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**National Consumer Credit Protection
Bill 2009**

No. , 2009

(Treasury)

**A Bill for an Act relating to credit, and for related
purposes**

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1 **A Bill for an Act relating to credit, and for related**
2 **purposes**

3 The Parliament of Australia enacts:

4 **Chapter 1—Introduction**

5 **Part 1-1—Introduction**
6

7 **1 Short title**

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

Section 2

1 **2 Commencement**

2 (1) Each provision of this Act specified in column 1 of the table
3 commences, or is taken to have commenced, in accordance with
4 column 2 of the table. Any other statement in column 2 has effect
5 according to its terms.
6

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.	
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.	

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

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

13 **3 The National Credit Code**

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

1

2 **Part 1-2—Definitions**

3 **Division 1—Introduction**

4 **4 Guide to this Part**

5

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.)

6

7

8

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.

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

14

15

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

Section 5

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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.

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.

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 external dispute resolution scheme: see section 11.

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.

1 **ASIC member** means a member of ASIC within the meaning of the
2 ASIC Act.

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

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

7 Note: Paragraph 17(a) of the *Acts Interpretation Act 1901* would otherwise
8 provide that **Australia** included the Territory of Christmas Island and
9 the Territory of Cocos (Keeling) Islands.

10 **Australian credit licence**: see subsection 35(1).

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

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

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

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

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

- 21 (a) the person holds a State or Territory credit licence that is
22 suspended (otherwise than by request of the person); or
23 (b) the person has held a State or Territory credit licence that has
24 been cancelled within the last 7 years (otherwise than by the
25 person's request); or
26 (c) an order of a court made under a law of a State or Territory
27 prohibits the person from engaging in a credit activity; or
28 (d) the person is otherwise prohibited under a law of a State or
29 Territory from engaging in a credit activity.

30 **banning order**: see subsection 81(1).

Section 5

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

4 **body regulated by APRA** has the same meaning as in subsection
5 3(2) of the *Australian Prudential Regulation Authority Act 1998*.

6 **book** includes:

- 7 (a) a register; and
8 (b) any other record of information; and
9 (c) financial reports or financial records, however compiled,
10 recorded or stored; and
11 (d) a document.

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

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

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

- 19 (a) the words “civil penalty” and one or more amounts in penalty
20 units are set out at the foot of the subsection (or section); or
21 (b) another provision of this Act specifies that the subsection (or
22 section) is a civil penalty provision.

23 **coastal sea**:

- 24 (a) in relation to Australia—means:
25 (i) the territorial sea of Australia; and
26 (ii) the sea on the landward side of the territorial sea of
27 Australia and not within the limits of a State or internal
28 Territory;
29 and includes the airspace over, and the sea-bed and subsoil
30 beneath, any such sea; and
31 (b) in relation to a State or Territory—means so much of the
32 coastal sea of Australia as is within the area described in
33 Schedule 1 to the *Offshore Petroleum and Greenhouse Gas*

1 *Storage Act 2006* under the heading that refers to that State or
2 Territory.

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

5 **Commonwealth credit legislation** means this Act and the
6 Transitional Act.

7 **consumer** means a natural person or a strata corporation.

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

10 **contravention**, in relation to a Commonwealth law, includes an
11 ancillary offence relating to an offence against that law.

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

14 **credit activity**: see section 6.

15 **credit assistance**: see section 8.

16 **credit book**: see subsection 227(4).

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

19 **credit legislation** means:

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

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

Section 5

- 1 **credit provider** has the same meaning as in section 204 of the
2 National Credit Code, and includes a person who is a credit
3 provider because of section 10.
- 4 **credit registers**: see section 213.
- 5 **credit representative**: see subsections 64(2) and 65(2).
- 6 **credit representative number** means the number given to a credit
7 representative under section 72.
- 8 **credit service**: see section 7.
- 9 **criminal procedure**: see section 205.
- 10 **debtor** has the same meaning as in section 204 of the National
11 Credit Code.
- 12 **director** has the same meaning as in section 9 of the *Corporations*
13 *Act 2001*.
- 14 **disqualification order** means an order of the court under
15 section 86.
- 16 **document registers**: see section 219.
- 17 **engage in conduct** means:
18 (a) do an act; or
19 (b) omit to perform an act.
- 20 **examination**, when used in Chapter 6 (which deals with
21 compliance and enforcement), means an examination of a person
22 pursuant to a requirement made under section 253.
- 23 **expenses**, in relation to an investigation under Part 6-1, includes
24 costs and expenses incurred by ASIC in relation to proceedings
25 brought under section 275 as a result of the investigation.
- 26 **Federal Court** means the Federal Court of Australia.
- 27 **financial records**: see subsection 88(2).
- 28 **financial year**: see subsection 100(6).

1 ***function*** includes a duty.

2 ***give***:

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

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

7 (i) explaining or stating a matter; and

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

9 (iii) disclosing information; and

10 (iv) answering a question.

11 ***guarantee*** means a guarantee to which the National Credit Code
12 applies.

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

17 ***initial National Credit Act*** means this Act as originally enacted.

18 ***initial Transitional Act*** means the Transitional Act as originally
19 enacted.

20 ***insolvent*** means:

21 (a) in the case of a natural person—a person who is an insolvent
22 under administration (within the meaning of the
23 *Corporations Act 2001*); or

24 (b) in the case of a body corporate—a body corporate that is an
25 externally-administered body corporate (within the meaning
26 of the *Corporations Act 2001*); or

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

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

Section 5

- 1 ***involved in***: a person is ***involved in*** a contravention of a provision
2 of legislation if, and only if, the person:
- 3 (a) has aided, abetted, counselled or procured the contravention;
4 or
5 (b) has induced the contravention, whether by threats or
6 promises or otherwise; or
7 (c) has been in any way, by act or omission, directly or
8 indirectly, knowingly concerned in or party to the
9 contravention; or
10 (d) has conspired with others to effect the contravention.
- 11 ***judgment*** means a judgment, decree or order, whether final or
12 interlocutory.
- 13 ***law of a referring State or a Territory*** means a law of, or in force
14 in, a referring State or a Territory but does not include a law of the
15 Commonwealth in force in the referring State or the Territory.
- 16 ***law of a State or Territory*** means a law of, or in force in, a State or
17 Territory but does not include a law of the Commonwealth in force
18 in the State or Territory.
- 19 ***lawyer*** means a person who is admitted to the legal profession by a
20 federal court or a Supreme Court of a State or Territory.
- 21 ***lessee*** means the lessee under a consumer lease.
- 22 ***lessor*** means the lessor under a consumer lease, and includes a
23 person who is a lessor because of section 10.
- 24 ***licence*** means an Australian credit licence.
- 25 ***licensee*** means a person who holds a licence.
- 26 ***licensing anniversary***: see subsection 53(7).
- 27 ***lodge with ASIC***: see section 216.
- 28 ***lower court*** means:
29 (a) the Federal Magistrates Court; or
30 (b) a court of a State or Territory that is not a superior court.

1 **malice**: see subsection 16(2).

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

3 **misleading**: see section 13.

4 **mortgage** means a mortgage to which the National Credit Code
5 applies.

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

8 **mortgagor** means the mortgagor under a mortgage.

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

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

12 (b) instruments made under that Schedule.

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

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

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

19 **power** includes an authority.

20 **premises** includes:

21 (a) a structure, building, aircraft, vehicle or vessel; and

22 (b) any land or place (whether enclosed or built in or not); and

23 (c) a part of a structure, building, aircraft, vehicle, vessel or of
24 such a place.

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

28 **proceedings**:

Section 5

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

6 ***qualified privilege*** has a meaning affected by section 16.

7 ***receiving court***: see section 191.

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

12 ***referred credit matters***: see section 20.

13 ***referring State***: see section 19.

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

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

18 ***related criminal justice process decision***: see section 188.

19 ***relevant criminal law***: see subsection 204(5).

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

- 21 (a) if the lower court is the Federal Magistrates Court—the
22 Federal Court; or
23 (b) if the lower court is a court of a State or Territory—the
24 Supreme Court of the State or Territory.

25 ***representative*** of a person means:

- 26 (a) if the person is a licensee:
27 (i) an employee or director of the licensee; or
28 (ii) an employee or director of a related body corporate of
29 the licensee; or
30 (iii) a credit representative of the licensee; or
31 (iv) any other person acting on behalf of the licensee; or

- 1 (b) otherwise:
2 (i) an employee or director of the person; or
3 (ii) an employee or director of a related body corporate of
4 the person; or
5 (iii) any other person acting on behalf of the person.

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

8 **serious fraud** means an offence involving fraud or dishonesty,
9 being an offence:

- 10 (a) against a law of the Commonwealth, or of a State or
11 Territory, or any other law; and
12 (b) punishable by imprisonment for life or for a period, or
13 maximum period, of at least 3 months.

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

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

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

- 21 (a) the knowledge, intention, opinion, belief or purpose of the
22 person; and
23 (b) the person's reasons for the intention, opinion, belief or
24 purpose.

25 **State or Territory credit licence** means a licence or registration
26 that:

- 27 (a) is granted under a law of a State or Territory; and
28 (b) authorises the licensee or registered person to engage in a
29 credit activity.

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

32 **superior court** means any of the following courts:

- 33 (a) the Federal Court;
-

Section 5

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

2 ***Territory*** means:

3 (a) the Australian Capital Territory; or

4 (b) the Northern Territory; or

5 (c) the Jervis Bay Territory;

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

8 ***this Act*** includes instruments made under this Act.

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

10 ***transfer matter***: see section 191.

11 ***transferring court***: see section 191.

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

15 ***tribunal*** means:

16 (a) a tribunal in Australia; or

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

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

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

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

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

30 (c) for a representative who is a credit representative of the
31 person—the conduct is within the scope of the authorisation

Section 5

- 1 of the credit representative under subsection 64(1) or 65(1);
2 or
3 (d) otherwise—the conduct is within the scope of the authority
4 given by the person.

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

7 **written record**, when used in Chapter 6 (which deals with
8 compliance and enforcement) in relation to an examination, means:

- 9 (a) a record of the examination:
10 (i) that is made in writing; or
11 (ii) as reduced to writing; or
12 (b) a part of such a record.

13 (2) In this Act (other than the National Credit Code), a reference to a
14 provision is a reference to a provision of this Act, unless the
15 contrary intention appears.

Section 6

1

2

Division 3—Definitions relating to the meaning of credit activity

3

4

6 Meaning of *credit activity*

5

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

6

7

Meaning of *credit activity*

Item	Topic	A person engages in a <i>credit activity</i> 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 for 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 for 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 for or on behalf of the mortgagee); or
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

Meaning of *credit activity*

Item	Topic	A person engages in a <i>credit activity</i> if:
		guarantee or proposed guarantee, in relation to the guarantee or proposed guarantee (whether the person does so on the person's own behalf or for 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.

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

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

7 **7 Meaning of *credit service***

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

- 9 (a) provides credit assistance to a consumer; or
10 (b) acts as an intermediary.

11 **8 Meaning of *credit assistance***

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

- 16 (a) suggests that the consumer apply for a particular credit
17 contract with a particular credit provider; or
18 (b) suggests that the consumer apply for an increase to the credit
19 limit of a particular credit contract with a particular credit
20 provider; or
21 (c) suggests that the consumer remain in a particular credit
22 contract with a particular credit provider; or
23 (d) assists the consumer to apply for a particular credit contract
24 with a particular credit provider; or

Chapter 1 Introduction

Part 1-2 Definitions

Division 3 Definitions relating to the meaning of credit activity

Section 9

- 1 (e) assists the consumer to apply for an increase to the credit
2 limit of a particular credit contract with a particular credit
3 provider; or
4 (f) suggests that the consumer apply for a particular consumer
5 lease with a particular lessor; or
6 (g) suggests that the consumer remain in a particular consumer
7 lease with a particular lessor; or
8 (h) assists the consumer to apply for a particular consumer lease
9 with a particular lessor.
10 It does not matter whether the person does so on the person's own
11 behalf or for or on behalf of another person.

12 **9 Meaning of *acts as an intermediary***

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

- 16 (a) acts as an intermediary (whether directly or indirectly)
17 between a credit provider and a consumer wholly or partly
18 for the purposes of securing a provision of credit for the
19 consumer under a credit contract for the consumer with the
20 credit provider; or
21 (b) acts as an intermediary (whether directly or indirectly)
22 between a lessor and a consumer wholly or partly for the
23 purposes of securing a consumer lease for the consumer with
24 the lessor.

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

27 **10 Assignees of credit providers, lessors, mortgagees and**
28 **beneficiaries of a guarantee**

- 29 (1) For the purposes of this Act (other than the National Credit Code),
30 a person is a credit provider, lessor, mortgagee or beneficiary of a
31 guarantee whether the person is:
32 (a) the original credit provider, lessor, mortgagee or beneficiary
33 of a guarantee under a credit contract, consumer lease,
34 mortgage or guarantee; or

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

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

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

Section 11

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2 **Division 4—Other definitions**

3 **11 Meaning of *approved external dispute resolution scheme***

- 4 (1) A person is a member of an *approved external dispute resolution*
5 *scheme* if the person is a member of one or more external dispute
6 resolution schemes that:
- 7 (a) is, or are, approved by ASIC in accordance with the
8 regulations; and
 - 9 (b) covers, or together cover, disputes in relation to the credit
10 activities engaged in by the person or its representatives.
- 11 (2) Regulations made for the purpose of paragraph (1)(a) may also
12 deal with the variation or revocation of approvals given by ASIC.

13 **12 When a business is *carried on in this jurisdiction***

- 14 (1) Division 3 of Part 1.2 of the *Corporations Act 2001* applies for the
15 purposes of working out whether a business is *carried on in this*
16 *jurisdiction*.
- 17 (2) Without limiting subsection (1), a business is taken to be *carried*
18 *on in this jurisdiction* by a person if, in the course of carrying on
19 the business, the person engages in conduct that is:
- 20 (a) intended to induce people in this jurisdiction to use the goods
21 or services the person provides; or
 - 22 (b) is likely to have that effect;
- 23 whether or not the conduct is intended, or likely, to have that effect
24 in other places as well.

25 **13 Meaning of *misleading***

- 26 (1) A representation made by a person is *misleading* if:
- 27 (a) the representation relates to a future matter (including the
28 doing of, or refusing to do, any act); and
 - 29 (b) the person does not have reasonable grounds for making the
30 representation.

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

3 **14 Meaning of *person*—generally includes a partnership**

- 4 (1) This Act (other than the National Credit Code) applies to a
5 partnership as if the partnership were a person, but it applies with
6 the following changes:
7 (a) obligations that would be imposed on the partnership are
8 imposed instead on each partner, but may be discharged by
9 any of the partners;
10 (b) any contravention of this Act (other than the National Credit
11 Code) that would otherwise be a contravention by the
12 partnership is taken (whether for the purposes of criminal or
13 civil liability) to have been a contravention by each partner
14 who:
15 (i) aided, abetted, counselled or procured the relevant act or
16 omission; or
17 (ii) was in any way knowingly concerned in, or party to, the
18 relevant act or omission (whether directly or indirectly
19 and whether by any act or omission of the partner).
20 Note: For the purposes of paragraph (b), to determine whether the
21 partnership has contravened this Act, see section 325.
- 22 (2) For the purposes of this Act (other than the National Credit Code),
23 a change in the composition of a partnership does not affect the
24 continuity of the partnership.
- 25 (3) Subsections (1) and (2) have effect subject to:
26 (a) an express or implied contrary intention in a provision of this
27 Act (other than the National Credit Code); and
28 (b) the regulations, which may exclude or modify the effect of
29 those subsections in relation to specified provisions.

30 **15 Meaning of *person*—generally includes multiple trustees**

- 31 (1) This section applies in relation to a trust during a period while the
32 trust continues to have:
33 (a) 2 or more trustees; or
-

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

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

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

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

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

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

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

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

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

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

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

36 (b) any contravention of this Act (other than the National Credit
37 Code) that would otherwise be a contravention by the

1 notional person is taken (whether for the purposes of criminal
2 or civil liability) to have been a contravention by that single
3 trustee.

- 4 (5) Subsections (2), (3) and (4) have effect subject to:
- 5 (a) an express or implied contrary intention in a provision of this
 - 6 Act (other than the National Credit Code); and
 - 7 (b) the regulations, which may exclude or modify the effect of
 - 8 those subsections in relation to specified provisions.

9 **16 Qualified privilege**

- 10 (1) If this Act provides that a person has qualified privilege in relation
11 to an act, matter or thing, then the person:
- 12 (a) has qualified privilege in proceedings for defamation; or
 - 13 (b) is not, in the absence of malice on the person's part, liable to
 - 14 an action for defamation at the suit of a person;
 - 15 in relation to that act, matter or thing.
- 16 (2) *Malice* includes ill will to the person concerned or any other
17 improper motive.
- 18 (3) Neither this section nor a provision of this Act that provides as
19 referred to in subsection (1) limits or affects any right, privilege or
20 immunity that a person has, apart from this section or such a
21 provision, as defendant in proceedings, or an action, for
22 defamation.

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

4 **Division 1—Introduction**

5 **17 Guide to this Part**

6

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

7

8

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.

9

10

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

11

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

4 **18 Constitutional basis for this Act and the Transitional Act**

5 *Application in a referring State*

- 6 (1) The application of this Act and the Transitional Act in the referring
7 States is based on:
- 8 (a) the legislative powers that the Commonwealth Parliament has
9 under section 51 of the Constitution (other than paragraph
10 51(xxxvii)); and
 - 11 (b) the legislative powers that the Commonwealth Parliament has
12 in relation to matters to which this Act relates because those
13 matters are referred to it by the Parliaments of the referring
14 States under paragraph 51(xxxvii) of the Constitution.

15 Note: The State referrals fully supplement the Commonwealth Parliament's
16 other powers by referring the matters to the Commonwealth
17 Parliament to the extent to which they are not otherwise included in
18 the legislative powers of the Commonwealth Parliament.

19 *Application in a Territory*

- 20 (2) The application of this Act and the Transitional Act in a Territory
21 is based on:
- 22 (a) the legislative powers that the Commonwealth Parliament has
23 under section 122 of the Constitution to make laws for the
24 government of a Territory; and
 - 25 (b) the legislative powers that the Commonwealth Parliament has
26 under section 51 of the Constitution.

27 Despite subsection 22(3) of the *Acts Interpretation Act 1901*, this
28 Act and the Transitional Act as applying in the Territory are laws
29 of the Commonwealth.

30 *Application outside Australia*

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

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

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

Section 19

- 1 (a) the legislative power the Commonwealth Parliament has
2 under paragraph 51(xxix) of the Constitution; and
3 (b) the other legislative powers that the Commonwealth
4 Parliament has under section 51 of the Constitution; and
5 (c) the legislative powers that the Commonwealth Parliament has
6 under section 122 of the Constitution to make laws for the
7 government of a Territory.

8 *Application in a non-referring State*

- 9 (4) The application of this Act and the Transitional Act in a State that
10 is not a referring State is based on:
11 (a) the legislative powers that the Commonwealth Parliament has
12 under section 51 (other than paragraph 51(xxxvii)) and
13 section 122 of the Constitution; and
14 (b) the legislative powers that the Commonwealth Parliament has
15 in relation to matters to which this Act relates because those
16 matters are referred to it by the Parliaments of the referring
17 States under paragraph 51(xxxvii) of the Constitution.

18 **19 Meaning of referring State**

19 *Reference of matters by State Parliament to Commonwealth*
20 *Parliament*

- 21 (1) A State is a **referring State** if the Parliament of the State has
22 referred the matters covered by subsections (3) and (4) to the
23 Parliament of the Commonwealth for the purposes of paragraph
24 51(xxxvii) of the Constitution:
25 (a) if and to the extent that the matters are not otherwise included
26 in the legislative powers of the Parliament of the
27 Commonwealth (otherwise than by a reference under
28 paragraph 51(xxxvii) of the Constitution); and
29 (b) if and to the extent to which the matters are included in the
30 legislative powers of the Parliament of the State.

