalty applicable to the offence.

288C 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 the number of penalty units worked out using the individual fine formula.

(3) The ***individual fine formula*** is:

$$\text{Term of imprisonment, expressed in months} \times 10$$

(4) If:

(a) a term of imprisonment is the only penalty specified for the 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

Authorised Version C2021C00117 registered 17/02/2021

(d) if the court can determine the benefit derived and detriment avoided because of the offence—that amount multiplied by 3.

Note: See section 14 in relation to contraventions by partners in a partnership and section 15 in relation to contraventions by multiple trustees.

(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.

288D 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 for an offence; 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:

(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

Authorised Version C2021C00117 registered 17/02/2021

(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.

288E 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.

288F Where is the penalty for an offence specified?

(1) The penalty ***specified*** for an offence is the penalty, pecuniary or otherwise, specified in any provision of this Act for the offence.

(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:

Authorised Version C2021C00117 registered 17/02/2021

(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 this Act or any other Act;
(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.

288G 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.

Authorised Version C2021C00117 registered 17/02/2021

Part 6-5B—Infringement notices

Division 1—Introduction

288H Guide to this Part

This Part is about the use of infringement notices where ASIC reasonably believes that a provision has been contravened.

Division 2 authorises ASIC to give an infringement notice in relation to a contravention of certain provisions. A person who is given an infringement notice can choose to pay an amount as an alternative to having court proceedings brought against the person for the contravention. If the person does not choose to pay the amount, proceedings can be brought against the person for the contravention.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Infringement notices

288J 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 Part, 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.

(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.

288K Provisions subject to an infringement notice

(1) The following provisions are ***subject to an infringement notice*** under this Part:
  (a) strict liability offences against this Act;
  (b) other prescribed offences against this Act;
  (c) prescribed civil penalty provisions;

Authorised Version C2021C00117 registered 17/02/2021

(ca) civil penalty provisions of an approved code of conduct;
(cb) civil penalty provisions of a mandatory code of conduct;
(d) prescribed provisions of the National Credit Code containing key requirements (as defined for the purposes of the National Credit Code).

(2) This Part applies in relation to a provision prescribed under paragraph (1)(d) in the same way as it applies in relation to a civil penalty provision.

288L 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
(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 on which 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):

Authorised Version C2021C00117 registered 17/02/2021

(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

(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

Authorised Version C2021C00117 registered 17/02/2021

(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 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) is:

(a) for a single contravention of an offence provision—one-fifth of the maximum penalty that a court could impose on the person for the contravention; and

(b) for multiple contraventions of an offence provision—the amount worked out under paragraph (a) for a single contravention multiplied by the number of contraventions; and

(c) for a single contravention of a civil penalty provision—50 penalty units for an individual and 250 penalty units for a body corporate; and

(d) for multiple contraventions of a civil penalty provision—the amount worked out under paragraph (c) for a single contravention multiplied by the number of contraventions.

Authorised Version C2021C00117 registered 17/02/2021

288M 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.

Payment period extended under section 288N

(2) If, under section 288N, ASIC extends the payment period for the notice, the ***payment period*** is as extended.

(3) If ASIC refuses an application under subsection 288N(1) for an extension of the payment period for the notice, the ***payment period*** ends on the later 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 288N(4).

Instalments

(4) If, under section 288P, 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 ASIC refuses an application made under subsection 288P(1) to make 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:

Authorised Version C2021C00117 registered 17/02/2021

(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 288P(4).

Payment period if ASIC refuses to withdraw infringement notice

(6) If ASIC refuses a representation made under subsection 288Q(1) for the notice to be withdrawn, the ***payment period*** ends on the later 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 288Q(5), ASIC is taken to have refused to withdraw the infringement notice.

288N 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;

Authorised Version C2021C00117 registered 17/02/2021

(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
(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).

288P 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):

Authorised Version C2021C00117 registered 17/02/2021

(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

(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.

288Q 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

Authorised Version C2021C00117 registered 17/02/2021

(b) if ASIC decides to withdraw the notice—give the person to whom the notice was issued a withdrawal notice in accordance with subsection (6); and

(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

Authorised Version C2021C00117 registered 17/02/2021

(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 all or part of the amount stated in the notice;

ASIC must refund to the person an amount equal to the amount paid.

288R 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

Authorised Version C2021C00117 registered 17/02/2021

(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.

288S Effect of this Part

This Part 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 Part; or

(b) affect the liability of a person for an alleged contravention of a provision subject to an infringement notice under this Part 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 Part; 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 Part.

Authorised Version C2021C00117 registered 17/02/2021

Part 6-6—Offences under this Chapter

Division 1—Introduction

289 Guide to this Part

This Part is about offences for non-compliance with requirements of this Chapter, and other offences in relation to requirements made under this Chapter.

Division 2 includes offences for non-compliance with the requirements of this Chapter. It also includes other offences relating to compliance and enforcement, including offences relating to giving false information, obstructing the exercise of powers under this Chapter, and contempt of ASIC.

Division 2 also includes rules in relation to self-incrimination and legal professional privilege.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Offences

290 Contraventions of requirements made under this Chapter

(1) A person must not intentionally or recklessly refuse or fail to comply with a requirement made under:

(a) section 253; or

(b) subsection 255(4); or

(c) section 265, 266, 267 or 268; or

(d) subsection 271(9); or

(e) section 272.

Criminal penalty: 2 years imprisonment.

(2) A person must not refuse or fail to comply with a requirement made under subsection 255(1) or 264(2), paragraph 258(2)(a) or subsection 274(4), 284(1), (2) or (4).

Criminal penalty: 30 penalty units.

(3) A person must comply with a requirement made under subsection 257(2).

Criminal penalty: 20 penalty units.

(4) Subsections (1) and (2) 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 subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

(5) 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.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3) of the *Criminal Code*).

(6) 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.

Authorised Version C2021C00117 registered 17/02/2021

Note: A defendant bears an evidential burden in relation to the matter in subsection (6) (see subsection 13.3(3) of the *Criminal Code*).

291 False information

(1) A person must not:

(a) in purported compliance with a requirement made under this Chapter; 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.

Criminal penalty: 5 years imprisonment.

(2) A person must not, at a hearing, give evidence that is false or misleading in a material particular.

Criminal 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*).

293 Disrupting hearings

(1) A person must not engage in conduct that results in the disruption of a hearing.

Criminal penalty: 1 year imprisonment.

(2) A person must not contravene a direction given under subsection 281(1).

Criminal penalty: 120 penalty units.

(3) Subsection (2) does not apply to the extent that the person has a reasonable excuse.

Authorised Version C2021C00117 registered 17/02/2021

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) Subsection (2) is an offence of strict liability.

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

(5) An offence constituted by a contravention of subsection (1) or (2) is punishable on summary conviction.

294 Concealing books relevant to investigation

(1) If 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.

Criminal 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 Commonwealth credit 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 referred to in subsection (2) (see section 13.4 of the *Criminal Code*).

295 Self-incrimination

(1) For the purposes of this Chapter, 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;

Authorised Version C2021C00117 registered 17/02/2021

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 if:

(a) before:

(i) making an oral statement giving information; or

(ii) signing a record;

pursuant to a requirement made under this Chapter, 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) criminal proceedings; or

(b) proceedings for the imposition of a penalty;

other than proceedings in relation to:

(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.

296 Legal professional privilege

(1) This section applies if:

(a) under this Chapter, a person requires a lawyer:

(i) to give information; or

(ii) to produce a book; and

Authorised Version C2021C00117 registered 17/02/2021

(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.

(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 (within the meaning of section 9 of the *Corporations Act 2001*) 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.

Criminal penalty: 3 months imprisonment.

297 Powers of court relating to contraventions of this Chapter

(1) This section applies if ASIC is satisfied that a person has, without reasonable excuse, refused or failed to comply with a requirement made under this Chapter, other than Part 6-7 (which deals with ASIC's powers in relation to non-compliance with this Chapter).

(2) ASIC may by writing certify the refusal or failure to the court.

Authorised Version C2021C00117 registered 17/02/2021

(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.

Authorised Version C2021C00117 registered 17/02/2021

Part 6-7—ASIC's powers in relation to contraventions of this Chapter

Division 1—Introduction

298 Guide to this Part

This Part is about powers of ASIC to in relation to non-compliance with this Chapter.