1 (2) A State is a *referring State* even if a law of the State provides that
2 the reference to the Commonwealth Parliament of either or both of
3 the matters covered by subsections (3) and (4) is to terminate in
4 particular circumstances.

5 *Reference covering initial National Credit Act and initial*
6 *Transitional Act*

7 (3) This subsection covers the matters to which the referred provisions
8 relate to the extent of making laws with respect to those matters by
9 including the referred provisions in the initial National Credit Act
10 and the initial Transitional Act.

11 *Reference covering amendments of this Act, the Transitional Act or*
12 *the Trade Practices Act*

13 (4) This subsection covers the referred credit matters (see section 20)
14 to the extent of the making of laws with respect to those matters by
15 making express amendments of this Act, the Transitional Act or
16 the Trade Practices Act.

17 *Effect of termination of reference*

18 (5) A State ceases to be a *referring State* if the State's initial reference
19 terminates.

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

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

Section 20

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Definitions

2

(8) In this section:

3

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

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express amendment of this Act, the Transitional Act or the Trade Practices Act means the direct amendment of the text of this Act, the Transitional Act or the Trade Practices 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, the Transitional Act or the Trade Practices Act.

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initial reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection (3).

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referred provisions means:

19

(a) the initial National Credit Act; and

20

(b) the initial Transitional Act;

21

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

22

23

Trade Practices Act means the *Trade Practices Act 1974*.

24

20 Meaning of referred credit matters

25

(1) ***Referred credit matters*** means any of the following:

26

(a) the matter of the regulation of credit or personal property leases;

27

28

(b) the matter of the regulation of securities (including mortgages), guarantees or insurance insofar as they relate to credit or personal property leases;

29

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31

(c) the matter of the regulation of credit activities;

- 1 (d) in relation to sales of goods or supplies of services where the
2 sale or supply is financed, or proposed to be financed, wholly
3 or partly by the provision of credit, the following matters:
4 (i) in the case of such a sale or supply where the person
5 providing the credit is linked in any way to the person
6 supplying the goods or services:
7 (A) the liability of the person providing credit for
8 any representation, warranty or statement by the
9 person supplying the goods or services; and
10 (B) the liability of the person providing the credit or
11 supplying the goods or services for loss or
12 damage;
13 and matters arising out of any such liability; and
14 (ii) the termination of any transaction in relation to such a
15 sale of goods or supply of services and matters arising
16 out of any such termination.
- 17 (2) However, *referred credit matters* does not include the matter of
18 making provision with respect to:
19 (a) a matter in a manner that excludes or limits the operation of a
20 law of a State to the extent that the law makes provision with
21 respect to:
22 (i) the creation, holding, transfer, assignment, disposal or
23 forfeiture of a State statutory right; or
24 (ii) limitations, restrictions or prohibitions concerning the
25 kinds of interests that may be created or held in, or the
26 kinds of persons or bodies that may create or hold
27 interests in, a State statutory right; or
28 (iii) without limiting the generality of subparagraph (i) or
29 (ii)—any of the following matters:
30 (A) the forfeiture of property or interests in property
31 (or the disposal of forfeited property or
32 interests) in connection with the enforcement of
33 the general law or any law of a State;
34 (B) the transfer, by operation of that law of a State,
35 of property or interests in property from any
36 specified person or body to any other specified

Chapter 1 Introduction

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

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

Section 20

1 person or body (whether or not for valuable
2 consideration or a fee or other reward); or

3 (b) an excluded State statutory right.

4 (3) In this section, despite section 5 (the Dictionary):

5 **credit** means:

6 (a) credit within the meaning of subsection 3(1) of the initial
7 National Credit Code if a charge is or may be made for
8 providing the credit; and

9 (b) credit because of the operation of sections 9, 10, 11 and 12 of
10 the initial National Credit Code (either because credit is
11 regarded as having been provided or because a contract is to
12 be taken to be a credit contract).

13 **credit activity** means any activity associated with the provision of
14 credit or the entering into of personal property leases and includes
15 (but is not limited to) any conduct that constitutes a credit activity
16 for the purposes of the initial National Credit Act.

17 **excluded State statutory right** means a State statutory right that is
18 declared by the law of a State by or under which it is granted to be
19 an excluded State statutory right for the purposes of that State's
20 reference Act.

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

23 **general law** means the principles and rules of the common law and
24 equity to the extent to which they have effect in a State from time
25 to time.

26 **initial National Credit Code** means the National Credit Code
27 within the meaning of the initial National Credit Act.

28 **interest**, in relation to property, includes a right in the property.

29 **law of a State** means any Act of a State or any instrument made
30 under such an Act, whenever enacted or made and as in force from
31 time to time.

32 **licence** means either of the following:

- 1 (a) a transferable right, entitlement or authority to do one or
2 more of the following:
3 (i) to manufacture, produce, sell, transport or otherwise
4 deal with property;
5 (ii) to provide services;
6 (iii) to explore for, exploit or use a resource;
7 (b) a transferable water right.

8 ***personal property lease*** means a contract for the hire of goods
9 (whether or not the person to whom the goods are hired has a right
10 or obligation to purchase the goods) if:

- 11 (a) a charge is or may be made for hiring the goods; and
12 (b) the charge, together with any other amount payable under or
13 in connection with the contract (including, if the person
14 hiring the goods has a right or obligation to purchase the
15 goods, any amount payable to purchase the goods or to
16 exercise an option to do so or any amount equal to any
17 agreed or residual value of the goods), exceeds the cash price
18 for the goods; and
19 (c) the goods are provided in the course of a business of
20 providing goods for hire or as part of or incidentally to any
21 other business carried on by the person who provides the
22 goods.

23 ***property*** includes a licence.

24 ***reference Act*** of a State is the law under which the initial reference
25 and the amendment reference are given as referred to in section 19.

26 ***State statutory right*** means a right, entitlement or authority that is
27 granted by or under a law of a State.

28 ***transferable***, in relation to a right, entitlement or authority, means
29 transferable under the general law or a law of a State by the holder
30 of the right, entitlement or authority (whether or not the right,
31 entitlement or authority is exclusive, and whether or not a transfer
32 is restricted or requires consent).

Section 21

1 **water right** means a right, entitlement or authority, whether or not
2 exclusive, that is granted by or under the general law or a law of a
3 State in relation to the control, use or flow of water.

4 **21 General application of this Act and the Transitional Act**

5 *Application in this jurisdiction*

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

8 *Geographical coverage of “this jurisdiction”*

9 (2) **This jurisdiction** means the geographical area that consists of:

- 10 (a) each referring State (including its coastal sea); and
11 (b) each Territory (including its coastal sea).

12 (3) Throughout this Act and the Transitional Act, **this jurisdiction**
13 therefore consists of either:

- 14 (a) if all of the States are referring States—the whole of
15 Australia; or
16 (b) if one or more States are not referring States—Australia
17 (other than any State that is not a referring State).

18 *Application outside this jurisdiction*

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

22 *Application in non-referring States*

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

27 *Residence, place of formation etc.*

28 (6) Each provision of this Act and the Transitional Act applies,
29 according to its tenor, to:

- 1 (a) natural persons whether:
2 (i) resident in this jurisdiction or not; and
3 (ii) resident in Australia or not; and
4 (iii) Australian citizens or not; and
5 (b) all bodies corporate and unincorporated bodies whether:
6 (i) formed or carrying on a business in this jurisdiction or
7 not; and
8 (ii) formed or carrying on a business in Australia or not.

9 **22 Acts bind Crown**

- 10 (1) This Act (other than Chapter 3 and the National Credit Code) and
11 the Transitional Act bind the Crown in each of its capacities.
12 (2) However, those Acts do not make the Crown liable to be
13 prosecuted for an offence or to any pecuniary penalty.

Section 23

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

4 **23 Concurrent operation intended**

5 (1) This Act and the Transitional Act (the *Commonwealth credit*
6 *legislation*) are not intended to exclude or limit the concurrent
7 operation of any law of a State or Territory.

8 (2) If:

9 (a) an act or omission of a person is both an offence against the
10 Commonwealth credit legislation and an offence against the
11 law of a State or Territory; and

12 (b) the person is convicted of either of those offences;
13 the person is not liable to be convicted of the other of those
14 offences.

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

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

20 **24 When Commonwealth credit legislation does not apply**

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

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

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

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

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

31 (2) By force of this subsection:

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- 1 (a) none of the provisions of the Commonwealth credit
2 legislation (other than this section) applies in or in relation to
3 the State or Territory with respect to the matter if the
4 declaration is one to which paragraph (1)(a) applies; and
5 (b) the specified provision of the Commonwealth credit
6 legislation does not apply in or in relation to the State or
7 Territory with respect to the matter if the declaration is one to
8 which paragraph (1)(b) applies; and
9 (c) the provisions of the Commonwealth credit legislation (other
10 than this section and the specified provisions) do not apply in
11 or in relation to the State or Territory with respect to the
12 matter if the declaration is one to which paragraph (1)(c)
13 applies; and
14 (d) the provisions of the Commonwealth credit legislation (other
15 than this section and otherwise than to the specified extent)
16 do not apply in or in relation to the State or Territory with
17 respect to the matter if the declaration is one to which
18 paragraph (1)(d) applies.
- 19 (3) Subsection (2) does not apply to the declaration to the extent to
20 which the regulations provide that that subsection does not apply to
21 that declaration.

22 **25 Avoiding direct inconsistency between Commonwealth and State**
23 **and Territory laws**

24 *This section overrides other Commonwealth credit legislation*

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

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

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

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

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

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

Section 25

1

When this section applies to a State or Territory law

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- (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).

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Effect of displacement provision

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- (4) The Commonwealth provision does not:

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(a) prohibit the doing of an act; or

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(b) impose a liability (whether civil or criminal) for doing an act;

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if the displacement provision specifically permits, authorises or requires the doing of that act.

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- (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:

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(a) the Commonwealth provision; and

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(b) the displacement provision to the extent to which the

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displacement provision would, apart from this subsection, be

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inconsistent with the Commonwealth provision.

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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.

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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.

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- (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.

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26 Regulations to deal with interaction between laws

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- (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
 - (f) authorises a person to do something for the purposes of the Commonwealth credit legislation that the person:

Chapter 1 Introduction

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

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

Section 26

- 1 (i) is authorised to do under a law of a referring State or a
2 Territory; and
3 (ii) would not otherwise be authorised to do under the
4 Commonwealth credit legislation; or
5 (g) will be taken to be satisfied if a law of a referring State or a
6 Territory is satisfied.

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**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, charging fees for unlicensed conduct, and giving misleading information.

Section 28

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2 **Division 2—Engaging in credit activities without a licence**

3 **28 Application of this Division**

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

6 **29 Prohibition on engaging in credit activities without a licence**

7 *Prohibition on engaging in credit activities without a licence*

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

11 Civil penalty: 2,000 penalty units.

12 *Offence*

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

18 Criminal penalty: 200 penalty units, or 2 years imprisonment, or
19 both.

20 *Defence*

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

- 1 (c) the person's conduct in engaging in the credit activity is
2 within the authority of the principal; and
3 (d) the principal holds a licence authorising the principal to
4 engage in the credit activity.

5 Note: For the purposes of subsection (2), a defendant bears an evidential
6 burden in relation to the matter in subsection (3) (see subsection
7 13.3(3) of the *Criminal Code*).

Section 30

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Division 3—Other prohibitions relating to the requirement to be licensed and to credit activities

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30 Prohibitions on holding out and advertising etc.

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Prohibitions on holding out and advertising etc.

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(1) A person must not hold out:

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(a) that the person holds a licence; or

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(b) that the person holds a licence authorising the person to engage in a particular credit activity; or

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10 (c) that a credit activity engaged in by the person or by someone else is exempt from a requirement to hold a licence; or

11

12 (d) that, in engaging in a credit activity, the person acts on behalf of another person; or

13

14 (e) that conduct, or proposed conduct, of the person is within the authority of a licensee;

15

16 if that is not the case.

17

Civil penalty: 2,000 penalty units.

18

(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).

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Civil penalty: 2,000 penalty units.

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Offence

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(3) A person commits an offence if:

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(a) the person is subject to a requirement under subsection (1) or (2); and

26

27 (b) the person engages in conduct; and

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(c) the conduct contravenes the requirement.

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Criminal penalty: 50 penalty units, or 1 year imprisonment, or both.

30

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: 2,000 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: 200 penalty units, or 2 years imprisonment, or both.

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: 2,000 penalty units.

Offence

(2) A person commits an offence if:

Chapter 2 Licensing of persons who engage in credit activities

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

Division 3 Other prohibitions relating to the requirement to be licensed and to credit activities

Section 33

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

5 Criminal penalty: 50 penalty units, or 1 year imprisonment, or
6 both.

7 **33 Prohibition on giving misleading information etc.**

8 *Prohibition on giving misleading information etc.*

- 9 (1) A person (the *giver*) must not, in the course of engaging in a credit
10 activity, give information or a document to another person if the
11 giver knows, or is reckless as to whether, the information or
12 document is false in a material particular or materially misleading.

13 Civil penalty: 2,000 penalty units.

14 *Offence*

- 15 (2) A person commits an offence if:
16 (a) the person gives information or a document to another
17 person; and
18 (b) the person does so in the course of engaging in a credit
19 activity; and
20 (c) the information or document is false in a material particular
21 or materially misleading.

22 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
23 both.

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2 **Part 2-2—Australian credit licences**

3 **Division 1—Introduction**

4 **34 Guide to this Part**

5

This Part is about Australian credit licences.

6

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

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8

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.

9

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

12

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Division 5 is about conduct obligations of licensees.

14

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

15

Section 35

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2 **Division 2—Australian credit licences**

3 **35 Australian credit licences**

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

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

1

2 **Division 3—How to get an Australian credit licence**

3 **36 Applying for a licence**

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

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

8 **37 When a licence may be granted—applicants other than ADIs**

9 *When ASIC must grant a licence*

- 10 (1) ASIC must grant a person (other than an ADI) a licence if (and
11 must not grant the person a licence unless):
- 12 (a) the person has applied for the licence in accordance with
13 section 36; and
 - 14 (b) ASIC has no reason to believe that the person is likely to
15 contravene the obligations that will apply under section 47 if
16 the licence is granted; and
 - 17 (c) ASIC has no reason to believe that the person is not a fit and
18 proper person to engage in credit activities; and
 - 19 (d) the person has given ASIC any additional information or
20 audit report requested by ASIC under subsection (4); and
 - 21 (e) the person meets any other requirements prescribed by the
22 regulations.

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

27 *Matters ASIC must have regard to*

- 28 (2) For the purposes of paragraphs (1)(b) and (c), ASIC must (subject
29 to Part VIIC of the *Crimes Act 1914*) have regard to the following:

Chapter 2 Licensing of persons who engage in credit activities

Part 2-2 Australian credit licences

Division 3 How to get an Australian credit licence

Section 37

- 1 (a) whether a registration under the Transitional Act, a licence or
2 an Australian financial services licence of the person has ever
3 been suspended or cancelled;
- 4 (b) whether a banning order or disqualification order under
5 Part 2-4 has ever been made against the person;
- 6 (c) whether a banning order or disqualification order under
7 Division 8 of Part 7.6 of the *Corporations Act 2001* has ever
8 been made against the person;
- 9 (d) whether the person has ever been banned from engaging in a
10 credit activity under a law of a State or Territory;
- 11 (e) any relevant information given to ASIC by a State or
12 Territory, or an authority of a State or Territory, in relation to
13 the person;
- 14 (f) if the person is not the trustees of a trust—whether the person
15 has ever been insolvent;
- 16 (g) if the person is a single natural person:
- 17 (i) whether the person has ever been disqualified from
18 managing corporations under Part 2D.6 of the
19 *Corporations Act 2001*; and
- 20 (ii) any criminal conviction of the person, within 10 years
21 before the application was made;
- 22 (h) if the person is not a single natural person, whether ASIC has
23 reason to believe that any of the following persons is not a fit
24 and proper person to engage in credit activities:
- 25 (i) if the person is a body corporate—each director,
26 secretary or senior manager of the body corporate who
27 would perform duties in relation to the credit activities
28 to be authorised by the licence;
- 29 (ii) if the person is a partnership or the trustees of a trust—
30 each partner or trustee who would perform duties in
31 relation to the credit activities to be authorised by the
32 licence;
- 33 (i) any other matter ASIC considers relevant;
- 34 (j) any other matter prescribed by the regulations.

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

- 1 (3) ASIC must (subject to Part VIIC of the *Crimes Act 1914*), in
2 considering whether it has reason to believe that a person referred
3 to in paragraph (2)(h) is not a fit and proper person to engage in
4 credit activities, have regard to:
5 (a) the matters set out in paragraphs (2)(a) to (g); and
6 (b) any other matter ASIC considers relevant; and
7 (c) any other matter prescribed by the regulations;
8 in relation to that person.

9 *ASIC may request information or audit report from applicant*

- 10 (4) ASIC may give a written notice to a person who has applied for a
11 licence requesting the person to lodge with ASIC, within the time
12 specified in the notice, either or both of the following:
13 (a) additional information specified in the notice in relation to
14 any matters that ASIC may have regard to in deciding
15 whether to grant the licence;
16 (b) an audit report, prepared by a suitably qualified person
17 specified in the notice, in relation to matters that ASIC may
18 have regard to in deciding whether to grant the licence.
- 19 (5) If the person does not lodge with ASIC the additional information
20 or audit report requested by ASIC under subsection (4) within the
21 time specified in the notice, the person is taken to have withdrawn
22 the application. ASIC may extend the time by giving a written
23 notice to the person.

24 **38 When a licence may be granted—ADIs**

25 If:

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

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

Section 39

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

5 **39 Regulations may prescribe streamlined process for other**
6 **applicants**

7 Despite sections 36 and 37, the regulations may provide that:
8 (a) some or all of sections 36 and 37 do not apply in relation to
9 particular classes of applicants; and
10 (b) alternative processes apply to applications for licences by,
11 and the grant of licences to, those classes of applicants.

12 **40 Licences must not be granted to certain applicants**

13 *Banning or disqualification order in force against person*

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

18 *Prescribed State or Territory order in force against person etc.*

19 (2) Despite subsection 37(1) and section 38, ASIC must not grant a
20 licence to a person if:
21 (a) the person is a natural person against whom a prescribed
22 State or Territory order is in force; or
23 (b) the person is a body corporate, and a prescribed State or
24 Territory order is in force against a director, secretary or
25 senior manager of the body corporate who would perform
26 duties in relation to the credit activities to be authorised by
27 the licence; or
28 (c) the person is a partnership or the trustees of a trust, and a
29 prescribed State or Territory order is in force against a
30 partner or trustee who would perform duties in relation to the
31 credit activities to be authorised by the licence.

1 **41 Applicant must be given hearing before refusal of licence**

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

- 4 (a) to appear, or be represented, at a hearing before ASIC that
5 takes place in private; and
6 (b) to make submissions to ASIC in relation to the refusal.

7 **42 Notice of grant or refusal of licence and date of effect**

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

- 10 (a) ASIC's decision on the application; and
11 (b) if the decision is to grant the applicant a licence—the day on
12 which the licence takes effect; and
13 (c) if the decision is not to grant the applicant a licence—the
14 reasons for the decision.

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

18 **43 Australian credit licence numbers**

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

21 (2) If:

- 22 (a) a person is granted a licence; and
23 (b) the person holds an Australian financial services licence;
24 then the Australian credit licence number that ASIC gives to the
25 licence held by that person must be the same number as the
26 person's Australian financial services licence number.