Division 2 is about orders that ASIC may make in relation to credit contracts, mortgages, guarantees and consumer leases.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—ASIC's powers in relation to contraventions of this Chapter

299 Application of this Part

This Part applies if, in ASIC's opinion, information about a credit contract, mortgage, guarantee or consumer lease needs to be found out for the purposes of the exercise of any of ASIC's powers under this Chapter but cannot be found out because a person has refused or failed to comply with a requirement made under this Chapter.

300 Orders by ASIC relating to credit contracts, mortgages, guarantees or consumer leases

(1) ASIC may make one or more of the following:

(a) an order restraining a specified person from assigning any interest in a credit contact, mortgage, guarantee or consumer lease;

(b) an order restraining a specified person from acquiring any interest in a credit contact, mortgage, guarantee or consumer lease;

(c) an order restraining the exercise of rights under a credit contract, mortgage, guarantee or consumer lease;

(d) an order directing a:

(i) credit provider under a credit contract; or

(ii) mortgagee under a mortgage; or

(iii) beneficiary of a guarantee under a guarantee; or

(iv) lessor under a consumer lease;

in relation to which an order under this section is in force to give written notice of that order to any person whom the credit provider, mortgagee, beneficiary or lessor knows to be entitled to exercise a right in relation to the credit contract, mortgage, guarantee or consumer lease.

Authorised Version C2021C00117 registered 17/02/2021

(2) An offence under subsection 301(4) 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*.

(3) An order made under subsection (1) is not a legislative instrument.

301 Orders under this Part

(1) ASIC may make an order varying or revoking an order in force under this Part.

(2) An order under this Part must be made by notice published in the Gazette or on ASIC's website.

(3) If an order is made under this Part (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) A person must comply with an order in force under this Part.

Criminal penalty: 60 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

Part 6-7A—Product intervention orders

Division 1—Introduction

301A Guide to this Part

This Part aims to reduce the risk that credit contracts, mortgages, guarantees or consumer leases (credit products) or proposed credit products result in significant detriment for consumers.

Division 2 provides ASIC with powers that it can use proactively to reduce the risk of significant detriment to consumers resulting from credit products.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Product intervention orders

301B Definitions

In this Part:

credit product has the meaning given by paragraph 301D(1)(a).

product intervention order means an order made under subsection 301D(1) or (3).

301C Application of product intervention orders

(1) A product intervention order does not apply to a credit product entered into by a person if the person entered into the product before the order comes into force.

(2) A product intervention order does not apply to a person:
  (a) in the person's capacity as a consumer; or
  (b) who is in a class of persons specified in regulations made for the purposes of this paragraph.

(3) The regulations may provide that this Part does not apply to a credit product specified in the regulations.

Note: In a prosecution for an offence, the defendant bears an evidential burden in relation to the matters in this section (see subsection 13.3(3) of the *Criminal Code*).

301D ASIC may make product intervention orders

Making product intervention orders

(1) Subject to subsection (5), if ASIC is satisfied that:
  (a) a person is engaging, or is likely to engage, in credit activity in relation to a credit contract, mortgage, guarantee or consumer lease (***credit product***) or a proposed credit product; and

Authorised Version C2021C00117 registered 17/02/2021

(b) the credit product has resulted in, or will or is likely to result in, significant detriment to consumers;

ASIC may, in accordance with this Part, order that a specified person must not engage in specified conduct in relation to the product, either entirely or except in accordance with conditions specified in the order.

Note 1: Section 301E specifies matters to be taken into account in considering whether a credit product has resulted in, or will or is likely to result in, significant detriment to consumers.

Note 2: Section 301N also provides that product intervention orders may include requirements for notifying consumers.

(2) An order under subsection (1) is not a legislative instrument.

(3) Subject to subsection (5), if ASIC is satisfied that:

(a) a person is engaging, or is likely to engage, in credit activity in relation to a class of credit products or proposed credit products; and

(b) the class of products has resulted in, or will or is likely to result in, significant detriment to consumers;

ASIC may, in accordance with this Part and by legislative instrument, order that a person must not engage in specified conduct in relation to the class of products and consumers, either entirely or except in accordance with conditions specified in the order.

Note 1: Section 301E specifies matters to be taken into account in considering whether a credit product has resulted in, or will or is likely to result in, significant detriment to consumers.

Note 2: Section 301N also provides that product intervention orders may include requirements for notifying consumers.

Restrictions on product intervention orders

(4) A product intervention order must not specify any of the following for subsection (1) or (3):

(a) a condition that a person satisfy a standard of training, or meet a professional standard, other than a standard prescribed for the person by or under this Act;

Authorised Version C2021C00117 registered 17/02/2021

(b) a condition that a person who is not required to hold an Australian credit licence become a member of an external dispute resolution scheme;

(c) a condition related to a person's remuneration, other than a condition related to so much of the person's remuneration as is conditional on the achievement of objectives directly related to the credit product.

(5) Conduct covered by a product intervention order must be limited to conduct in relation to a consumer.

301E Significant detriment to consumers

(1) In considering whether a credit product has resulted in, or will or is likely to result in, significant detriment to consumers for the purposes of this Part, the following must be taken into account:

(a) the nature and extent of the detriment;

(b) without limiting paragraph (a), the actual or potential financial loss to consumers resulting from the product;

(c) the impact that the detriment has had, or will or is likely to have, on consumers;

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

(2) Subsection (1) does not limit the matters to be taken into account in considering whether a credit product has resulted in, or will or is likely to result in, significant detriment to consumers for the purposes of this Part.

(3) A credit product may result in significant detriment to consumers even if a person has complied with the disclosure requirements in the National Credit Code in relation to the product.

301F ASIC to consult before making product intervention orders

(1) ASIC must not make a product intervention order unless ASIC has:

(a) consulted persons who are reasonably likely to be affected by the proposed order; and

Authorised Version C2021C00117 registered 17/02/2021

(b) if the proposed order will apply to a body that is regulated by APRA—consulted APRA; and

(c) complied with any other requirements as to consultation prescribed by regulations made for the purposes of this paragraph.

(2) Without limiting paragraph (1)(a), ASIC is taken to comply with that paragraph if ASIC, on its website:

(a) makes the proposed order, or a description of the content of the proposed order, available; and

(b) invites the public to comment on the proposed order.

(3) A failure to comply with subsection (1) does not invalidate a product intervention order.

(4) Section 17 of the *Legislation Act 2003* (rule-makers should consult before making legislative instruments) does not apply to the making of a product intervention order.

301G Commencement and duration of product intervention orders

Commencement of product intervention orders

(1) A product intervention order comes into force:

(a) for an order that is a legislative instrument—on the day after the instrument is registered under the *Legislation Act 2003*; or

(b) otherwise—on the day after the notice under subsection 301L(3) in relation to the order is published;

or a later day specified in the order.

Duration of product intervention orders

(2) A product intervention order remains in force for:

(a) 18 months, or any shorter period specified by the regulations; or

(b) any shorter period specified in the order.

Authorised Version C2021C00117 registered 17/02/2021

However, if a court makes an order staying or otherwise affecting the operation or enforcement of a product intervention order, then, in determining when the period referred to in paragraph (a) or (b) ends, disregard the period during which the court's order has that effect.

(3) Subsection (2) does not apply to a product intervention order if a declaration under section 301H (which relates to extensions of product intervention orders) is in force in relation to the order.

(4) Subsection (2) does not prevent the revocation of a product intervention order.

Repeal of product intervention orders

(5) A product intervention order that is a legislative instrument that ceases to be in force is repealed by force of this subsection.

301H Extension of product intervention orders

(1) ASIC may, in accordance with an approval under subsection (4), by legislative instrument, declare that a product intervention order that is in force:

(a) remains in force until it is revoked; or

(b) remains in force for a specified period, unless it is revoked earlier.

Note: A declaration under this subsection has the effect of overriding any provisions in a product intervention order about the duration of the order: see subsection 301G(3).

(2) ASIC may make more than one declaration under subsection (1) in relation to a product intervention order that is in force.

Approval of Minister

(3) ASIC may, at any time before the order ceases to be in force, give the Minister a report on whether the declaration should be made.

(4) After considering the report, the Minister may give an approval in writing for the purposes of subsection (1).