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

29 **44 Basis on which licence is granted**

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

Chapter 2 Licensing of persons who engage in credit activities

Part 2-2 Australian credit licences

Division 3 How to get an Australian credit licence

Section 44

- 1 (a) conditions on the licence may be imposed, varied or revoked
2 under section 45 or 46; and
3 (b) the licence may be suspended under section 54, 55 or 56; and
4 (c) the licence may be cancelled under section 54, 55 or 56; and
5 (d) the licence may be varied under section 57; and
6 (e) the licence may be cancelled, revoked, terminated or varied
7 by or under later legislation; and
8 (f) no compensation is payable if:
9 (i) conditions on the licence are imposed, varied or revoked
10 as referred to in paragraph (a); or
11 (ii) the licence is suspended, cancelled, varied, revoked or
12 terminated as referred to in paragraphs (b) to (e).

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2 **Division 4—Conditions on an Australian credit licence**

3 **45 The conditions on the licence**

4 *ASIC may impose, vary or revoke conditions on licences*

- 5 (1) ASIC may, at any time:
- 6 (a) impose conditions, or additional conditions, on a licence; and
- 7 (b) vary or revoke conditions imposed on a licence.
- 8 (2) ASIC may do so:
- 9 (a) on its own initiative; or
- 10 (b) if the licensee lodges an application with ASIC for the
- 11 imposition, variation or revocation.
- 12 (3) The application must be in the approved form.

13 *Notice and effect of imposition, variation or revocation of*

14 *conditions*

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

20 *ASIC must give the licensee a hearing*

- 21 (5) Despite subsection (1), ASIC may only impose conditions or
- 22 additional conditions, or vary or revoke the conditions, on the
- 23 licence after giving the licensee an opportunity:
- 24 (a) to appear, or be represented, at a hearing before ASIC that
- 25 takes place in private; and
- 26 (b) to make submissions to ASIC in relation to the conditions.
- 27 This subsection does not apply to ASIC imposing conditions when
- 28 the licence is granted.

Section 46

1 *Condition in relation to credit activities authorised*

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

5 *Regulations may prescribe conditions*

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

9 **46 Licence conditions—special procedures for APRA-regulated**
10 **bodies**

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

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

15 (a) ASIC cannot:

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

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

25 unless ASIC has first consulted APRA about the proposed
26 action;

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

1 *Special procedures for ADIs*

- 2 (2) If the licensee, or a related body corporate, is an ADI, then the
3 following provisions apply:
- 4 (a) subject to paragraphs (b) and (c), the powers that ASIC
5 would otherwise have under section 45:
- 6 (i) to impose, vary or revoke a condition on the licence
7 that, in ASIC's opinion, has or would have the result of
8 preventing the ADI from being able to carry on all or
9 any of its banking business (within the meaning of the
10 *Banking Act 1959*); or
- 11 (ii) to vary a condition so that it would, in ASIC's opinion,
12 become a condition that would have a result as
13 described in subparagraph (i);
- 14 are instead powers of the Minister;
- 15 (b) the following provisions apply in relation to a power to
16 which paragraph (a) applies:
- 17 (i) the procedures for the exercise of the power are the
18 same as would apply if ASIC could exercise the power,
19 except that the Minister must not exercise the power
20 unless he or she has first considered advice from ASIC
21 on the proposed action, being advice given after ASIC
22 has consulted APRA about the proposed action;
- 23 (ii) ASIC (rather than the Minister) must still conduct any
24 hearing required under paragraph 45(5)(a) and receive
25 any submissions under paragraph 45(5)(b);
- 26 (c) if ASIC imposes, varies or revokes a condition on the licence
27 and paragraph (a) does not apply to that action, ASIC must,
28 within one week, inform APRA of the action that has been
29 taken.

Section 47

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2 **Division 5—Obligations of licensees**

3 **47 General conduct obligations of licensees**

4 *General conduct obligations*

5 (1) A licensee must:

- 6 (a) do all things necessary to ensure that the credit activities
7 authorised by the licence are engaged in efficiently, honestly
8 and fairly; and
- 9 (b) have in place adequate arrangements to ensure that clients of
10 the licensee are not disadvantaged by any conflict of interest
11 that may arise wholly or partly in relation to credit activities
12 engaged in by the licensee or its representatives; and
- 13 (c) comply with the conditions on the licence; and
- 14 (d) comply with the credit legislation; and
- 15 (e) take reasonable steps to ensure that its representatives
16 comply with the credit legislation; and
- 17 (f) maintain the competence to engage in the credit activities
18 authorised by the licence; and
- 19 (g) ensure that its representatives are adequately trained, and are
20 competent, to engage in the credit activities authorised by the
21 licence; and
- 22 (h) have an internal dispute resolution procedure that:
- 23 (i) complies with standards and requirements made or
24 approved by ASIC in accordance with the regulations;
25 and
- 26 (ii) covers disputes in relation to the credit activities
27 engaged in by the licensee or its representatives; and
- 28 (i) be a member of an approved external dispute resolution
29 scheme; and
- 30 (j) have compensation arrangements in accordance with
31 section 48; and
- 32 (k) have adequate arrangements and systems to ensure
33 compliance with its obligations under this section, and a

1 written plan that documents those arrangements and systems;
2 and

- 3 (l) unless the licensee is a body regulated by APRA:
4 (i) have available adequate resources (including financial,
5 technological and human resources) to engage in the
6 credit activities authorised by the licence and to carry
7 out supervisory arrangements; and
8 (ii) have adequate risk management systems; and
9 (m) comply with any other obligations that are prescribed by the
10 regulations.

11 *Assessment of whether compliance is adequate*

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

16 *Regulations in relation to internal dispute resolution procedures*

- 17 (3) Regulations made for the purposes of paragraph (1)(h) may also
18 deal with the variation or revocation of:
19 (a) standards or requirements made by ASIC; or
20 (b) approvals given by ASIC.

21 **48 Requirements for compensation arrangements**

22 *Requirement to have adequate compensation arrangements*

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

26 *When arrangements are adequate*

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

Section 49

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Approval of arrangements by ASIC

2

(3) Before approving arrangements under paragraph (2)(b), ASIC must have regard to:

3

4

(a) the credit activities authorised by the licence; and

5

(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

6

7

8

(c) any other matters that are prescribed by the regulations.

9

(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).

10

11

12

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

13

14

Notice to licensee to provide a statement

15

(1) ASIC may give a licensee a written notice directing the licensee to lodge with ASIC a written statement containing specified information about the credit activities engaged in by the licensee or its representatives.

16

17

18

19

(2) Notices under subsection (1):

20

(a) may be given at any time; and

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(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

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

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(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.

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Notice to licensee to obtain an audit report

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(3) ASIC may also give a licensee a written notice directing the licensee to obtain an audit report, prepared by a suitably qualified

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1 person specified in the notice, on a statement, or on each statement
2 in a class of statements, under subsection (1) before the statement
3 is given to ASIC.

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

5 *Notice must specify day by which licensee must comply*

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

10 *Requirement to comply with notice*

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

13 Civil penalty: 2,000 penalty units.

14 *Offence*

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

20 Criminal penalty: 25 penalty units, or 6 months imprisonment,
21 or both.

22 *Strict liability offence*

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

28 Criminal penalty: 10 penalty units.

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

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

2 **50 Obligation to give ASIC information required by the regulations**

3 *Regulations may require licensee to give information*

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

7 *Requirement to comply with regulations*

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

10 Civil penalty: 2,000 penalty units.

11 *Offence*

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

17 Criminal penalty: 25 penalty units, or 6 months imprisonment,
18 or both.

19 *Strict liability offence*

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

25 Criminal penalty: 10 penalty units.

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

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

1 **51 Obligation to provide ASIC with assistance if reasonably**
2 **requested**

3 *Requirement to provide assistance*

- 4 (1) If ASIC, or a person authorised by ASIC, reasonably requests
5 assistance from a licensee in relation to whether the licensee and its
6 representatives are complying with the credit legislation, the
7 licensee must give ASIC or the authorised person the requested
8 assistance.

9 Civil penalty: 2,000 penalty units.

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

11 *Offence*

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

17 Criminal penalty: 25 penalty units, or 6 months imprisonment,
18 or both.

19 *Assistance may include showing ASIC credit books etc.*

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

22 **52 Obligation to cite Australian credit licence number**

23 *When this section applies*

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

26 *Requirement to include licence number in documents*

- 27 (2) Whenever a licensee identifies itself in a document of a kind
28 prescribed by the regulations, the licensee must:

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- 1 (a) include in the document the licensee's Australian credit
2 licence number; and
3 (b) identify in the document that the number is the licensee's
4 Australian credit licence number.

5 Civil penalty: 2,000 penalty units.

6 *Strict liability offence*

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

13 Criminal penalty: 10 penalty units.

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

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

16 **53 Obligation to lodge annual compliance certificate**

17 *Requirement to lodge annual compliance certificate*

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

22 Civil penalty: 2,000 penalty units.

23 *Compliance certificate must be in approved form*

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

25 *Who must sign compliance certificate*

- 26 (3) The compliance certificate must be signed by:
27 (a) if the licensee is a single natural person—the licensee; or

- 1 (b) if the licensee is a body corporate—a person of a kind
2 prescribed by the regulations; or
3 (c) if the licensee is a partnership or the trustees of a trust—a
4 partner or trustee who performs duties in relation to credit
5 activities.

6 *Requirement to ensure compliance certificate is lodged*

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

10 Civil penalty: 2,000 penalty units.

11 *Strict liability offence*

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

17 Criminal penalty: 60 penalty units.

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

19 *Meaning of licensing anniversary*

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

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

4 **Subdivision A—Suspensions and cancellations**

5 **54 Suspension or cancellation without hearing**

- 6 (1) ASIC may suspend or cancel a licensee's licence if:
- 7 (a) the licensee lodges with ASIC an application for the
8 suspension or cancellation; or
- 9 (b) the licensee ceases to engage in credit activities; or
- 10 (c) any of the matters set out in subsection (2) applies to any of
11 the following persons:
- 12 (i) the licensee;
- 13 (ii) if the licensee is a body corporate—a director, secretary
14 or senior manager of the body corporate who performs
15 duties in relation to credit activities;
- 16 (iii) if the licensee is a partnership or the trustees of a trust—
17 a partner or trustee who performs duties in relation to
18 credit activities.
- 19 (2) For the purposes of paragraph (1)(c), the matters are as follows:
- 20 (a) if the person is not the trustees of a trust—the person is
21 insolvent;
- 22 (b) if the person is a natural person:
- 23 (i) the person is convicted of serious fraud; or
- 24 (ii) the person is incapable of managing his or her affairs
25 because of physical or mental incapacity; or
- 26 (iii) a prescribed State or Territory order is in force against
27 the person.
- 28 (3) An application for suspension or cancellation of a licence must be
29 in the approved form.

1 **55 Suspension or cancellation after offering a hearing**

- 2 (1) ASIC may suspend or cancel a licensee's licence (subject to
3 complying with subsection (4)) if:
4 (a) the licensee has contravened an obligation under section 47
5 (which deals with general conduct obligations of licensees);
6 or
7 (b) ASIC has reason to believe that the licensee is likely to
8 contravene an obligation under that section; or
9 (c) ASIC has reason to believe that the licensee is not a fit and
10 proper person to engage in credit activities; or
11 (d) the application for the licence:
12 (i) was false in a material particular or materially
13 misleading; or
14 (ii) omitted a material matter.
- 15 (2) For the purposes of paragraphs (1)(b) and (c), ASIC must (subject
16 to Part VIIC of the *Crimes Act 1914*) have regard to the following:
17 (a) if the person is a natural person—the matters set out in
18 paragraphs 37(2)(a) to (f) and subparagraph 37(2)(g)(i) in
19 relation to the person;
20 (b) if the person is not a natural person:
21 (i) the matters set out in paragraphs 37(2)(a) to (f) in
22 relation to the person; and
23 (ii) whether ASIC has reason to believe that any of the
24 persons referred to in paragraph 37(2)(h) in relation to
25 the person is not a fit and proper person to engage in
26 credit activities;
27 (c) any criminal conviction of the person, within 10 years before
28 the licence is proposed to be suspended or cancelled;
29 (d) any other matter ASIC considers relevant;
30 (e) any other matter prescribed by the regulations.

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

- 35 (3) ASIC must (subject to Part VIIC of the *Crimes Act 1914*), in
36 considering whether it has reason to believe that a person referred

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1 to in subparagraph (2)(b)(ii) is not a fit and proper person to
2 engage in credit activities, have regard to the matters set out in
3 paragraphs (2)(a), (c), (d) and (e) in relation to the person.

- 4 (4) ASIC may only suspend or cancel a licensee's licence under this
5 section after giving the licensee an opportunity:
6 (a) to appear, or be represented, at a hearing before ASIC that
7 takes place in private; and
8 (b) to make submissions to ASIC on the matter.

9 **56 Suspension and cancellation—special procedures for**
10 **APRA-regulated bodies**

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

- 12 (1) If a licensee, or a related body corporate, is a body (the **APRA**
13 **body**) regulated by APRA (other than an ADI), then the following
14 provisions apply:
15 (a) ASIC cannot suspend or cancel the licensee's licence if doing
16 so would, in ASIC's opinion, have the result of preventing
17 the APRA body from being able to carry on all or any of its
18 usual activities (being activities in relation to which APRA
19 has regulatory or supervisory responsibilities), unless ASIC
20 has first consulted APRA about the proposed action;
21 (b) if ASIC suspends or cancels the licensee's licence and
22 paragraph (a) does not apply to that action, ASIC must,
23 within one week, inform APRA of the action that has been
24 taken.

25 *Special procedures for ADIs*

- 26 (2) If:
27 (a) a licensee is an ADI; or
28 (b) a related body corporate of a licensee is an ADI, and
29 cancellation or suspension of the licensee's licence would, in
30 ASIC's opinion, have the result of preventing the ADI from
31 being able to carry on all or any of its banking business
32 (within the meaning of the *Banking Act 1959*);
33 then the following provisions have effect:

- 1 (c) subject to paragraph (d), the powers that ASIC would
2 otherwise have under this Division to cancel or suspend the
3 licensee's licence, or to revoke a suspension to which this
4 subsection applied, are instead powers of the Minister;
- 5 (d) the procedures for the exercise of a power to which
6 paragraph (c) applies are the same as would apply if ASIC
7 could exercise the power, except that the Minister must not
8 exercise the power unless he or she has first considered
9 advice from ASIC on the proposed action, being advice given
10 after ASIC has consulted APRA about the proposed action;
- 11 (e) ASIC (rather than the Minister) must still conduct any
12 hearing required under paragraph 55(4)(a) and receive any
13 submissions under paragraph 55(4)(b).

14 **Subdivision B—Variations**

15 **57 Varying licences**

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

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

19 **Subdivision C—Miscellaneous rules about suspensions,
20 cancellations and variations**

21 **58 Effect of suspension**

- 22 (1) A suspended licence has no effect while it remains suspended.
- 23 (2) Subsection (1) has effect subject to section 62 (which deals with
24 the continued effect of some suspended or cancelled licences).

25 **59 Revocation of suspension**

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

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

4 **Division 1—Introduction**

5 **63 Guide to this Part**

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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.

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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.

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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.

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

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

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2 **Division 2—Authorisation of credit representatives**

3 **64 Licensee may authorise credit representatives**

4 *Authorisation of credit representative by licensee*

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

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

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

12 *When authorisation is of no effect*

13 (4) The authorisation:

14 (a) is of no effect if subsection (5) applies to it when it is given;
15 and

16 (b) ceases to have effect if and when subsection (5) starts to
17 apply to it after it is given;

18 to the extent that subsection (5) applies.

19 (5) This section applies to the authorisation to the extent that it
20 purports to authorise:

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

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

26 (c) a person who is not a member of an approved external
27 dispute resolution scheme; or

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

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

- 1 (f) a natural person against whom a prescribed State or Territory
2 order is in force; or
3 (g) a person that is a body corporate, if a prescribed State or
4 Territory order is in force against a director, secretary or
5 senior manager of the body corporate who would perform
6 duties in relation to the credit activities specified in the
7 authorisation; or
8 (h) a person that is a partnership or the trustees of a trust, if a
9 prescribed State or Territory order is in force against a
10 partner or trustee who would perform duties in relation to the
11 credit activities specified in the authorisation.

12 **65 Credit representative that is a body corporate may sub-authorise**
13 **natural persons as credit representatives**

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

- 16 (1) A body corporate that is a credit representative of a licensee may,
17 in that capacity, give a natural person a written notice authorising
18 that natural person to engage in specified credit activities on behalf
19 of the licensee.
20 (2) A natural person who is authorised under subsection (1) is a **credit**
21 **representative** of the relevant licensee.
22 (3) The credit activities specified may be some or all of the credit
23 activities authorised by the licensee's licence.

24 *Licensee must give consent to authorisation*

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

30 *When authorisation is of no effect*

- 31 (5) The authorisation:

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- 1 (a) is of no effect if subsection (6) applies to it when it is given;
2 and
3 (b) ceases to have effect if and when subsection (6) starts to
4 apply to it after it is given;
5 to the extent that subsection (6) applies.
- 6 (6) This subsection applies to the authorisation to the extent that it
7 purports to authorise:
8 (a) a natural person to engage in a credit activity that is not
9 authorised by the licensee's licence; or
10 (b) a natural person to engage in a credit activity, and a banning
11 order or disqualification order under Part 2-4 is in force
12 against the natural person in relation to the credit activity; or
13 (c) a natural person who is not a member of an approved external
14 dispute resolution scheme; or
15 (d) a natural person who is banned from engaging in a credit
16 activity under a law of a State or Territory; or
17 (e) a natural person who has been convicted, within the last 10
18 years, of serious fraud; or
19 (f) a natural person against whom a prescribed State or Territory
20 order is in force; or
21 (g) a natural person in relation to the authorisation of whom the
22 licensee has not given its written consent in accordance with
23 subsection (4).
- 24 (7) To avoid doubt, an authorisation under subsection (1) is taken, for
25 the purposes of sections 66 to 72, to be given by the body
26 corporate, not the licensee.

66 Credit representative of 2 or more licensees

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28 (1) One person can be the credit representative of 2 or more licensees,
29 but only if:
30 (a) each of those licensees has consented to the person also being
31 the credit representative of each of the other licensees; or
32 (b) each of the licensees is a related body corporate of each of
33 the other licensees.
- 34 (2) An authorisation:

- 1 (a) is of no effect if it contravenes subsection (1) when it is
2 given; and
3 (b) ceases to have effect if and when it starts to contravene
4 subsection (1) after it is given.

5 **67 A person cannot be a credit representative in relation to credit**
6 **activities authorised by a person's licence**

- 7 (1) A person must not authorise another person to engage in a credit
8 activity as a credit representative under subsection 64(1) or 65(1) if
9 the other person holds a licence authorising the person to engage in
10 the credit activity.
- 11 (2) An authorisation:
12 (a) is of no effect if it contravenes subsection (1) when it is
13 given; and
14 (b) ceases to have effect if and when it starts to contravene
15 subsection (1) after it is given.

16 **68 Variation and revocation of authorisations and**
17 **sub-authorisations**

18 *Variation and revocation of authorisations*

- 19 (1) An authorisation under subsection 64(1) may be varied or revoked
20 at any time by the licensee giving written notice to the credit
21 representative.

22 *Variation and revocation of sub-authorisations*

- 23 (2) An authorisation under subsection 65(1) may be varied or revoked
24 at any time by:
25 (a) the licensee in relation to whom the authorisation was given;
26 or
27 (b) the body corporate that gave the authorisation;
28 giving written notice to the credit representative.
- 29 (3) If a person varies or revokes an authorisation under subsection (2),
30 that person must give the other person who could have varied or

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1 revoked the authorisation written notice of the variation or
2 revocation.

3 **69 Obligation not to give authorisation that has no effect**

4 *Requirement not to give authorisation*

5 (1) A person must not purport to authorise a credit representative
6 under subsection 64(1) or 65(1) if, at the time the person first
7 purports to give the authorisation, it is of no effect, to any extent,
8 under this Division.

9 Civil penalty: 2,000 penalty units.

10 *Offence*

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

16 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
17 both.

18 **70 Obligation to vary or revoke authorisation that ceases to have
19 effect**

20 *Requirement to vary or revoke authorisation*

21 (1) If a person:
22 (a) has authorised a credit representative under subsection 64(1)
23 or 65(1); and
24 (b) becomes aware of a matter because of which the
25 authorisation of the credit representative has ceased to have
26 effect under this Division;
27 the person must, as soon as practicable:
28 (c) revoke the authorisation; or
29 (d) vary the authorisation so that it is no longer, to any extent, of
30 no effect under this Division.

1 Civil penalty: 2,000 penalty units.

2 *Offence*

- 3 (2) A person commits an offence if:
4 (a) the person is required to vary or revoke an authorisation
5 under subsection (1); and
6 (b) the person engages in conduct; and
7 (c) the conduct contravenes subsection (1).

8 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
9 both.

10 **71 Obligation to notify ASIC etc. about credit representatives**

11 *Requirement to notify ASIC when credit representative authorised*

- 12 (1) If a person authorises a credit representative under subsection
13 64(1) or 65(1), the person must, within 15 business days of the
14 authorisation, lodge with ASIC a written notice in accordance with
15 subsection (3).

16 Civil penalty: 2,000 penalty units.

17 *Requirement to notify licensee of sub-authorisation*

- 18 (2) If:
19 (a) a person authorises a natural person as a credit representative
20 of a licensee under subsection 65(1) (which deals with
21 sub-authorisations); and
22 (b) the consent of the licensee to the authorisation was given in
23 relation to a specified class of natural persons;
24 then the person must, within 15 business days of the authorisation,
25 give the licensee written notice of the authorisation in accordance
26 with subsection (3).

27 Civil penalty: 2,000 penalty units.

28 *Details to be included in notice*

- 29 (3) The notice must include the following details:

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- 1 (a) the name and business address of the credit representative;
2 (b) details of the authorisation, including the date on which it
3 was made and what the credit representative is authorised to
4 do on behalf of the licensee;
5 (c) details of the external dispute resolution scheme of which the
6 credit representative is a member;
7 (d) details of each other licensee on behalf of whom the credit
8 representative is a credit representative.

9 *Requirement to notify ASIC of change in details etc.*

- 10 (4) If:
11 (a) a person authorises a credit representative under subsection
12 64(1) or 65(1); and
13 (b) either:
14 (i) any of the details that are referred to in subsection (3) in
15 relation to the credit representative changes; or
16 (ii) the person revokes the authorisation;
17 then the person must, within 10 business days of the change or
18 revocation, lodge with ASIC a written notice of the change or
19 revocation.

20 Civil penalty: 2,000 penalty units.

- 21 (5) A notice given under subsection (1), (2) or (4) must be in the
22 approved form.

23 *Strict liability offence*

- 24 (6) A person commits an offence if:
25 (a) the person is subject to a requirement to give a notice under
26 subsection (1), (2) or (4); and
27 (b) the person engages in conduct; and
28 (c) the conduct contravenes the requirement.

29 Criminal penalty: 25 penalty units, or 6 months imprisonment,
30 or both.

- 31 (7) Subsection (6) is an offence of strict liability.

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

1 **72 Credit representative numbers**

- 2 (1) Within a reasonable period after receiving a notice under
3 subsection 71(1) of the authorisation of a credit representative,
4 ASIC must allocate the credit representative a unique credit
5 representative number.
- 6 (2) ASIC must give written notice of the credit representative number
7 to:
8 (a) the credit representative; and
9 (b) the person who authorised the credit representative.
- 10 (3) This section does not apply in relation to a credit representative
11 that has already been allocated a credit representative number.

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2 **Division 3—Information about representatives**

3 **73 ASIC may give licensee information about representatives**

4 *ASIC may give licensee information about representatives*

5 (1) If ASIC considers it appropriate to do so, it may give information
6 to a licensee about a person whom ASIC believes is, or will be, a
7 representative of the licensee. However, ASIC may only do so if it
8 believes, on reasonable grounds, that the information is true.

9 *Requirements about use of information*

10 (2) A licensee to whom information is given under subsection (1) may
11 make use of, make a record of, or give to another person, the
12 information for a purpose connected with:

13 (a) the licensee making a decision about what action (if any) to
14 take in relation to the representative, as a consequence of
15 receiving the information; or

16 (b) the licensee taking action pursuant to such a decision.

17 (3) A licensee to whom information is given under subsection (1) must
18 not make use of, make a record of, or give to another person, the
19 information other than as permitted by subsection (2).

20 Civil penalty: 2,000 penalty units.

21 (4) A person to whom information has been given for a purpose or
22 purposes under subsection (2) or this subsection may make use of,
23 make a record of, or give to another person, that information for
24 that purpose or any of those purposes.

25 (5) A person to whom information has been given for a purpose or
26 purposes under subsection (2) or (4) must not make use of, make a
27 record of, or give to another person, the information other than as
28 permitted by subsection (4).

29 Civil penalty: 2,000 penalty units.

1 *Offence*

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

7 Criminal penalty: 50 penalty units, or 1 year imprisonment, or
8 both.

9 *Qualified privilege*

- 10 (7) A person has qualified privilege in relation to an act done by the
11 person under subsection (2) or (4).

12 *Use of information obtained under this section in court*

- 13 (8) A person to whom information is given in accordance with this
14 section must not give any of the information to a court, or produce
15 in a court a document that sets out some or all of the information,
16 except:
17 (a) for a purpose connected with:
18 (i) a licensee making a decision about what action (if any)
19 to take in relation to the representative, as a
20 consequence of receiving some or all of the information;
21 or
22 (ii) a licensee taking action pursuant to that decision; or
23 (iii) proving in proceedings in that court that particular
24 action taken by a licensee in relation to the
25 representative was taken pursuant to that decision; or
26 (b) in proceedings in that court, in so far as the proceedings
27 relate to an alleged contravention of this section; or
28 (c) in proceedings about giving to a court false information
29 some, at least, of which was the information given under this
30 section.
- 31 (9) For the purposes of subsection (8), a licensee takes action in
32 relation to a representative if the licensee:

Chapter 2 Licensing of persons who engage in credit activities
Part 2-3 Credit representatives and other representatives of licensees
Division 3 Information about representatives

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- 1 (a) takes action by way of making, terminating or varying the
2 terms and conditions of an agreement; or
3 (b) otherwise takes action in relation to an agreement;
4 to the extent that the agreement relates to the representative acting
5 on behalf of the licensee.
- 6 (10) Subsection (8) also has the effect it would have if:
7 (a) a reference in it to a court were a reference to a court of an
8 external Territory or of a country outside Australia and the
9 external Territories; and
10 (b) paragraph (8)(b) were omitted.

1

2 **Division 4—Liability of licensees for representatives**

3 **74 Application of this Division**

4 This Division applies to any conduct of a representative of a
5 licensee:

- 6 (a) that relates to a credit activity; and
7 (b) on which a third person (the *client*) could reasonably be
8 expected to rely; and
9 (c) on which the client in fact relied in good faith.

10 **75 Responsibility if representative of only one licensee**

11 If the representative is the representative of only one licensee, the
12 licensee is responsible, as between the licensee and the client, for
13 the conduct of the representative, whether or not the
14 representative's conduct is within the authority of the licensee.

15 **76 Representatives of multiple licensees**

16 *When this section applies*

- 17 (1) This section applies if the representative is the representative of
18 more than one licensee.

19 *Conduct covered by only one authority*

- 20 (2) If:
21 (a) the representative is the representative of one of the licensees
22 only in relation to a particular class of credit activity; and
23 (b) the conduct relates to that class of credit activity;
24 that licensee is responsible for the conduct, as between that
25 licensee and the client, whether or not the conduct is within the
26 authority of the licensee.

27 *Conduct covered by multiple authorities*

- 28 (3) If:
-

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- 1 (a) the representative is the representative of more than one of
2 the licensees in relation to a particular class of credit activity;
3 and
4 (b) the conduct relates to that class of credit activity; and
5 (c) the conduct is within the authority of:
6 (i) only one of those licensees (the *authorising licensee*);
7 or
8 (ii) 2 or more of those licensees (the *authorising licensees*);
9 then:
10 (d) if subparagraph (c)(i) applies—the authorising licensee is
11 responsible for the conduct, as between that licensee and the
12 client; or
13 (e) if subparagraph (c)(ii) applies—the authorising licensees are
14 jointly and severally responsible for the conduct, as between
15 themselves and the client.

16 *All other cases*

- 17 (4) In any other case, all of the licensees are jointly and severally
18 responsible for the conduct, as between themselves and the client,
19 whether or not the representative’s conduct is within the authority
20 of any of them.

21 **77 Responsibility extends to loss or damage suffered by client**

22 The responsibility of a licensee under this Division extends so as to
23 make the licensee liable to the client in relation to any loss or
24 damage suffered by the client as a result of the representative’s
25 conduct.

26 **78 Effect of this Division**

- 27 (1) If a licensee is responsible for the conduct of its representative
28 under this Division, the client has the same remedies against the
29 licensee that the client has against the representative.
30 (2) The licensee and the representative (along with any other licensees
31 that are also responsible) are all jointly and severally liable to the
32 client in relation to those remedies.

- 1 (3) However, nothing in this Division imposes:
2 (a) any criminal responsibility; or
3 (b) any civil liability under a provision of this Act apart from this
4 Division;
5 on a licensee that would not otherwise be imposed on the licensee.
- 6 (4) This Division does not relieve a representative of a licensee of any
7 liability that the representative has to the client or the licensee.
- 8 (5) An agreement has no effect in so far as it purports to alter or
9 restrict the operation of section 75, 76 or 77.
- 10 (6) However, subsection (5) does not apply to the extent that the
11 agreement:
12 (a) provides for a representative of a licensee to indemnify the
13 licensee for a liability of the licensee in relation to the
14 representative; or
15 (b) provides for a licensee, for whom a representative acts, to
16 indemnify another licensee for a liability in relation to the
17 representative.
- 18 (7) A licensee must not make, or offer to make, an agreement that has,
19 or would have, no effect under subsection (5).

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2 **Part 2-4—Banning or disqualification of persons**
3 **from engaging in credit activities**

4 **Division 1—Introduction**

5 **79 Guide to this Part**

6 This Part is about the banning and disqualification of persons from
7 engaging in credit activities.

8 Division 2 deals with banning orders, which are orders made by
9 ASIC that prohibit a person from engaging in credit activities.

10 Division 3 deals with disqualification orders, which are orders of
11 the court that disqualify a person from engaging in credit activities.

1

2 **Division 2—Banning orders**

3 **80 ASIC's power to make a banning order**

- 4 (1) ASIC may make a banning order against a person:
- 5 (a) if ASIC suspends or cancels a licence of the person; or
- 6 (b) for a person other than the trustees of a trust—if the person
- 7 becomes insolvent; or
- 8 (c) for a natural person—if the person is convicted of fraud; or
- 9 (d) if the person has:
- 10 (i) contravened any credit legislation; or
- 11 (ii) been involved in a contravention of a provision of any
- 12 credit legislation by another person; or
- 13 (e) if ASIC has reason to believe that the person is likely to:
- 14 (i) contravene any credit legislation; or
- 15 (ii) be involved in a contravention of a provision of any
- 16 credit legislation by another person; or
- 17 (f) if ASIC has reason to believe that the person is not a fit and
- 18 proper person to engage in credit activities; or
- 19 (g) if a prescribed State or Territory order is in force against the
- 20 person; or
- 21 (h) in any other circumstances prescribed by the regulations.
- 22 (2) For the purposes of paragraphs (1)(e) and (f), ASIC must (subject
- 23 to Part VIIC of the *Crimes Act 1914*) have regard to the following:
- 24 (a) if the person is a natural person—the matters set out in
- 25 paragraphs 37(2)(a) to (f) and subparagraph 37(2)(g)(i) in
- 26 relation to the person;
- 27 (b) if the person is not a natural person:
- 28 (i) the matters set out in paragraphs 37(2)(a) to (f) in
- 29 relation to the person; and
- 30 (ii) whether ASIC has reason to believe that any of the
- 31 persons referred to in paragraph 37(2)(h) in relation to
- 32 the person is not a fit and proper person to engage in
- 33 credit activities;

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- 1 (c) any criminal conviction of the person, within 10 years before
2 the banning order is proposed to be made;
3 (d) any other matter ASIC considers relevant;
4 (e) any other matter prescribed by the regulations.

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

9 (3) ASIC must (subject to Part VIIC of the *Crimes Act 1914*), in
10 considering whether it has reason to believe that a
11 person referred to in subparagraph (2)(b)(ii) is not a fit and proper
12 person to engage in credit activities, have regard to the matters set
13 out in paragraphs (2)(a), (c), (d) and (e) in relation to the person.

14 (4) Despite subsection (1), ASIC may only make a banning order
15 against a person after giving the person an opportunity:
16 (a) to appear, or be represented, at a hearing before ASIC that
17 takes place in private; and
18 (b) to make submissions to ASIC on the matter.

19 (5) Subsection (4) does not apply if:
20 (a) ASIC's grounds for making the banning order against the
21 person include that ASIC has suspended or cancelled a
22 licence of the person (see paragraph (1)(a)); and
23 (b) the suspension or cancellation took place without a hearing
24 under section 54.

25 (6) Subsection (4) also does not apply if:
26 (a) ASIC's grounds for making the banning order against the
27 person include that the person has been convicted of fraud
28 (see paragraph (1)(c)); and
29 (b) the person has been convicted of serious fraud.

30 (7) ASIC must give a copy of the banning order to the person against
31 whom it was made.

1 **81 What is a *banning order*?**

- 2 (1) A *banning order* is a written order that prohibits a person from
3 engaging in any credit activities or specified credit activities in
4 specified circumstances or capacities.
- 5 (2) The order may prohibit the person against whom it is made from
6 engaging in a credit activity:
7 (a) permanently; or
8 (b) for a specified period.
- 9 (3) A banning order may include a provision allowing the person
10 against whom it was made, subject to any specified conditions:
11 (a) to do specified acts; or
12 (b) to do specified acts in specified circumstances;
13 that the order would otherwise prohibit them from doing.
- 14 (4) A banning order is not a legislative instrument.

15 **82 Effect of banning orders**

16 *Requirement not to engage in conduct contrary to banning order*

- 17 (1) A person must not engage in conduct that is contrary to a banning
18 order that is in force against the person.

19 Civil penalty: 2,000 penalty units.

20 *Offence*

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

26 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
27 both.

28 Note: A person against whom a banning order is in force cannot be granted a
29 licence authorising the person to engage in a credit activity to which
30 the banning order applies (see subsection 40(1)).

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1 **83 Variation or cancellation of banning orders**

- 2 (1) ASIC may vary or cancel a banning order if ASIC is satisfied that
3 it is appropriate to do so because of a change in any of the
4 circumstances based on which ASIC made the order.
- 5 (2) ASIC may do so:
- 6 (a) on its own initiative; or
7 (b) if the person against whom the order was made lodges with
8 ASIC an application for the variation or cancellation.
- 9 (3) The application must be in the approved form.
- 10 (4) If ASIC proposes not to vary or cancel a banning order in
11 accordance with an application given by a person under
12 paragraph (2)(b), ASIC must give the person an opportunity:
- 13 (a) to appear, or be represented, at a hearing before ASIC that
14 takes place in private; and
15 (b) to make submissions to ASIC on the matter.
- 16 (5) ASIC must give written notice of the variation or cancellation of a
17 banning order to the person against whom the order was made.

18 **84 Date of effect, notice and publication of banning order, variation**
19 **or cancellation**

- 20 (1) A banning order comes into force when it is given to the person
21 against whom it is made.
- 22 (2) A variation or cancellation of a banning order comes into force
23 when written notice of the variation or cancellation is given to the
24 person against whom the order was made.
- 25 (3) ASIC must publish a notice on ASIC's website as soon as
26 practicable after making, varying or cancelling a banning order.
27 The notice must state when the banning order, or variation or
28 cancellation of the banning order, came into force and:
- 29 (a) in the case of the making of a banning order—set out a copy
30 of the banning order; or
31 (b) in the case of the variation of a banning order—set out a copy
32 of the banning order as varied.

- 1 (4) However, if the banning order contains a provision of the kind
2 referred to in subsection 81(3) and ASIC considers that the notice
3 on its website would be unreasonably long if that provision were
4 included, the notice may instead set out a summary of the
5 provision's effect.

6 **85 Statement of reasons**

- 7 (1) A copy of a banning order given to a person must be accompanied
8 by a statement of reasons for the order.
- 9 (2) If ASIC varies a banning order made against a person, ASIC must,
10 on request by the person, give the person a statement of reasons for
11 the variation.

Section 86

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2 **Division 3—Disqualification by the court**

3 **86 Disqualification by the court**

4 (1) ASIC may apply to the court for an order under subsection (2) in
5 relation to a person if ASIC:

- 6 (a) cancels a licence of the person; or
7 (b) makes a banning order against the person that is to operate
8 permanently.

9 (2) The court may make:

- 10 (a) an order disqualifying the person, permanently or for a
11 specified period, from engaging in credit activities, or
12 specified credit activities, in specified circumstances or
13 capacities; or
14 (b) any other order the court considers appropriate.

15 Note: A person against whom a disqualification order is in force cannot be
16 granted a licence authorising the person to engage in a credit activity
17 to which the disqualification order applies (see subsection 40(1)).

1

2 **Part 2-5—Financial records, trust accounts and**
3 **audit reports**

4 **Division 1—Introduction**

5 **87 Guide to this Part**

6

This Part is about financial records, trust accounts and matters relating to audit reports required under this Act.

7

8

Division 2 deals with the requirement for licensees to keep certain financial records, and provides for how those records must be kept.

9

10

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.

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Division 4 has requirements relating to audit reports required by this Act, and the auditors that prepare those reports.

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Section 88

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Division 2—Financial records of licensees

3

88 Obligation to keep financial records

4

Requirement to keep financial records

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(1) A licensee must:

6

(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

7

8

9

(b) keep those records in accordance with this Division; and

10

11

(c) comply with subsection 90(2) in relation to the conversion of records into the English language; and

12

13

(d) comply with section 91 in relation to the location and production of records and particulars.

14

Civil penalty: 2,000 penalty units.

15

Meaning of financial records

16

(2) **Financial records** includes:

17

(a) invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers; and

18

19

(b) documents of prime entry; and

20

21

(c) any trust account statement or trust account report required under section 100.

22

Offence

23

(3) A person commits an offence if:

24

(a) the person is subject to a requirement in relation to financial records under subsection (1); and

25

26

(b) the person engages in conduct; and

27

(c) the conduct contravenes subsection (1).

28

29

Criminal penalty: 200 penalty units, or 5 years imprisonment, or both.

1 *Financial records may be kept with other records*

- 2 (4) A licensee does not contravene this Division merely because some
3 or all of the financial records are prepared as a part of, or in
4 conjunction with, the records relating to any other business that is
5 carried on by the licensee.

6 Note: For the purposes of subsection (3), a defendant bears an evidential
7 burden in relation to the matter in subsection (4) (see subsection
8 13.3(3) of the *Criminal Code*).