Authorised Version C2021C00117 registered 17/02/2021

301J Amendment of product intervention orders

(1) Subject to this section, ASIC may, in writing, amend a product intervention order that is in force.

Requirements before amending product intervention orders

(2) If a declaration under section 301H is in force in relation to a product intervention order, ASIC must not amend the order without the Minister's approval, given after considering a report from ASIC on whether the amendment should be made.

(3) ASIC may, at any time before the order ceases to be in force, give the Minister a report on whether the amendment should be made.

Amendments of product intervention orders

(4) An amendment of a product intervention order must not be such that the order remains in force for a period longer than the maximum period determined for the order in accordance with subsection 301G(2) or 301H(1).

(5) An amendment of a product intervention order comes into force:

(a) for an amendment of an order that is a legislative instrument—on the day after the amendment is registered under the *Legislation Act 2003*; or

(b) otherwise—on the day after the day on which the notice under subsection 301L(6) in relation to the amendment is published;

or a later day specified in the amendment.

Amendments of orders that are legislative instruments

(6) An amendment of a product intervention order that is a legislative instrument must be by legislative instrument.

Authorised Version C2021C00117 registered 17/02/2021

301K Revocation of product intervention orders

(1) Subject to this section, ASIC may, in writing, revoke a product intervention order.

Requirements for revocation of product intervention orders

(2) If a declaration under section 301H is in force in relation to a product intervention order, ASIC must not revoke the order without the Minister's approval, given after considering a report from ASIC on whether the order should be revoked.

(3) ASIC may, at any time before the order ceases to be in force, give the Minister a report on whether the order should be revoked.

Revocation of orders that are legislative instruments

(4) A revocation of a product intervention order that is a legislative instrument must be by legislative instrument.

301L ASIC to issue public notice of product intervention orders

Product intervention orders

(1) ASIC must serve a copy of a product intervention order that is not a legislative instrument on any person to whom ASIC considers the order applies. Failure to comply with this subsection does not invalidate the order.

(2) ASIC must publish each product intervention order, as in force for the time being, on its website.

Note: The *Legislation Act 2003* requires legislative instruments to be registered on the Federal Register of Legislation and provides for compilations of legislative instruments.

(3) ASIC must also publish on its website, with the product intervention order, a notice that:

(a) describes the significant detriment to consumers that has resulted from, or will or is likely to result from, the credit product or class of credit products to which the order relates,

Authorised Version C2021C00117 registered 17/02/2021

and sets out why the order is an appropriate way of reducing the detriment; and

(b) describes the consultation that ASIC undertook in relation to the order; and

(c) if the order comes into force after it is published—specifies the day it comes into force.

(4) ASIC must publish on its website, with the product intervention order, each declaration under section 301H (which relates to extensions of product intervention orders) that relates to the order.

Amendments of product intervention orders

(5) ASIC must serve a copy of the instrument amending a product intervention order that is not a legislative instrument on any person to whom ASIC considers the order applies. Failure to comply with this subsection does not invalidate the order.

(6) ASIC must publish on its website, with the product intervention order, each amendment of the product intervention order.

(7) ASIC must also publish on its website, with the amendment, a notice that:

(a) sets out why the amendment is appropriate; and

(b) describes the consultation that ASIC undertook in relation to the amendment; and

(c) if the day the amendment is to take effect is later than the day after the day of publication of the amendment—specifies the day the amendment is to take effect.

Revocation of product intervention orders

(8) If a product intervention order is revoked, ASIC must publish notice of the revocation on its website.

Authorised Version C2021C00117 registered 17/02/2021

301M Remaking product intervention orders

If a product intervention order ceases to be in force or is revoked, ASIC must not remake the order, or make an order in substantially the same terms, unless:

(a) ASIC is satisfied the circumstances have materially changed since the order was made; or

(b) the Minister approves, in writing, the remaking or making of the order.

301N Product intervention orders may require notification

A product intervention order in relation to a credit product may:

(a) require that a specified person who has engaged in a credit activity in relation to the product in respect of a consumer take reasonable steps to notify the consumer:

(i) of the terms of the order; and

(ii) of any other matter specified in regulations made for the purposes of this subparagraph; and

(b) specify requirements in relation to giving those notifications (including requirements as to the periods within which to give those notifications).