9 **89 How financial records are to be kept**

10 The financial records must be kept in a way that:

- 11 (a) enables true and fair profit and loss statements, and balance
12 sheets, of the business referred to in paragraph 88(1)(a) to be
13 prepared from time to time; and
14 (b) allows those statements and balance sheets to be
15 conveniently and properly audited in accordance with the
16 auditing standards (if any) prescribed by regulations made
17 under section 106.

18 **90 Language of financial records**

- 19 (1) The financial records must be kept in writing in the English
20 language, or in a manner that enables them to be readily accessible
21 and readily converted into writing in the English language.
22 (2) If any of the financial records are not kept in writing in the English
23 language, the licensee must, if required to convert the financial
24 records concerned into writing in the English language by a person
25 who is entitled to examine the financial records concerned, comply
26 with the requirement within a reasonable time.

27 **91 Location of financial records**

28 If any of the financial records are kept outside this jurisdiction, the
29 licensee must:

- 30 (a) cause to be sent to and retained at a place in this jurisdiction
31 such particulars in relation to the business dealt with in those

Section 92

- 1 financial records as will enable true and fair profit and loss
2 statements and balance sheets to be prepared; and
3 (b) if required by ASIC to produce those financial records at a
4 place in this jurisdiction, comply with the requirement not
5 later than 28 days after the requirement is made.

6 **92 Information to be shown in financial records**

- 7 The financial records must be kept in sufficient detail to show
8 particulars of:
9 (a) all money received or paid by the licensee; and
10 (b) for each credit contract under which the licensee is the credit
11 provider:
12 (i) the amount and day of all payments made by or on
13 behalf of the debtor under the credit contract; and
14 (ii) all amounts (including principal, interest, fees and
15 charges) owed by the debtor under the credit contract;
16 and
17 (c) for each consumer lease under which the licensee is the
18 lessor—the amount and day of all payments made by or on
19 behalf of the lessee under the consumer lease; and
20 (d) for each guarantee under which the licensee is the beneficiary
21 of the guarantee—the amount and day of all payments made
22 by or on behalf of the guarantor under the guarantee; and
23 (e) all income received by the licensee from commissions,
24 interest, and other sources, and all expenses, commissions,
25 and interest paid by the licensee; and
26 (f) all the assets and liabilities (including contingent liabilities)
27 of the licensee; and
28 (g) any other matters prescribed by the regulations.

29 **93 Regulations may impose additional requirements**

- 30 The regulations may impose additional requirements to be
31 complied with in relation to the financial records including, for
32 example:
33 (a) requirements for things to be contained in the records; and

1 (b) requirements relating to the level of detail to be shown in the
2 records.

3 **94 Financial records taken to be made with licensee's authority**

4 An entry in the records is, unless the contrary is proved, to be taken
5 to have been made by, or with the authority of, the licensee.

6 **95 Obligation to retain financial records for 7 years**

7 *Requirement to retain financial records*

8 (1) A licensee that is required by this Division to make a financial
9 record must retain it for 7 years after the transactions covered by
10 the record are completed.

11 Civil penalty: 2,000 penalty units.

12 *Regulations*

13 (2) The regulations may prescribe financial records to which
14 subsection (1) does not apply.

15 *Records to be kept even if person stops carrying on business*

16 (3) Financial records must be retained in accordance with this section,
17 even if the person stops carrying on any business to which they
18 relate.

19 *Offence*

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

25 Criminal penalty: 50 penalty units, or 6 months imprisonment,
26 or both.

Section 96

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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.

1

2 **Division 3—Trust accounts of credit service licensees**

3 **97 Application of this Division**

4 This Division applies to a licensee (the *credit service licensee*)
5 that:

- 6 (a) holds a licence that authorises the licensee to provide a credit
7 service; and
8 (b) in the course of providing the credit service, receives money
9 for or on behalf of another person.

10 **98 Obligation for credit service licensees to maintain trust account**

11 *Requirement to maintain trust account*

- 12 (1) The credit service licensee must maintain one more trust accounts
13 (the *trust account*) in accordance with this section.

14 Civil penalty: 2,000 penalty units.

15 *Requirements for trust accounts*

- 16 (2) The trust account must be maintained with an Australian ADI
17 (within the meaning of section 9 of the *Corporations Act 2001*).
18 (3) The trust account must be designated as the credit service
19 licensee's trust account.

20 *Offence*

- 21 (4) The credit service licensee commits an offence if:
22 (a) the credit service licensee is subject to a requirement under
23 subsection (1); and
24 (b) the credit service licensee engages in conduct; and
25 (c) the conduct contravenes the requirement.

26 Criminal penalty: 25 penalty units, or 6 months imprisonment,
27 or both.

Section 99

1 **99 Obligations in relation to trust account money**

2 *Requirement to pay money to credit of trust account*

- 3 (1) The credit service licensee must pay to the credit of the trust
4 account any money received by the credit service licensee for or on
5 behalf of another person in relation to the credit service provided
6 by the licensee.

7 Civil penalty: 2,000 penalty units.

8 *Requirement in relation to withdrawal of money from trust account*

- 9 (2) The credit service licensee must not withdraw any money paid into
10 the trust account, other than for the purpose of paying the money in
11 accordance with subsection (3).

12 Civil penalty: 2,000 penalty units.

13 *Requirement in relation to payment of money from trust account*

- 14 (3) The credit service licensee must pay any money withdrawn from
15 the trust account to the person or persons lawfully entitled to
16 receive that money.

17 Civil penalty: 2,000 penalty units.

18 *Offence*

- 19 (4) The credit service licensee commits an offence if:
20 (a) the credit service licensee is subject to a requirement under
21 subsection (1), (2) or (3); and
22 (b) the credit service licensee engages in conduct; and
23 (c) the conduct contravenes the requirement.

24 Criminal penalty: 25 penalty units, or 6 months imprisonment,
25 or both.

26 *Trust account money not available for payment of debts etc.*

- 27 (5) Money paid into a trust account by the credit service licensee under
28 this section:

- 1 (a) is not available for the payment of a debt of any other
2 creditor of the credit service licensee; and
3 (b) is not liable to be attached or taken in execution under the
4 order or process of a court at the instance of any such
5 creditors.

6 **100 Obligation to lodge trust account statement and trust account**
7 **audit report**

8 *Requirement to prepare and lodge trust account statement*

- 9 (1) The credit service licensee must, for each financial year of the
10 credit service licensee:
11 (a) prepare a written statement in relation to the trust account
12 (the ***trust account statement***) in accordance with this section;
13 and
14 (b) lodge the trust account statement with ASIC in accordance
15 with this section.

16 Civil penalty: 2,000 penalty units.

17 *Requirement to prepare and lodge trust account audit report*

- 18 (2) The credit service licensee must, with the trust account statement,
19 lodge with ASIC an auditor's report (the ***trust account audit***
20 ***report***) in accordance with this section.

21 Civil penalty: 2,000 penalty units.

22 *Requirements for statement and audit report*

- 23 (3) Each of the trust account statement and trust account audit report
24 must:
25 (a) be in the approved form; and
26 (b) contain the information and matters prescribed by the
27 regulations; and
28 (c) be lodged with ASIC in accordance with section 101.

Section 101

- 1 (4) The trust account audit report must be prepared by a person who
2 complies with any eligibility requirements prescribed by the
3 regulations.

4 *Offence*

- 5 (5) The credit service licensee commits an offence if:
6 (a) the credit service licensee is subject to a requirement under
7 subsection (1) or (2); and
8 (b) the credit service licensee engages in conduct; and
9 (c) the conduct contravenes the requirement.

10 Criminal penalty: 200 penalty units, or 5 years imprisonment, or
11 both.

12 *Meaning of financial year*

- 13 (6) A *financial year* of the credit service licensee means:
14 (a) if the credit service licensee is not a body corporate—a year
15 ending on 30 June; and
16 (b) if the credit service licensee is a body corporate—a financial
17 year of the body corporate (within the meaning of
18 section 323D of the *Corporations Act 2001*).

19 **101 Time of lodgment of trust account statement and trust account**
20 **audit report**

- 21 (1) Unless an extension is granted under subsection (3), the trust
22 account statement and trust account audit report must be lodged
23 with ASIC before the day that is 3 months after the end of the
24 financial year of the credit service licensee to which they relate.
- 25 (2) If an extension is granted under subsection (3), the trust account
26 statement and trust account audit report must be lodged with ASIC
27 before the end of the extended period.
- 28 (3) ASIC may, on application made:
29 (a) by the credit service licensee and the auditor that is to prepare
30 the trust account audit report; and
31 (b) before the end of the period that would otherwise apply;

Section 101

- 1 approve an extension of the period for lodging the trust account
2 statement and trust account audit report. The extension may be of
3 the period originally applicable or the period applicable under a
4 previous extension.
- 5 (4) An approval may be given subject to any conditions imposed by
6 ASIC.
- 7 (5) If an approval is given subject to conditions, the licensee must
8 comply with those conditions.

Section 102

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2 **Division 4—Matters relating to audit reports**

3 **102 Auditor’s right of access to records, information etc.**

4 *Auditor is entitled to access and assistance etc. from licensee*

5 (1) An auditor (the *auditor*) who prepares one of the following audit
6 reports (the *audit report*):

7 (a) an audit report required under subsection 49(3) in relation to
8 a licensee;

9 (b) a trust account audit report required under subsection 100(2)
10 in relation to a licensee;

11 has a right of access at all reasonable times to the financial records
12 or other credit books of the licensee for purposes relating to the
13 audit report.

14 (2) The auditor is entitled to require:

15 (a) from the licensee; or

16 (b) if the licensee is a body corporate—from any director,
17 secretary or senior manager of the licensee;

18 any assistance and explanations that the auditor desires for
19 purposes relating to the audit report.

20 *Requirement to give auditor access and assistance etc.*

21 (3) The licensee, or a director, secretary or senior manager of the
22 licensee if it is a body corporate, must not:

23 (a) refuse or fail to allow the auditor access, in accordance with
24 subsection (1), to financial records or other credit books of
25 the licensee; or

26 (b) refuse or fail to give assistance, or an explanation, to the
27 auditor as and when required under subsection (2); or

28 (c) otherwise hinder, obstruct or delay the auditor in the
29 performance or exercise of the auditor’s duties or powers.

30 Civil penalty: 2,000 penalty units.

1 *Offence*

- 2 (4) A person commits an offence if:
3 (a) the person is subject to a requirement under subsection (3);
4 and
5 (b) the person engages in conduct; and
6 (c) the person's conduct contravenes the requirement.

7 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
8 both.

9 **103 Auditor's fees and expenses**

- 10 (1) The reasonable fees and expenses of the auditor for preparing the
11 audit report are payable by the licensee.
12 (2) The auditor may recover those fees by action against the licensee.

13 **104 Auditor to report on certain matters**

14 *Requirement for auditor to disclose matters*

- 15 (1) If the auditor, in the performance of duties relating to the audit
16 report, becomes aware of a matter referred to in subsection (2), the
17 auditor must, within 7 days after becoming aware of the matter:
18 (a) lodge a written report on the matter with ASIC; and
19 (b) give a copy of the report to the licensee.

20 Civil penalty: 2,000 penalty units.

21 *Matters that must be disclosed*

- 22 (2) A report must be given in relation to any matter that, in the opinion
23 of the auditor:
24 (a) has adversely affected, is adversely affecting or may
25 adversely affect the ability of the licensee to meet the
26 licensee's obligations as a licensee; or
27 (b) constitutes or may constitute a contravention of:
28 (i) Division 2 or 3 (or regulations made under those
29 Divisions); or

Section 105

- 1 (ii) a condition of the licensee's licence; or
2 (c) constitutes an attempt to unduly influence, coerce,
3 manipulate or mislead the auditor in the preparation of the
4 audit report.

5 *Offence*

- 6 (3) The auditor commits an offence if:
7 (a) the auditor is subject to a requirement under subsection (1);
8 and
9 (b) the auditor engages in conduct; and
10 (c) the auditor's conduct contravenes the requirement.

11 Criminal penalty: 50 penalty units, or 1 year imprisonment, or
12 both.

13 **105 Qualified privilege for auditor etc.**

14 *Qualified privilege for auditor*

- 15 (1) The auditor has qualified privilege in relation to:
16 (a) a statement that the auditor makes, orally or in writing, in the
17 course of its duties relating to the audit report; or
18 (b) the lodging of a report with ASIC under subsection 104(1);
19 or
20 (c) the giving of a report to the licensee under subsection 104(1).

21 Note: If the auditor is a company, the company has qualified privilege under
22 this subsection in relation to statements made, and reports lodged or
23 sent, by natural persons on behalf of the company if those statements
24 and notices can be properly attributed to the company.

25 *Qualified privilege for registered company auditor acting on
26 behalf of company*

- 27 (2) If the auditor is a company registered under the *Corporations Act*
28 *2001*, a registered company auditor acting on behalf of the
29 company has qualified privilege in relation to:
30 (a) a statement that the registered company auditor makes (orally
31 or in writing) in the course of the performance, on behalf of

- 1 the company, of the company's duties relating to the audit
2 report; or
3 (b) the lodging by the registered company auditor, on behalf of
4 the company, of a report with ASIC under subsection 104(1);
5 or
6 (c) the giving by the registered company auditor, on behalf of the
7 company, of a report to the licensee under subsection 104(1).

8 *Qualified privilege for subsequent publication*

- 9 (3) A person has qualified privilege in relation to the publishing of a
10 document prepared by the auditor in the course of the auditor's
11 duties relating to the audit report.
- 12 (4) A person has qualified privilege in relation to the publishing of a
13 statement:
14 (a) made by the auditor as referred to in subsection (1); or
15 (b) made by a registered company auditor as referred to in
16 subsection (2).

17 **106 Regulations in relation to audit reports etc.**

- 18 The regulations may make provision in relation to:
19 (a) the audit reports referred to in subsection 102(1); and
20 (b) audit reports that persons who have applied for a licence may
21 be requested to lodge under subsection 37(4); and
22 (c) the auditors that prepare those reports; and
23 (d) auditing standards that must be complied with in relation to
24 those reports.

Section 107

1

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

4 **Division 1—Introduction**

5 **107 Guide to this Part**

6

This Part is about exemptions from, and modifications of, the provisions of this Chapter.

7

8

Division 2 deals with how exemptions and modifications may be made by ASIC or by the regulations.

9

1

2 **Division 2—Exemptions and modifications relating to this**
3 **Chapter**

4 **108 Provisions to which this Part applies**

5 The provisions to which this Part applies are:

- 6 (a) this Chapter; and
7 (b) definitions in this Act, as they apply to references in this
8 Chapter; and
9 (c) instruments made for the purposes of this Chapter.

10 **109 Exemptions and modifications by ASIC**

11 *Exemptions and modifications*

- 12 (1) ASIC may:
13 (a) exempt a person from all or specified provisions to which
14 this Part applies; or
15 (b) exempt a credit activity that is engaged in in relation to a
16 specified credit contract, mortgage, guarantee or consumer
17 lease from all or specified provisions to which this Part
18 applies; or
19 (c) declare that provisions to which this Part applies apply in
20 relation to a person, or a credit activity referred to in
21 paragraph (1)(b), as if specified provisions were omitted,
22 modified or varied as specified in the declaration.
- 23 (2) An exemption or declaration under subsection (1) is not a
24 legislative instrument.
- 25 (3) ASIC may, by legislative instrument:
26 (a) exempt a class of persons from all or specified provisions to
27 which this Part applies; or
28 (b) exempt a credit activity (other than a credit activity referred
29 to in paragraph (1)(b)) from all or specified provisions to
30 which this Part applies; or

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- 1 (c) exempt a class of credit activities from all or specified
2 provisions to which this Part applies; or
3 (d) declare that provisions to which this Part applies apply in
4 relation to a credit activity (other than a credit activity
5 referred to in paragraph (1)(b)), or a class of persons or credit
6 activities, as if specified provisions were omitted, modified
7 or varied as specified in the declaration.

8 *Conditions on exemptions*

- 9 (4) An exemption may apply unconditionally or subject to specified
10 conditions. A person to whom a condition specified in an
11 exemption applies must comply with the condition. The court may
12 order the person to comply with the condition in a specified way.
13 Only ASIC may apply to the court for the order.

14 *Publication of exemptions and declarations*

- 15 (5) An exemption or declaration under subsection (1) must be in
16 writing and ASIC must publish notice of it on its website.

17 *Special rules in relation to offences*

- 18 (6) If conduct (including an omission) of a person would not have
19 constituted an offence if a particular declaration under
20 paragraph (1)(c) or (3)(d) had not been made, that conduct does not
21 constitute an offence unless, before the conduct occurred:
22 (a) the text of the declaration was published by ASIC on its
23 website; or
24 (b) ASIC gave written notice setting out the text of the
25 declaration to the person;
26 (in addition to complying with the requirements of the *Legislative*
27 *Instruments Act 2003* if the declaration is made under
28 subsection (3)).
29 (7) In a prosecution for an offence to which subsection (6) applies, the
30 prosecution must prove that paragraph (6)(a) or (b) was complied
31 with before the conduct occurred.

1 **110 Exemptions and modifications by the regulations**

2 The regulations may:

- 3 (a) exempt a person or class of persons from all or specified
4 provisions to which this Part applies; or
5 (b) exempt a credit activity or a class of credit activities from all
6 or specified provisions to which this Part applies; or
7 (c) provide that the provisions to which this Part applies apply as
8 if specified provisions were omitted, modified or varied as
9 specified in the regulations.

Section 111

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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 commission the licensee is likely to receive).

Section 112

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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.

4 **112 Application of this Part**

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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.

Section 113

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2 **Division 2—Credit guide of credit assistance providers**

3 **113 Credit guide of credit assistance providers**

4 *Requirement to give credit guide*

5 (1) A licensee must, as soon as practicable after it becomes apparent to
6 the licensee that it is likely to provide credit assistance to a
7 consumer in relation to a credit contract, give the consumer the
8 licensee's credit guide in accordance with subsection (2).

9 Civil penalty: 2,000 penalty units.

10 (2) The licensee's credit guide must:

11 (a) be in writing; and

12 (b) be in the form (if any) prescribed by the regulations; and

13 (c) specify the licensee's name and contact details; and

14 (d) specify the licensee's Australian credit licence number; and

15 (e) give information about:

16 (i) any fees that are payable by a consumer to the licensee
17 for the licensee's credit assistance; and

18 (ii) any charges that are payable by a consumer to the
19 licensee for matters associated with providing the credit
20 assistance; and

21 (iii) the method for working out the amount of the fees and
22 charges; and

23 (f) give information about:

24 (i) if there are 6 or fewer credit providers that the licensee
25 conducts business with when providing credit assistance
26 in relation to credit contracts—the names of those credit
27 providers; and

28 (ii) if there are more than 6 credit providers that the licensee
29 conducts business with when providing credit assistance
30 in relation to credit contracts—the names of the 6 credit
31 providers with whom the licensee reasonably believes it
32 conducts the most business; and

33 (g) give information about:

- 1 (i) any commissions that the licensee, or an employee,
2 director or credit representative of the licensee, is likely
3 to receive, directly or indirectly, from credit providers in
4 relation to credit contracts for which the licensee has
5 provided credit assistance; and
6 (ii) a reasonable estimate of the amounts of those
7 commissions or the range of those amounts; and
8 (iii) the method for working out those amounts; and
9 (h) give information about the licensee's procedure for resolving
10 disputes with a consumer, including contact details for a
11 consumer to access:
12 (i) the licensee's internal dispute resolution procedure; and
13 (ii) the approved external dispute resolution scheme of
14 which the licensee is a member; and
15 (i) give information about the licensee's obligations under
16 sections 120 and 123; and
17 (j) comply with any other requirements prescribed by the
18 regulations.

- 19 (3) The regulations may prescribe:
20 (a) information that need not be included in the credit guide,
21 despite subsection (2); and
22 (b) for the purposes of paragraph (2)(g):
23 (i) the method for working out amounts of commissions;
24 and
25 (ii) how commissions or amounts of commissions must be
26 described.

27 *Manner of giving credit guide*

- 28 (4) The licensee must give the consumer the licensee's credit guide in
29 the manner (if any) prescribed by the regulations.

30 *Strict liability offence*

- 31 (5) A person commits an offence if:
32 (a) the person is subject to a requirement under subsection (1);
33 and
34 (b) the person engages in conduct; and

Chapter 3 Responsible lending conduct

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

Division 2 Credit guide of credit assistance providers

Section 113

1 (c) the conduct contravenes the requirement.

2 Criminal penalty: 50 penalty units.

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

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

1

2

**Division 3—Quote for providing credit assistance etc. in
relation to credit contracts**

3

4

114 Quote for providing credit assistance etc.

5

Requirement to give quote

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(1) A licensee must not provide credit assistance to a consumer by:

7

(a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular credit contract with a particular credit provider; or

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(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

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

15

unless:

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(d) the licensee has given the consumer a quote in accordance with subsection (2); and

17

18

(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

19

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(f) the licensee has given the consumer a copy of the accepted quote.

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Civil penalty: 2,000 penalty units.

25

(2) The quote must:

26

(a) be in writing; and

27

(b) give information about the credit assistance and other services that the quote covers; and

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29

(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

30

31

Chapter 3 Responsible lending conduct

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

Division 3 Quote for providing credit assistance etc. in relation to credit contracts

Section 114

- 1 (d) give information about what that amount relates to,
2 including:
3 (i) the maximum amount of the licensee's fee for providing
4 the credit assistance and other services; and
5 (ii) the maximum amount of charges that will be incurred
6 by the licensee for matters associated with providing the
7 credit assistance and other services; and
8 (iii) the maximum amount of fees or charges that will be
9 payable by the licensee to another person on the
10 consumer's behalf; and
11 (e) state whether the maximum amount or any other amount will
12 be payable by the consumer to the licensee if a credit contract
13 is not entered or a credit limit is not increased; and
14 (f) comply with any other requirements prescribed by the
15 regulations.

16 *Manner of giving quote*

- 17 (3) The licensee must give the quote to the consumer in the manner (if
18 any) prescribed by the regulations.

19 *No demanding payment of amount exceeding quoted amount*

- 20 (4) The licensee must not request or demand payment of an amount
21 that exceeds the maximum amount set out in the quote.

22 Civil penalty: 2,000 penalty units.

23 *No demanding payment before credit assistance provided*

- 24 (5) The licensee must not request or demand payment of an amount for
25 the licensee's credit assistance before the licensee provides the
26 assistance.

27 Civil penalty: 2,000 penalty units.

28 *Caveats*

- 29 (6) The licensee must not lodge, or threaten to lodge, a caveat in
30 relation to land to induce the consumer to pay an amount to the
31 licensee for the licensee's credit assistance or other services.

1

Civil penalty: 2,000 penalty units.

Chapter 3 Responsible lending conduct

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

Division 4 Obligations of credit assistance providers before providing credit assistance for credit contracts

Section 115

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2 **Division 4—Obligations of credit assistance providers**
3 **before providing credit assistance for credit**
4 **contracts**

5 **115 Obligations of credit assistance providers before providing**
6 **credit assistance for credit contracts**

- 7 (1) A licensee must not provide credit assistance to a consumer on a
8 day (the *assistance day*) by:
9 (a) suggesting that the consumer apply, or assisting the consumer
10 to apply, for a particular credit contract with a particular
11 credit provider; or
12 (b) suggesting that the consumer apply, or assisting the consumer
13 to apply, for an increase to the credit limit of a particular
14 credit contract with a particular credit provider;
15 unless the licensee has, within 90 days (or other period prescribed
16 by the regulations) before the assistance day:
17 (c) made a preliminary assessment that:
18 (i) is in accordance with subsection 116(1); and
19 (ii) covers the period proposed for the entering of the
20 contract or the increase of the credit limit; and
21 (d) made the inquiries and verification in accordance with
22 section 117.

23 Civil penalty: 2,000 penalty units.

- 24 (2) A licensee must not provide credit assistance to a consumer on a
25 day (the *assistance day*) by suggesting that the consumer remain in
26 a particular credit contract with a particular credit provider unless
27 the licensee has, within 90 days (or other period prescribed by the
28 regulations) before the assistance day:
29 (a) made a preliminary assessment that:
30 (i) is in accordance with subsection 116(2); and
31 (ii) covers a period in which the assistance day occurs; and
32 (b) made the inquiries and verification in accordance with
33 section 117.

1 Civil penalty: 2,000 penalty units.

2 **116 Preliminary assessment of unsuitability of the credit contract**

3 (1) For the purposes of paragraph 115(1)(c), the licensee must make a
4 preliminary assessment that:

- 5 (a) specifies the period the assessment covers; and
6 (b) assesses whether the credit contract will be unsuitable for the
7 consumer if the contract is entered or the credit limit is
8 increased in that period.

9 (2) For the purposes of paragraph 115(2)(a), the licensee must make a
10 preliminary assessment that:

- 11 (a) specifies the period the assessment covers; and
12 (b) assesses whether the credit contract will be unsuitable for the
13 consumer if the consumer remains in the contract in that
14 period.

15 Note: The licensee is not required to make a preliminary assessment under
16 this section if the credit assistance is not provided.

17 **117 Reasonable inquiries etc. about the consumer**

18 (1) For the purposes of paragraph 115(1)(d) or 115(2)(b), the licensee
19 must, before making the preliminary assessment:

- 20 (a) make reasonable inquiries about the consumer's requirements
21 and objectives in relation to the credit contract; and
22 (b) make reasonable inquiries about the consumer's financial
23 situation; and
24 (c) take reasonable steps to verify the consumer's financial
25 situation; and
26 (d) make any inquiries prescribed by the regulations about any
27 matter prescribed by the regulations; and
28 (e) take any steps prescribed by the regulations to verify any
29 matter prescribed by the regulations.

30 Civil penalty: 2,000 penalty units.

Chapter 3 Responsible lending conduct

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

Division 4 Obligations of credit assistance providers before providing credit assistance for credit contracts

Section 118

- 1 (2) The regulations may prescribe particular inquiries or steps that
2 must be made or taken, or do not need to be made or taken, for the
3 purposes of paragraph (1)(a), (b) or (c).

4 **118 When the credit contract must be assessed as unsuitable—**
5 **entering contract or increasing the credit limit**

6 *Requirement to assess the contract as unsuitable*

- 7 (1) For a preliminary assessment under subsection 116(1) about
8 entering a credit contract or increasing a credit limit of a credit
9 contract, the licensee must assess that the contract will be
10 unsuitable for the consumer if the contract will be unsuitable for
11 the consumer under subsection (2).

12 Civil penalty: 2,000 penalty units.

13 Note: Even if the contract will not be unsuitable for the consumer under
14 subsection (2), the licensee may still assess that the contract will be
15 unsuitable for other reasons.

16 *Particular circumstances when the contract will be unsuitable*

- 17 (2) The contract will be unsuitable for the consumer if, at the time of
18 the preliminary assessment, it is likely that:
19 (a) the consumer will be unable to comply with the consumer's
20 financial obligations under the contract, or could only comply
21 with substantial hardship, or
22 (b) the contract will not meet the consumer's requirements or
23 objectives; or
24 (c) if the regulations prescribe circumstances in which a credit
25 contract is unsuitable—those circumstances will apply to the
26 contract;
27 if the contract is entered in the period proposed for it to be entered
28 or the credit limit is increased in the period proposed for it to be
29 increased.
30 (3) For the purposes of paragraph (2)(a), it is presumed that, if the
31 consumer could only comply with the consumer's financial
32 obligations under the contract by selling the consumer's principal

Section 119

1 place of residence, the consumer could only comply with those
2 obligations with substantial hardship, unless the contrary is proved.

3 *Information to be used to determine if contract will be unsuitable*

- 4 (4) For the purposes of determining under subsection (2) whether the
5 contract will be unsuitable, only information that satisfies both of
6 the following paragraphs is to be taken into account:
- 7 (a) the information is about the consumer's financial situation,
8 requirements or objectives, or any other matter prescribed by
9 the regulations under paragraph 117(1)(d) or (e);
 - 10 (b) at the time of the preliminary assessment:
 - 11 (i) the licensee had reason to believe that the information
12 was true; or
 - 13 (ii) the licensee would have had reason to believe that the
14 information was true if the licensee had made the
15 inquiries or verification under section 117.

16 **119 When the credit contract must be assessed as unsuitable—**
17 **remaining in credit contract**

18 *Requirement to assess the contract as unsuitable*

- 19 (1) For a preliminary assessment under subsection 116(2) about
20 remaining in a credit contract, the licensee must assess that the
21 contract will be unsuitable for the consumer if the contract will be
22 unsuitable for the consumer under subsection (2).

23 Civil penalty: 2,000 penalty units.

24 Note: Even if the contract will not be unsuitable for the consumer under
25 subsection (2), the licensee may still assess that the contract will be
26 unsuitable for other reasons.

27 *Particular circumstances when the contract will be unsuitable*

- 28 (2) The contract will be unsuitable for the consumer if, at the time of
29 the preliminary assessment, it is likely that:
 - 30 (a) the consumer will be unable to comply with the consumer's
31 financial obligations under the contract, or could only comply
32 with substantial hardship, if the consumer remains in the

Chapter 3 Responsible lending conduct

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

Division 4 Obligations of credit assistance providers before providing credit assistance for credit contracts

Section 120

- 1 contract in the period covered by the preliminary assessment;
2 or
3 (b) the contract will not meet the consumer's requirements or
4 objectives if the consumer remains in the contract in the
5 period covered by the preliminary assessment; or
6 (c) if the regulations prescribe circumstances in which a credit
7 contract is unsuitable—those circumstances will apply to the
8 contract if the consumer remains in the contract in the period
9 covered by the preliminary assessment.

- 10 (3) For the purposes of paragraph (2)(a), it is presumed that, if the
11 consumer could only comply with the consumer's financial
12 obligations under the contract by selling the consumer's principal
13 place of residence, the consumer could only comply with those
14 obligations with substantial hardship, unless the contrary is proved.

15 *Information to be used to determine if contract will be unsuitable*

- 16 (4) For the purposes of determining under subsection (2) whether the
17 contract will be unsuitable, only information that satisfies both of
18 the following paragraphs is to be taken into account:
19 (a) the information is about the consumer's financial situation,
20 requirements or objectives, or any other matter prescribed by
21 the regulations under paragraph 117(1)(d) or (e);
22 (b) at the time of the preliminary assessment:
23 (i) the licensee had reason to believe that the information
24 was true; or
25 (ii) the licensee would have had reason to believe that the
26 information was true if the licensee had made the
27 inquiries or verification under section 117.

28 **120 Providing the consumer with the preliminary assessment**

29 *Requirement to give assessment if requested*

- 30 (1) If the consumer requests the licensee for a copy of the preliminary
31 assessment within 7 years of the date of the credit assistance quote
32 under section 114, the licensee must give the consumer a written
33 copy of the assessment:

Section 120

- 1 (a) if the request is made within 2 years of the quote—before the
2 end of 7 business days after the day the licensee receives the
3 request; and
4 (b) otherwise—before the end of 21 business days after the day
5 the licensee receives the request.

6 Note: The licensee is not required to give the consumer a copy of the
7 preliminary assessment if the licensee does not provide credit
8 assistance to the consumer.

9 Civil penalty: 2,000 penalty units.

10 *Manner of giving assessment*

- 11 (2) The licensee must give the consumer the copy of the assessment in
12 the manner (if any) prescribed by the regulations.

13 *No payment for assessment*

- 14 (3) The licensee must not request or demand payment of an amount for
15 giving the consumer a copy of the preliminary assessment.

16 Civil penalty: 2,000 penalty units.

17 *Strict liability offence*

- 18 (4) A person commits an offence if:
19 (a) the person is subject to a requirement under subsection (1) or
20 (3); and
21 (b) the person engages in conduct; and
22 (c) the conduct contravenes the requirement.

23 Criminal penalty: 50 penalty units.

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

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

Section 121

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Division 5—Fees, commissions etc. relating to credit contracts

3

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121 Fees, commissions etc. relating to credit contracts

5

Requirement for disclosure

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- (1) A licensee must, at the same time as providing credit assistance to a consumer by:

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- (a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular credit contract with a particular credit provider; or

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- (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

12

13

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- (c) suggesting that the consumer remain in a particular credit contract with a particular credit provider;

15

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give the consumer a credit proposal disclosure document in accordance with subsection (2).

17

18

Civil penalty: 2,000 penalty units.

19

- (2) The credit proposal disclosure document must contain the following:

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- (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;

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- (b) a reasonable estimate of the total amount of any commissions 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;

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- (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;

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Section 122

- 1 (d) a reasonable estimate of the total amount of any fees or
2 charges that the consumer is likely to be liable to pay to any
3 other person in relation to applying for the credit contract;
4 (e) if the credit is to be applied to pay any of the amounts in the
5 above paragraphs—a reasonable estimate of the likely
6 amount of credit that will be available to the consumer after
7 payments under paragraphs (a), (c) and (d) are made.
- 8 (3) For the purposes of paragraph (2)(b), the regulations may
9 prescribe:
10 (a) the method for working out amounts of commissions; and
11 (b) how amounts of commissions must be described.

12 *Manner of giving credit proposal disclosure document*

- 13 (4) The licensee must give the credit proposal disclosure document to
14 the consumer in the manner (if any) prescribed by the regulations.

15 **122 No profiting from fees etc. paid to third parties**

16 *Requirement not to profit*

- 17 (1) If, in the course of providing credit assistance to a consumer in
18 relation to a credit contract, a licensee pays an amount (the ***third***
19 ***party amount***) to another person on behalf of the consumer, the
20 licensee must not request or demand payment of an amount, as
21 reimbursement for the third party amount, that exceeds the third
22 party amount.

23 Civil penalty: 2,000 penalty units.

24 *Offence*

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

30 Criminal penalty: 25 penalty units, or 6 months imprisonment,
31 or both.

Section 123

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2 **Division 6—Prohibition on suggesting, or assisting with,**
3 **unsuitable credit contracts**

4 **123 Prohibition on suggesting or assisting consumers to enter, or**
5 **increase the credit limit under, unsuitable credit contracts**

6 *Prohibition on suggesting, or assisting with, unsuitable contracts*

7 (1) A licensee must not provide credit assistance to a consumer by:

8 (a) suggesting that the consumer apply, or assisting the consumer
9 to apply, for a particular credit contract with a particular
10 credit provider; or

11 (b) suggesting that the consumer apply, or assisting the consumer
12 to apply, for an increase to the credit limit of a particular
13 credit contract with a particular credit provider;

14 if the contract will be unsuitable for the consumer under
15 subsection (2).

16 Civil penalty: 2,000 penalty units.

17 *When the contract will be unsuitable*

18 (2) The contract will be unsuitable for the consumer if, at the time the
19 licensee provides the credit assistance, it is likely that:

20 (a) the consumer will be unable to comply with the consumer's
21 financial obligations under the contract, or could only comply
22 with substantial hardship; or

23 (b) the contract will not meet the consumer's requirements or
24 objectives; or

25 (c) if the regulations prescribe circumstances in which a credit
26 contract is unsuitable—those circumstances will apply to the
27 contract;

28 if the contract is entered in the period proposed for it to be entered
29 or the credit limit is increased in the period proposed for it to be
30 increased.

- 1 (3) For the purposes of paragraph (2)(a), it is presumed that, if the
2 consumer could only comply with the consumer's financial
3 obligations under the contract by selling the consumer's principal
4 place of residence, the consumer could only comply with those
5 obligations with substantial hardship, unless the contrary is proved.

6 *Information to be used to determine if contract will be unsuitable*

- 7 (4) For the purposes of determining under subsection (2) whether the
8 contract will be unsuitable, only information that satisfies both of
9 the following paragraphs is to be taken into account:
10 (a) the information is about the consumer's financial situation,
11 requirements or objectives, or any other matter prescribed by
12 the regulations under paragraph 117(1)(d) or (e);
13 (b) at the time the licensee provides the credit assistance:
14 (i) the licensee had reason to believe that the information
15 was true; or
16 (ii) the licensee would have had reason to believe that the
17 information was true if the licensee had made the
18 inquiries or verification under section 117.

19 *Credit contract not unsuitable under regulations*

- 20 (5) The regulations may prescribe particular situations in which a
21 credit contract is taken not to be unsuitable for a consumer, despite
22 subsection (2).

23 *Offence*

- 24 (6) A person commits an offence if:
25 (a) the person is subject to a requirement under subsection (1);
26 and
27 (b) the person engages in conduct; and
28 (c) the conduct contravenes the requirement.

29 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
30 both.

Section 124

1 **124 Prohibition on suggesting to consumers to remain in unsuitable**
2 **credit contracts**

3 *Prohibition on suggesting to remain in unsuitable contracts*

- 4 (1) A licensee must not provide credit assistance to a consumer by
5 suggesting that the consumer remain in a particular credit contract
6 with a particular credit provider if the contract is unsuitable for the
7 consumer under subsection (2).

8 Civil penalty: 2,000 penalty units.

9 *When the contract is unsuitable*

- 10 (2) The credit contract is unsuitable for the consumer if, at that time
11 the licensee provides the credit assistance:
12 (a) the consumer is, or is likely to be, unable to comply with the
13 consumer's financial obligations under the contract, or only
14 able to comply with substantial hardship; or
15 (b) the contract does not meet the consumer's requirements or
16 objectives; or
17 (c) if the regulations prescribe circumstances in which a credit
18 contract is unsuitable—those circumstances apply to the
19 contract.
- 20 (3) For the purposes of paragraph (2)(a), it is presumed that, if the
21 consumer could only comply with the consumer's financial
22 obligations under the contract by selling the consumer's principal
23 place of residence, the consumer could only comply with those
24 obligations with substantial hardship, unless the contrary is proved.

25 *Information to be used to determine if contract is unsuitable*

- 26 (4) For the purposes of determining under subsection (2) whether the
27 contract is unsuitable, only information that satisfies both of the
28 following paragraphs is to be taken into account:
29 (a) the information is about the consumer's financial situation,
30 requirements or objectives, or any other matter prescribed by
31 the regulations under paragraph 117(1)(d) or (e);
32 (b) at the time the licensee provides the credit assistance:
-

- 1 (i) the licensee had reason to believe that the information
2 was true; or
3 (ii) the licensee would have had reason to believe that the
4 information was true if the licensee had made the
5 inquiries or verification under section 117.

6 *Credit contract not unsuitable under regulations*

- 7 (5) The regulations may prescribe particular situations in which a
8 credit contract is taken not to be unsuitable for a consumer, despite
9 subsection (2).

10 *Offence*

- 11 (6) A person commits an offence if:
12 (a) the person is subject to a requirement under subsection (1);
13 and
14 (b) the person engages in conduct; and
15 (c) the conduct contravenes the requirement.

16 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
17 both.

18 *Defence*

- 19 (7) For the purposes of subsections (1) and (6), it is a defence if:
20 (a) the licensee suggested that the consumer remain in the credit
21 contract because, after making reasonable inquiries, the
22 licensee reasonably believed that there was no other credit
23 contract that was not unsuitable for the consumer; and
24 (b) the licensee informed the consumer that there is a procedure
25 under sections 72 and 94 of the National Credit Code for
26 consumers in hardship.