301P Enforcement of product intervention orders

(1) A person must not engage in conduct contrary to a product intervention order that is in force in relation to the person.

Civil penalty: 5,000 penalty units.

(2) A person must not engage in conduct contrary to a product intervention order.

Criminal penalty: 5 years imprisonment.

(3) A person who is required by a product intervention order to take reasonable steps to notify a consumer must comply with the requirement.

Authorised Version C2021C00117 registered 17/02/2021

Civil penalty: 5,000 penalty units.

Note: For this requirement, see section 301N.

(4) A person who is required by a product intervention order to take reasonable steps to notify a consumer must comply with the requirement.

Criminal penalty: 5 years imprisonment.

Note: For this requirement, see section 301N.

(5) Subsections (1), (2), (3) and (4) do not apply if:
   (a) the product intervention order is not a legislative instrument; and
   (b) the person was not aware, and could not reasonably have been aware, of the order.

(6) If a product intervention order has been served on a person, the person must take all reasonable steps to ensure that other persons who engage in conduct to which the order applies are aware of the order.

Civil penalty: 5,000 penalty units.

(7) If a product intervention order has been served on a person, the person must take all reasonable steps as soon as practicable to ensure that other persons who engage in conduct to which the order applies are aware of the order.

Criminal penalty: 5 years imprisonment.

Authorised Version C2021C00117 registered 17/02/2021

Part 6-8—Evidentiary use of certain material

Division 1—Introduction

302 Guide to this Part

This Part is about the evidentiary use and value of certain material.

Division 2 includes rules in relation to the evidentiary value of statements made at examinations, copies or extracts made from certain books, and reports of investigations made under Part 6-1.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Evidentiary use of certain material

303 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 proceedings unless:

(a) because of subsection 295(3), the statement is not admissible in evidence against the person in the proceedings; or

(b) the statement is not relevant to the proceedings and the person objects to the admission of evidence of the statement; or

(c) the statement (the ***first statement***) is qualified or explained by some other statement made at the examination, evidence of the other statement is not tendered in the proceedings and the person objects to the admission of evidence of the first statement; or

(d) the statement discloses matter in relation to which the person could claim legal professional privilege in the proceedings 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 proceedings against a person even if it is heard together with proceedings against another person.

(3) If a written record of an examination of a person is signed by the person under subsection 258(2) or authenticated in any other manner prescribed by the regulations, the record is, in proceedings, prima facie evidence of the statements it records, but nothing in this Chapter limits or affects the admissibility in the proceedings of other evidence of statements made at the examination.

Authorised Version C2021C00117 registered 17/02/2021

304 Statements made at an examination: other proceedings

If direct evidence by a person (the ***absent witness***) of a matter would be admissible in proceedings, 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 proceedings 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 proceedings 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 proceedings requires the party tendering evidence of the statement to call the absent witness as a witness in the proceedings and the tendering party does not so call the absent witness.

305 Weight of evidence admitted under section 304

(1) This section applies if evidence of a statement made by a person at an examination of the person is admitted under section 304 in proceedings.

(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.

(3) If the person is not called as a witness in the proceedings:

Authorised Version C2021C00117 registered 17/02/2021

(a) evidence that would, if the person had been so called, have been admissible in the proceedings 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 proceedings and denied the matter in cross-examination, evidence of the matter would not have been admissible if adduced by the cross-examining party.

306 Objection to admission of statements made at examination

(1) A party (the ***adducing party***) to proceedings may, not less than 14 days before the first day of the hearing of the proceedings, give to another party to the proceedings written notice that the adducing party:

(a) will apply to have admitted in evidence in the proceedings specified statements made at an examination; and

(b) for that purpose, will apply to have evidence of those statements admitted in the proceedings.

(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 proceedings; 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.

Authorised Version C2021C00117 registered 17/02/2021

(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) If subsection (5) is complied with, the court or tribunal may either:
  (a) determine the objections as a preliminary point before the hearing of the proceedings begins; or
  (b) defer determination of the objections until the hearing.

(7) If 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 proceedings to a statement specified in the notice being admitted in evidence in the proceedings, 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.