27 Note: For the purposes of subsection (6), a defendant bears an evidential
28 burden in relation to the matter in subsection (7) (see subsection
29 13.3(3) of the *Criminal Code*).

- 30 (8) The regulations may prescribe particular inquiries that must be
31 made, or do not need to be made, for the purposes of
32 paragraph (7)(a).

Section 125

1

2 **Part 3-2—Licensees that are credit providers under**
3 **credit contracts**

4 **Division 1—Introduction**

5 **125 Guide to this Part**

6

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.

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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.

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Division 3 requires a licensee, before entering or increasing the credit limit of 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.

18

19

Division 4 prohibits a licensee from entering or increasing the credit limit of a credit contract that is unsuitable for a consumer.

1

2 **Division 2—Credit guide of credit providers**

3 **126 Credit guide of credit providers**

4 *Requirement to give credit guide*

5 (1) A licensee must, as soon as practicable after it becomes apparent to
6 the licensee that it is likely to enter a credit contract with a
7 consumer who will be the debtor under the contract, give the
8 consumer the licensee's credit guide in accordance with
9 subsection (2).

10 Civil penalty: 2,000 penalty units.

11 (2) The licensee's credit guide must:

- 12 (a) be in writing; and
13 (b) be in the form (if any) prescribed by the regulations; and
14 (c) specify the licensee's name and contact details; and
15 (d) specify the licensee's Australian credit licence number; and
16 (e) give information about the licensee's procedure for resolving
17 disputes with a consumer, including contact details for a
18 consumer to access:
19 (i) the licensee's internal dispute resolution procedure; and
20 (ii) the approved external dispute resolution scheme of
21 which the licensee is a member; and
22 (f) give information about the licensee's obligations under
23 sections 132 and 133; and
24 (g) comply with any other requirements prescribed by the
25 regulations.

26 (3) The regulations may prescribe information that need not be
27 included in the credit guide, despite subsection (2).

28 *Manner of giving credit guide*

29 (4) The licensee must give the consumer the licensee's credit guide in
30 the manner (if any) prescribed by the regulations.

Section 127

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: 2,000 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 approved external dispute resolution scheme of which the licensee is a member; and
 - (f) 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).

Section 127

1 *Manner of giving credit guide*

2 (4) The licensee must give the consumer the licensee's credit guide in
3 the manner (if any) prescribed by the regulations.

4 *Strict liability offence*

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

10 Criminal penalty: 50 penalty units.

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

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

Chapter 3 Responsible lending conduct

Part 3-2 Licensees that are credit providers under credit contracts

Division 3 Obligations of credit providers before entering credit contracts or increasing credit limits

Section 128

1

2 **Division 3—Obligations of credit providers before entering**
3 **credit contracts or increasing credit limits**

4 **128 Obligations of credit providers before entering credit contracts**
5 **or increasing credit limits**

6 A licensee must not:

- 7 (a) enter a credit contract with a consumer who will be the
8 debtor under the contract; or
9 (b) increase the credit limit of a credit contract with a consumer
10 who is the debtor under the contract;
11 on a day (the *credit day*) unless the licensee has, within 90 days (or
12 other period prescribed by the regulations) before the credit day:
13 (c) made an assessment that:
14 (i) is in accordance with section 129; and
15 (ii) covers the period in which the credit day occurs; and
16 (d) made the inquiries and verification in accordance with
17 section 130.

18 Civil penalty: 2,000 penalty units.

19 **129 Assessment of unsuitability of the credit contract**

20 For the purposes of paragraph 128(1)(c), the licensee must make an
21 assessment that:

- 22 (a) specifies the period the assessment covers; and
23 (b) assesses whether the credit contract will be unsuitable for the
24 consumer if the contract is entered or the credit limit is
25 increased in that period.

26 Note: The licensee is not required to make the assessment under this section
27 if the contract is not entered or the credit limit is not increased.

1 **130 Reasonable inquiries etc. about the consumer**

2 *Requirement to make inquiries and take steps to verify*

- 3 (1) For the purposes of paragraph 128(1)(d), the licensee must, before
4 making the assessment:
- 5 (a) make reasonable inquiries about the consumer's requirements
6 and objectives in relation to the credit contract; and
 - 7 (b) make reasonable inquiries about the consumer's financial
8 situation; and
 - 9 (c) take reasonable steps to verify the consumer's financial
10 situation; and
 - 11 (d) make any inquiries prescribed by the regulations about any
12 matter prescribed by the regulations; and
 - 13 (e) take any steps prescribed by the regulations to verify any
14 matter prescribed by the regulations.

15 Civil penalty: 2,000 penalty units.

- 16 (2) The regulations may prescribe particular inquiries or steps that
17 must be made or taken, or do not need to be made or taken, for the
18 purposes of paragraph (1)(a), (b) or (c).

19 *When not required to take steps to verify*

- 20 (3) Despite subsection (1), if:
- 21 (a) a preliminary assessment under subsection 116(1) about the
22 entering of the credit contract or the increase to the credit
23 limit has been made; and
 - 24 (b) the preliminary assessment was made no more than 90 days
25 before the day of entering the contract or increasing the credit
26 limit; and
 - 27 (c) the preliminary assessment assesses the contract as not being
28 unsuitable for the consumer; and
 - 29 (d) the preliminary assessment contains the information that was
30 used for the purposes of making the preliminary assessment;
31 the licensee is not required, for the purposes of paragraph (1)(c) or
32 (e), to verify that information.

Chapter 3 Responsible lending conduct

Part 3-2 Licensees that are credit providers under credit contracts

Division 3 Obligations of credit providers before entering credit contracts or increasing credit limits

Section 131

1 **131 When credit contract must be assessed as unsuitable**

2 *Requirement to assess the contract as unsuitable*

- 3 (1) The licensee must assess that the credit contract will be unsuitable
4 for the consumer if the contract will be unsuitable for the consumer
5 under subsection (2).

6 Note: Even if the contract will not be unsuitable for the consumer under
7 subsection (2), the licensee may still assess that the contract will be
8 unsuitable for other reasons.

9 *Particular circumstances when the contract will be unsuitable*

- 10 (2) The contract will be unsuitable for the consumer if, at the time of
11 the assessment, it is likely that:
12 (a) the consumer will be unable to comply with the consumer's
13 financial obligations under the contract, or could only comply
14 with substantial hardship, if the contract is entered or the
15 credit limit is increased in the period covered by the
16 assessment; or
17 (b) the contract will not meet the consumer's requirements or
18 objectives if the contract is entered or the credit limit is
19 increased in the period covered by the assessment; or
20 (c) if the regulations prescribe circumstances in which a credit
21 contract is unsuitable—those circumstances will apply to the
22 contract if the contract is entered or the credit limit is
23 increased in the period covered by the assessment.

24 Civil penalty: 2,000 penalty units.

- 25 (3) For the purposes of paragraph (2)(a), it is presumed that, if the
26 consumer could only comply with the consumer's financial
27 obligations under the contract by selling the consumer's principal
28 place of residence, the consumer could only comply with those
29 obligations with substantial hardship, unless the contrary is proved.

30 *Information to be used to determine if contract will be unsuitable*

- 31 (4) For the purposes of determining under subsection (2) whether the
32 contract will be unsuitable, only information that satisfies both of
33 the following paragraphs is to be taken into account:

Section 132

- 1 (a) the information is about the consumer's financial situation,
2 requirements or objectives, or any other matter prescribed by
3 the regulations under paragraph 130(1)(d) or (e);
4 (b) at the time of the assessment:
5 (i) the licensee had reason to believe that the information
6 was true; or
7 (ii) the licensee would have had reason to believe that the
8 information was true if the licensee had made the
9 inquiries or verification under section 130.

10 **132 Giving the consumer the assessment**

11 *Requirement to give assessment if requested*

- 12 (1) If, before entering the credit contract or increasing the credit limit,
13 the consumer requests the licensee for a copy of the assessment,
14 the licensee must give the consumer a written copy of the
15 assessment before entering the contract or increasing the credit
16 limit.

17 Note: The licensee is not required to give the consumer a copy of the
18 assessment if the contract is not entered or the credit limit is not
19 increased.

20 Civil penalty: 2,000 penalty units.

- 21 (2) If, during the period that:
22 (a) starts on the day (the *credit day*) the credit contract is entered
23 or the credit limit is increased; and
24 (b) ends 7 years after that day;
25 the consumer requests the licensee for a copy of the assessment,
26 the licensee must give the consumer a written copy of the
27 assessment:
28 (c) if the request is made within 2 years of the credit day—
29 before the end of 7 business days after the day the licensee
30 receives the request; and
31 (d) otherwise—before the end of 21 business days after the day
32 the licensee receives the request.

33 Civil penalty: 2,000 penalty units.

Chapter 3 Responsible lending conduct

Part 3-2 Licensees that are credit providers under credit contracts

Division 3 Obligations of credit providers before entering credit contracts or increasing credit limits

Section 132

1 *Manner of giving assessment*

2 (3) The licensee must give the consumer the copy of the assessment in
3 the manner (if any) prescribed by the regulations.

4 *No payment for assessment*

5 (4) The licensee must not request or demand payment of an amount for
6 giving the consumer a copy of the assessment.

7 Civil penalty: 2,000 penalty units.

8 *Strict liability offence*

9 (5) A person commits an offence if:

10 (a) the person is subject to a requirement under subsection (1),
11 (2) or (4); and

12 (b) the person engages in conduct; and

13 (c) the conduct contravenes the requirement.

14 Criminal penalty: 50 penalty units.

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

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

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

3

4

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

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6

Prohibition on entering etc. unsuitable contracts

7

(1) A licensee must not:

8

(a) enter a credit contract with a consumer who will be the
debtor under the contract; or

9

10

(b) increase the credit limit of a credit contract with a consumer
who is the debtor under the contract;

11

12

if the contract is unsuitable for the consumer under subsection (2).

13

Civil penalty: 2,000 penalty units.

14

When the contract is unsuitable

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(2) The contract is unsuitable for the consumer if, at the time it is
entered or the credit limit is increased:

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(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

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(b) the contract does not meet the consumer's requirements or
objectives; or

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22

(c) if the regulations prescribe circumstances in which a credit
contract is unsuitable—those circumstances apply to the
contract.

23

24

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(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.

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Chapter 3 Responsible lending conduct

Part 3-2 Licensees that are credit providers under credit contracts

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

Section 133

1 *Information to be used to determine if contract will be unsuitable*

2 (4) For the purposes of determining under subsection (2) whether the
3 contract will be unsuitable, only information that satisfies both of
4 the following paragraphs is to be taken into account:

5 (a) the information is about the consumer's financial situation,
6 requirements or objectives, or any other matter prescribed by
7 the regulations under paragraph 130(1)(d) or (e);

8 (b) at the time of the contract is entered or the credit limit is
9 increased, the information:

10 (i) the licensee had reason to believe that the information
11 was true; or

12 (ii) the licensee would have had reason to believe that the
13 information was true if the licensee had made the
14 inquiries or verification under section 130.

15 *Credit contract not unsuitable under regulations*

16 (5) The regulations may prescribe particular situations in which a
17 credit contract is taken not to be unsuitable for a consumer, despite
18 subsection (2).

19 *Offence*

20 (6) A person commits an offence if:

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

23 (b) the person engages in conduct; and

24 (c) the conduct contravenes the requirement.

25 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
26 both.

1

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

4 **Division 1—Introduction**

5 **134 Guide to this Part**

6 This Part has rules that apply to licensees that provide credit
7 assistance in relation to consumer leases. These rules are aimed at
8 better informing consumers and preventing them from being in
9 unsuitable consumer leases. However, these rules do not apply to a
10 licensee that will be the lessor under the consumer lease.

11 Division 2 requires a licensee to give its credit guide to a
12 consumer. The credit guide has information about the licensee and
13 some of the licensee's obligations under this Act.

14 Division 3 requires a licensee to give a quote before providing
15 credit assistance to a consumer. The quote must set out the
16 maximum amount the consumer will be required to pay to the
17 licensee. The licensee must not charge more than that amount.

18 Division 4 requires a licensee, before providing credit assistance to
19 a consumer in relation to a consumer lease, to make a preliminary
20 assessment as to whether the lease will be unsuitable for the
21 consumer. To do this, the licensee must make inquiries and
22 verifications about the consumer's requirements, objectives and
23 financial situation. The licensee must give the consumer a copy of
24 the assessment if requested.

25 Division 5 requires a licensee, when providing credit assistance to
26 a consumer in relation to a consumer lease, to give the consumer a
27 document that discloses certain information (for example, the
28 commission the licensee is likely to receive).

Chapter 3 Responsible lending conduct

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

Division 1 Introduction

Section 135

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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.

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135 Application of this Part

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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.

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2 **Division 2—Credit guide of credit assistance providers**

3 **136 Credit guide of credit assistance providers**

4 *Requirement to give credit guide*

5 (1) A licensee must, as soon as practicable after it becomes apparent to
6 the licensee that it is likely to provide credit assistance to a
7 consumer in relation to a consumer lease, give the consumer the
8 licensee's credit guide in accordance with subsection (2).

9 Civil penalty: 2,000 penalty units.

10 (2) The licensee's credit guide must:

11 (a) be in writing; and

12 (b) be in the form (if any) prescribed by the regulations; and

13 (c) specify the licensee's name and contact details; and

14 (d) specify the licensee's Australian credit licence number; and

15 (e) give information about:

16 (i) any fees that are payable by a consumer to the licensee
17 for the licensee's credit assistance; and

18 (ii) any charges that are payable by a consumer to the
19 licensee for matters associated with providing the credit
20 assistance; and

21 (iii) the method for working out the amount of the fees and
22 charges; and

23 (f) give information about:

24 (i) if there are 6 or fewer lessors that the licensee conducts
25 business with when providing credit assistance in
26 relation to consumer leases—the names of those lessors;
27 and

28 (ii) if there are more than 6 lessors that the licensee
29 conducts business with when providing credit assistance
30 in relation to consumer leases—the names of the 6
31 lessors with whom the licensee reasonably believes it
32 conducts the most business; and

33 (g) give information about:

Chapter 3 Responsible lending conduct

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

Division 2 Credit guide of credit assistance providers

Section 136

- 1 (i) any commissions that the licensee, or an employee,
2 director or credit representative of the licensee, is likely
3 to receive, directly or indirectly, from lessors in relation
4 to consumer leases for which the licensee has provided
5 credit assistance; and
6 (ii) a reasonable estimate of the amounts of those
7 commissions or the range of those amounts; and
8 (iii) the method for working out those amounts; and
9 (h) give information about the licensee's procedure for resolving
10 disputes with a consumer, including contact details for a
11 consumer to access:
12 (i) the licensee's internal dispute resolution procedure; and
13 (ii) the approved external dispute resolution scheme of
14 which the licensee is a member; and
15 (i) give information about the licensee's obligations under
16 sections 143 and 146; and
17 (j) comply with any other requirements prescribed by the
18 regulations.
- 19 (3) The regulations may prescribe:
20 (a) information that need not be included in the credit guide,
21 despite subsection (2); and
22 (b) for the purposes of paragraph (2)(g):
23 (i) the method for working out amounts of commissions;
24 and
25 (ii) how commissions or amounts of commissions must be
26 described.

27 *Manner of giving credit guide*

- 28 (4) The licensee must give the consumer the licensee's credit guide in
29 the manner (if any) prescribed by the regulations.

30 *Strict liability offence*

- 31 (5) A person commits an offence if:
32 (a) the person is subject to a requirement under subsection (1);
33 and
34 (b) the person engages in conduct; and

Section 136

1 (c) the conduct contravenes the requirement.

2 Criminal penalty: 50 penalty units.

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

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

Section 137

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

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137 Quote for providing credit assistance etc.

5

Requirement to give quote

6

(1) A licensee must not provide credit assistance to a consumer by:

7

(a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular consumer lease with a particular lessor; or

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(b) suggesting that the consumer remain in a particular consumer lease with a particular lessor;

11

12

unless:

13

(c) the licensee has given the consumer a quote in accordance with subsection (2); and

14

15

(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

16

17

18

(e) the licensee has given the consumer a copy of the accepted quote.

19

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Civil penalty: 2,000 penalty units.

22

(2) The quote must:

23

(a) be in writing; and

24

(b) give information about the credit assistance and other services that the quote covers; and

25

26

(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

27

28

29

(d) give information about what that amount relates to, including:

30

31

(i) the maximum amount of the licensee's fee for providing the credit assistance and other services; and

32

- 1 (ii) the maximum amount of charges that will be incurred
2 by the licensee for matters associated with providing the
3 credit assistance and other services; and
4 (iii) the maximum amount of fees or charges that will be
5 payable by the licensee to another person on the
6 consumer's behalf; and
7 (e) state whether the maximum amount or any other amount will
8 be payable by the consumer to the licensee if a consumer
9 lease is not entered; and
10 (f) comply with any other requirements prescribed by the
11 regulations.

12 *Manner of giving quote*

- 13 (3) The licensee must give the quote to the consumer in the manner (if
14 any) prescribed by the regulations.

15 *No demanding payment of amount exceeding quoted amount*

- 16 (4) The licensee must not request or demand payment of an amount
17 that exceeds the maximum amount set out in the quote.

18 Civil penalty: 2,000 penalty units.

19 *No demanding payment before credit assistance provided*

- 20 (5) The licensee must not request or demand payment of an amount for
21 the licensee's credit assistance before the licensee provides the
22 assistance.

23 Civil penalty: 2,000 penalty units.

24 *Caveats*

- 25 (6) The licensee must not lodge, or threaten to lodge, a caveat in
26 relation to land to induce the consumer to pay an amount to the
27 licensee for the licensee's credit assistance or other services.

28 Civil penalty: 2,000 penalty units.

Chapter 3 Responsible lending conduct

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

Division 4 Obligations of credit assistance providers before providing credit assistance for consumer leases

Section 138

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**Division 4—Obligations of credit assistance providers
before providing credit assistance for consumer
leases**

3

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**138 Obligations of credit assistance providers before providing
credit assistance for consumer leases**

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7

(1) A licensee must not provide credit assistance to a consumer on a day (the *assistance day*) by:

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

10

11

(b) assisting the consumer to apply for a particular consumer lease with a particular lessor;

12

13

unless the licensee has, within 90 days (or other period prescribed by the regulations) before the assistance day:

14

15

(c) made a preliminary assessment that:

16

(i) is in accordance with subsection 139(1); and

17

(ii) covers the period proposed for the entering of the lease; and

18

19

(d) made the inquiries and verification in accordance with section 140.

20

21

Civil penalty: 2,000 penalty units.

22

(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:

23

24

25

26

27

(a) made a preliminary assessment that:

28

(i) is in accordance with subsection 139(2); and

29

(ii) covers a period in which the assistance day occurs; and

30

(b) made the inquiries and verification in accordance with section 140.

31

32

Civil penalty: 2,000 penalty units.

1 **139 Preliminary assessment of unsuitability of the consumer lease**

- 2 (1) For the purposes of paragraph 138(1)(c), the licensee must make a
3 preliminary assessment that:
4 (a) specifies the period the assessment covers; and
5 (b) assesses whether the consumer lease will be unsuitable for
6 the consumer if the lease is entered in that period.

- 7 (2) For the purposes of paragraph 138(2)(a), the licensee must make a
8 preliminary assessment that:
9 (a) specifies the period the assessment covers; and
10 (b) assesses whether the consumer lease will be unsuitable for
11 the consumer if the consumer remains in the lease in that
12 period.

13 Note: The licensee is not required to make a preliminary assessment under
14 this section if the credit assistance is not provided.