307 Copies of, or extracts from, certain books

(1) A copy of, or an extract from, a book relating to:
  (a) affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity; or
  (b) a matter referred to in paragraph 266(1)(d) or (e);

is admissible in evidence in proceedings 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 271.

(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

Authorised Version C2021C00117 registered 17/02/2021

(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.

308 Report under Part 6-1

Subject to section 309, if a copy of a report under Part 6-1 purports to be certified by ASIC as a true copy of such a report, the copy is admissible in proceedings (other than criminal proceedings) as prima facie evidence of any facts or matters that the report states ASIC to have found to exist.

309 Exceptions to admissibility of report

(1) This section applies if a party to proceedings tenders a copy of a report as evidence against another party.

(2) The copy is not admissible under section 308 in the proceedings 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.

(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.

Authorised Version C2021C00117 registered 17/02/2021

(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 308 in the proceedings 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.

310 Material otherwise admissible

Nothing in this Part renders evidence inadmissible in proceedings in circumstances if it would have been admissible in those proceedings if this Part had not been enacted.

Authorised Version C2021C00117 registered 17/02/2021

Part 6-9—Miscellaneous provisions relating to compliance and enforcement

Division 1—Introduction

311 Guide to this Part

This Part includes miscellaneous provisions relating to this Chapter.

Authorised Version C2021C00117 registered 17/02/2021

Division 2—Miscellaneous provisions relating to compliance and enforcement

312 Requirement made of a body corporate

If a provision of this Chapter 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 an officer (within the meaning of section 5 of the ASIC Act) or employee of the body.

313 Evidence of authority

(1) A person (the ***inspector***), other than ASIC, who is about to make, or has made, a requirement of another person under this Chapter (other than Part 6-5) 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.

(2) An identity card under paragraph (1)(a) is not a legislative instrument.

314 Giving documents to natural persons

Section 109X of the *Corporations Act 2001* applies for the purposes of this Chapter as if a reference in subsection (2) of that section to leaving a document at an address were a reference to leaving it at that address with a person whom the person leaving the document believes on reasonable grounds:

Authorised Version C2021C00117 registered 17/02/2021

(a) to live or work at that address; and
(b) to have attained the age of 16 years.

315 Place and time for production of books

A provision of this Chapter 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.

316 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 proceedings to which that Act applies under section 4 of that Act.

317 Allowances and expenses

(1) A person who, pursuant to a requirement made under section 253, appears for examination is entitled to the allowances and expenses prescribed by the regulations (if any).

(2) A person who, pursuant to a summons issued under section 284, 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;

allowances and expenses prescribed by the regulations (if any).

Authorised Version C2021C00117 registered 17/02/2021

(3) ASIC may pay such amount as it considers reasonable on account of the costs and expenses (if any) that a person incurs in complying with a requirement made under this Chapter.

318 Expenses of investigation under Part 6-1

Subject to section 319, ASIC must pay the expenses of an investigation.

319 Recovery of expenses of investigation

(1) If:

(a) a person is convicted of an offence against a law of the Commonwealth, or a law of a referring State or a Territory, in a prosecution; or

(b) a judgment is awarded, or a declaration or other order is made, against a person in proceedings in a court or tribunal of this jurisdiction;

brought as a result of an investigation under Part 6-1, 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 relation to, the whole, or a specified part, of the cost to ASIC of making the investigation, including the remuneration of an ASIC member or ASIC staff member concerned in the investigation.

(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.

Criminal penalty: 120 penalty units.

Authorised Version C2021C00117 registered 17/02/2021

(4) Subsection (3) is an offence of strict liability.

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

(5) 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.

(6) A report under Part 6-1 may include recommendations about the making of orders under this section.

(7) An order made under this section is not a legislative instrument.

320 Compliance with this Chapter

A person is neither liable to proceedings, 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 Chapter.

321 Effect of this Chapter

(1) Except as expressly provided, nothing in this Chapter limits the generality of anything else in this Chapter.

(2) The functions and powers that this Chapter 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.

322 Enforcement of undertakings

(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 the Commonwealth credit legislation.

(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).

Authorised Version C2021C00117 registered 17/02/2021

(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.

Authorised Version C2021C00117 registered 17/02/2021