15 **140 Reasonable inquiries etc. about the consumer**

- 16 (1) For the purposes of paragraph 138(1)(d) or 138(2)(b), the licensee
17 must, before making the preliminary assessment:
18 (a) make reasonable inquiries about the consumer's requirements
19 and objectives in relation to the consumer lease; and
20 (b) make reasonable inquiries about the consumer's financial
21 situation; and
22 (c) take reasonable steps to verify the consumer's financial
23 situation; and
24 (d) make any inquiries prescribed by the regulations about any
25 matter prescribed by the regulations; and
26 (e) take any steps prescribed by the regulations to verify any
27 matter prescribed by the regulations.

28 Civil penalty: 2,000 penalty units.

- 29 (2) The regulations may prescribe particular inquiries or steps that
30 must be made or taken, or do not need to be made or taken, for the
31 purposes of paragraph (1)(a), (b) or (c).

Chapter 3 Responsible lending conduct

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

Division 4 Obligations of credit assistance providers before providing credit assistance for consumer leases

Section 141

1 **141 When the consumer lease must be assessed as unsuitable—**
2 **entering lease**

3 *Requirement to assess the lease as unsuitable*

- 4 (1) For a preliminary assessment under subsection 139(1) about
5 entering a consumer lease, the licensee must assess that the lease
6 will be unsuitable for the consumer if the lease will be unsuitable
7 for the consumer under subsection (2).

8 Civil penalty: 2,000 penalty units.

9 Note: Even if the lease will not be unsuitable for the consumer under
10 subsection (2), the licensee may still assess that the lease will be
11 unsuitable for other reasons.

12 *Particular circumstances when the lease will be unsuitable*

- 13 (2) The lease will be unsuitable for the consumer if, at the time of the
14 preliminary assessment, it is likely that:
15 (a) the consumer will be unable to comply with the consumer's
16 financial obligations under the lease, or could only comply
17 with substantial hardship, if the lease is entered in the period
18 proposed for it to be entered; or
19 (b) the lease will not meet the consumer's requirements or
20 objectives if the lease is entered in the period proposed for it
21 to be entered; or
22 (c) if the regulations prescribe circumstances in which a
23 consumer lease is unsuitable—those circumstances will apply
24 to the lease if the lease is entered in the period proposed for it
25 to be entered.
- 26 (3) For the purposes of paragraph (2)(a), it is presumed that, if the
27 consumer could only comply with the consumer's financial
28 obligations under the lease by selling the consumer's principal
29 place of residence, the consumer could only comply with those
30 obligations with substantial hardship, unless the contrary is proved.

Section 142

Information to be used to determine if lease will be unsuitable

- 1
- 2 (4) For the purposes of determining under subsection (2) whether the
- 3 lease will be unsuitable, only information that satisfies both of the
- 4 following paragraphs is to be taken into account:
- 5 (a) the information is about the consumer's financial situation,
- 6 requirements or objectives, or any other matter prescribed by
- 7 the regulations under paragraph 140(1)(d) or (e);
- 8 (b) at the time of the preliminary assessment:
- 9 (i) the licensee had reason to believe that the information
- 10 was true; or
- 11 (ii) the licensee would have had reason to believe that the
- 12 information was true if the licensee had made the
- 13 inquiries or verification under section 140.

14 **142 When the consumer lease must be assessed as unsuitable—**

15 **remaining in lease**

16 *Requirement to assess the lease as unsuitable*

- 17 (1) For a preliminary assessment under subsection 139(2) about
- 18 remaining in a consumer lease, the licensee must assess that the
- 19 lease will be unsuitable for the consumer if the lease will be
- 20 unsuitable for the consumer under subsection (2).

21 Civil penalty: 2,000 penalty units.

22 Note: Even if the lease will not be unsuitable for the consumer under

23 subsection (2), the licensee may still assess that the lease will be

24 unsuitable for other reasons.

25 *Particular circumstances when the lease will be unsuitable*

- 26 (2) The lease will be unsuitable for the consumer if, at the time of the
- 27 preliminary assessment, it is likely that:
- 28 (a) the consumer will be unable to comply with the consumer's
- 29 financial obligations under the lease, or could only comply
- 30 with substantial hardship if the consumer remains in the lease
- 31 in the period covered by the preliminary assessment; or

Chapter 3 Responsible lending conduct

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

Division 4 Obligations of credit assistance providers before providing credit assistance for consumer leases

Section 143

- 1 (b) the lease will not meet the consumer's requirements or
2 objectives if the consumer remains in the lease in the period
3 covered by the preliminary assessment; or
4 (c) if the regulations prescribe circumstances in which a
5 consumer lease is unsuitable—those circumstances will apply
6 to the lease if the consumer remains in the lease in the period
7 covered by the preliminary assessment.
- 8 (3) For the purposes of paragraph (2)(a), it is presumed that, if the
9 consumer could only comply with the consumer's financial
10 obligations under the lease by selling the consumer's principal
11 place of residence, the consumer could only comply with those
12 obligations with substantial hardship, unless the contrary is proved.

13 *Information to be used to determine if lease will be unsuitable*

- 14 (4) For the purposes of determining under subsection (2) whether the
15 lease will be unsuitable, only information that satisfies both of the
16 following paragraphs is to be taken into account:
17 (a) the information is about the consumer's financial situation,
18 requirements or objectives, or any other matter prescribed by
19 the regulations under paragraph 140(1)(d) or (e);
20 (b) at the time of the preliminary assessment:
21 (i) the licensee had reason to believe that the information
22 was true; or
23 (ii) the licensee would have had reason to believe that the
24 information was true if the licensee had made the
25 inquiries or verification under section 140.

26 **143 Providing the consumer with the preliminary assessment**

27 *Requirement to give assessment if requested*

- 28 (1) If the consumer requests the licensee for a copy of the preliminary
29 assessment within 7 years of the date of the credit assistance quote
30 under section 137, the licensee must give the consumer a written
31 copy of the assessment:
32 (a) if the request is made within 2 years of the quote—before the
33 end of 7 business days after the day the licensee receives the
34 request; and
-

Section 143

1 (b) otherwise—before the end of 21 business days after the day
2 the licensee receives the request.

3 Note: The licensee is not required to give the consumer a copy of the
4 preliminary assessment if the licensee does not provide credit
5 assistance to the consumer.

6 Civil penalty: 2,000 penalty units.

7 *Manner of giving assessment*

8 (2) The licensee must give the consumer the copy of the assessment in
9 the manner (if any) prescribed by the regulations.

10 *No payment for assessment*

11 (3) The licensee must not request or demand payment of an amount for
12 giving the consumer a copy of the preliminary assessment.

13 Civil penalty: 2,000 penalty units.

14 *Strict liability offence*

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

20 Criminal penalty: 50 penalty units.

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

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

Section 144

1

2

Division 5—Fees, commissions etc. relating to consumer leases

3

4

144 Fees, commissions etc. relating to consumer leases

5

Requirement for disclosure

6

(1) A licensee must, at the same time as providing credit assistance to a consumer by:

7

8

(a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular consumer lease with a particular lessor; or

9

10

11

(b) suggesting that the consumer remain in a particular consumer lease with a particular lessor;

12

13

give the consumer a lease proposal disclosure document in accordance with subsection (2).

14

15

Civil penalty: 2,000 penalty units.

16

(2) The lease proposal disclosure document must contain the following:

17

18

(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;

19

20

21

(b) a reasonable estimate of the total amount of any commissions 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;

22

23

24

25

26

(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;

27

28

29

(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.

30

31

- 1 (3) For the purposes of paragraph (2)(b), the regulations may
2 prescribe:
3 (a) the method for working out amounts of commissions; and
4 (b) how amounts of commissions must be described.

5 *Manner of giving lease proposal disclosure document*

- 6 (4) The licensee must give the lease proposal disclosure document to
7 the consumer in the manner (if any) prescribed by the regulations.

8 **145 No profiting from fees etc. paid to third parties**

9 *Requirement not to profit*

- 10 (1) If, in the course of providing credit assistance to a consumer in
11 relation to a consumer lease, a licensee pays an amount (the *third*
12 *party amount*) to another person on behalf of the consumer, the
13 licensee must not request or demand payment of an amount, as
14 reimbursement for the third party amount, that exceeds the third
15 party amount.

16 Civil penalty: 2,000 penalty units.

17 *Offence*

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

23 Criminal penalty: 25 penalty units, or 6 months imprisonment,
24 or both.

Section 146

1

2 **Division 6—Prohibition on suggesting, or assisting with,**
3 **unsuitable consumer leases**

4 **146 Prohibition on suggesting, or assisting with, unsuitable**
5 **consumer leases**

6 *Prohibition on suggesting, or assisting with, unsuitable leases*

- 7 (1) A licensee must not provide credit assistance to a consumer by:
8 (a) suggesting that the consumer apply for a particular consumer
9 lease with a particular lessor; or
10 (b) assisting the consumer to apply for a particular consumer
11 lease with a particular lessor;
12 if the lease will be unsuitable for the consumer under
13 subsection (2).

14 Civil penalty: 2,000 penalty units.

15 *When the lease will be unsuitable*

- 16 (2) The lease will be unsuitable for the consumer if, at the time the
17 licensee provides the credit assistance, it is likely that:
18 (a) the consumer will be unable to comply with the consumer's
19 financial obligations under the lease, or could only comply
20 with substantial hardship, if the lease is entered in the period
21 proposed for it to be entered; or
22 (b) the lease will not meet the consumer's requirements or
23 objectives if the lease is entered in the period proposed for it
24 to be entered; or
25 (c) if the regulations prescribe circumstances in which a
26 consumer lease is unsuitable—those circumstances will apply
27 to the lease if the lease is entered in the period proposed for it
28 to be entered.
- 29 (3) For the purposes of paragraph (2)(a), it is presumed that, if the
30 consumer could only comply with the consumer's financial
31 obligations under the lease by selling the consumer's principal

1 place of residence, the consumer could only comply with those
2 obligations with substantial hardship, unless the contrary is proved.

3 *Information to be used to determine if lease will be unsuitable*

4 (4) For the purposes of determining under subsection (2) whether the
5 lease will be unsuitable, only information that satisfies both of the
6 following paragraphs is to be taken into account:

7 (a) the information is about the consumer's financial situation,
8 requirements or objectives, or any other matter prescribed by
9 the regulations under paragraph 140(1)(d) or (e);

10 (b) at the time the licensee provides the credit assistance:

11 (i) the licensee had reason to believe that the information
12 was true; or

13 (ii) the licensee would have had reason to believe that the
14 information was true if the licensee had made the
15 inquiries or verification under section 140.

16 *Consumer lease not unsuitable under regulations*

17 (5) The regulations may prescribe particular situations in which a
18 consumer lease is taken not to be unsuitable for a consumer,
19 despite subsection (2).

20 *Offence*

21 (6) A person commits an offence if:

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

24 (b) the person engages in conduct; and

25 (c) the conduct contravenes the requirement.

26 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
27 both.

Section 147

1 **147 Prohibition on suggesting to consumers to remain in unsuitable**
2 **consumer leases**

3 *Prohibition on suggesting to remain in unsuitable lease*

- 4 (1) A licensee must not provide credit assistance to a consumer by
5 suggesting that the consumer remain in a particular consumer lease
6 with a particular lessor if the lease is unsuitable for the consumer
7 under subsection (2).

8 Civil penalty: 2,000 penalty units.

9 *When the lease is unsuitable*

- 10 (2) The lease is unsuitable for the consumer if, at that time the licensee
11 provides the credit assistance:

12 (a) the consumer is, or is likely to be, unable to comply with the
13 consumer's financial obligations under the lease, or only able
14 to comply with substantial hardship; or

15 (b) the lease does not meet the consumer's requirements or
16 objectives; or

17 (c) if the regulations prescribe circumstances in which a
18 consumer lease is unsuitable—those circumstances apply to
19 the lease.

- 20 (3) For the purposes of paragraph (2)(a), it is presumed that, if the
21 consumer could only comply with the consumer's financial
22 obligations under the lease by selling the consumer's principal
23 place of residence, the consumer could only comply with those
24 obligations with substantial hardship, unless the contrary is proved.

25 *Information to be used to determine if lease is unsuitable*

- 26 (4) For the purposes of determining under subsection (2) whether the
27 lease is unsuitable, only information that satisfies both of the
28 following paragraphs is to be taken into account:

29 (a) the information is about the consumer's financial situation,
30 requirements or objectives, or any other matter prescribed by
31 the regulations under paragraph 140(1)(d) or (e);

32 (b) at the time the licensee provides the credit assistance:

Section 147

- 1 (i) the licensee had reason to believe that the information
2 was true; or
3 (ii) the licensee would have had reason to believe that the
4 information was true if the licensee had made the
5 inquiries or verification under section 140.

6 *Consumer lease not unsuitable under regulations*

- 7 (5) The regulations may prescribe particular situations in which a
8 consumer lease is taken not to be unsuitable for a consumer,
9 despite subsection (2).

10 *Offence*

- 11 (6) A person commits an offence if:
12 (a) the person is subject to a requirement under subsection (1);
13 and
14 (b) the person engages in conduct; and
15 (c) the conduct contravenes the requirement.

16 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
17 both.

18 *Defence*

- 19 (7) For the purposes of subsections (1) and (6), it is a defence if:
20 (a) the licensee suggested that the consumer remain in the
21 consumer lease because the licensee reasonably believed that
22 there was no other consumer lease that was not unsuitable for
23 the consumer; and
24 (b) the licensee informed the consumer that there is a procedure
25 under sections 72 and 94 of the National Credit Code for
26 consumers in hardship.

27 Note 1: For the purposes of subsection (6), a defendant bears an evidential
28 burden in relation to the matter in subsection (7) (see subsection
29 13.3(3) of the *Criminal Code*).

30 Note 2: Sections 72 and 94 of the National Credit Code apply in relation to
31 consumer leases because of section 177 of the Code.

Chapter 3 Responsible lending conduct

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

Division 6 Prohibition on suggesting, or assisting with, unsuitable consumer leases

Section 147

- 1 (8) The regulations may prescribe particular inquiries that must be
2 made, or do not need to be made, for the purposes of
3 paragraph (7)(a).

1

2 **Part 3-4—Licensees that are lessors under**
3 **consumer leases**

4 **Division 1—Introduction**

5 **148 Guide to this Part**

6

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.

7

8

9

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.

10

11

12

Division 3 requires a licensee, before 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.

13

14

15

16

17

18

Division 4 prohibits a licensee from entering a consumer lease that is unsuitable for a consumer.

19

Section 149

1

2 **Division 2—Credit guide of lessors**

3 **149 Credit guide of lessors**

4 *Requirement to give credit guide*

5 (1) A licensee must, as soon as practicable after it becomes apparent to
6 the licensee that it is likely to enter a consumer lease with a
7 consumer who will be the lessee under the lease, give the consumer
8 the licensee's credit guide in accordance with subsection (2).

9 Civil penalty: 2,000 penalty units.

10 (2) The licensee's credit guide must:

11 (a) be in writing; and

12 (b) be in the form (if any) prescribed by the regulations; and

13 (c) specify the licensee's name and contact details; and

14 (d) specify the licensee's Australian credit licence number; and

15 (e) give information about the licensee's procedure for resolving
16 disputes with a consumer, including contact details for a
17 consumer to access:

18 (i) the licensee's internal dispute resolution procedure; and

19 (ii) the approved external dispute resolution scheme of
20 which the licensee is a member; and

21 (f) give information about the licensee's obligations under
22 sections 155 and 156; and

23 (g) comply with any other requirements prescribed by the
24 regulations.

25 (3) The regulations may prescribe information that need not be
26 included in the credit guide, despite subsection (2).

27 *Manner of giving credit guide*

28 (4) The licensee must give the consumer the licensee's credit guide in
29 the manner (if any) prescribed by the regulations.

1 *Strict liability offence*

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

7 Criminal penalty: 50 penalty units.

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

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

10 **150 Credit guide of lessors who are assignees**

11 *Requirement to give credit guide*

- 12 (1) A licensee must, as soon as practicable after it has been assigned
13 any rights or obligations of a lessor under a consumer lease, give
14 the lessee under the lease the licensee's credit guide in accordance
15 with subsection (2).

16 Civil penalty: 2,000 penalty units.

- 17 (2) The licensee's credit guide must:
18 (a) be in writing; and
19 (b) be in the form (if any) prescribed by the regulations; and
20 (c) specify the licensee's name and contact details; and
21 (d) specify the licensee's Australian credit licence number; and
22 (e) give information about the licensee's procedure for resolving
23 disputes with a consumer, including contact details for a
24 consumer to access:
25 (i) the licensee's internal dispute resolution procedure; and
26 (ii) the approved external dispute resolution scheme of
27 which the licensee is a member; and
28 (f) comply with any other requirements prescribed by the
29 regulations.

- 30 (3) The regulations may prescribe information that need not be
31 included in the credit guide, despite subsection (2).

Chapter 3 Responsible lending conduct

Part 3-4 Licensees that are lessors under consumer leases

Division 2 Credit guide of lessors

Section 150

1

Manner of giving credit guide

2

- (4) The licensee must give the consumer the licensee's credit guide in the manner (if any) prescribed by the regulations.

3

4

Strict liability offence

5

- (5) A person commits an offence if:

6

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

7

8

- (b) the person engages in conduct; and

9

- (c) the conduct contravenes the requirement.

10

Criminal penalty: 50 penalty units.

11

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

12

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

1

2

Division 3—Obligations of lessors before entering consumer leases

3

4

151 Obligations of lessors before entering consumer leases

5

A licensee must not enter a consumer lease with a consumer who will be the lessee under the lease on a day (the *lease day*) unless the licensee has, within 90 days (or other period prescribed by the regulations) before the lease day:

6

7

8

9

(a) made an assessment that:

10

(i) is in accordance with section 152; and

11

(ii) covers a period in which the lease day occurs; and

12

(b) made the inquiries and verification in accordance with section 130.

13

14

Civil penalty: 2,000 penalty units.

15

152 Assessment of unsuitability of the consumer lease

16

For the purposes of paragraph 151(a), the licensee must make an assessment that:

17

18

(a) specifies the period the assessment covers; and

19

(b) assesses whether the consumer lease will be unsuitable for the consumer if the lease is entered in that period.

20

21

Note: The licensee is not required to make the assessment under this section if the lease is not entered.

22

23

153 Reasonable inquiries etc. about the consumer

24

Requirement to make inquiries and take steps to verify

25

(1) For the purposes of paragraph 151(b), the licensee must, before making the assessment:

26

27

(a) make reasonable inquiries about the consumer's requirements and objectives in relation to the consumer lease; and

28

29

(b) make reasonable inquiries about the consumer's financial situation; and

30

Section 154

- 1 (c) take reasonable steps to verify the consumer's financial
2 situation; and
3 (d) make any inquiries prescribed by the regulations about any
4 matter prescribed by the regulations; and
5 (e) take any steps prescribed by the regulations to verify any
6 matter prescribed by the regulations.
- 7 Civil penalty: 2,000 penalty units.
- 8 (2) The regulations may prescribe particular inquiries or steps that
9 must be made or taken, or do not need to be made or taken, for the
10 purposes of paragraph (1)(a), (b) or (c).
- 11 *When not required to take steps to verify*
- 12 (3) Despite subsection (1), if:
13 (a) a preliminary assessment under subsection 139(1) about the
14 entering of the consumer lease has been made; and
15 (b) the preliminary assessment was made no more than 90 days
16 before the day of entering the lease; and
17 (c) the preliminary assessment assesses the lease as not being
18 unsuitable for the consumer; and
19 (d) the preliminary assessment contains the information that was
20 used for the purposes of making the preliminary assessment;
21 the licensee is not required, for the purposes of paragraph (1)(c) or
22 (e), to verify that information.

154 When consumer lease must be assessed as unsuitable

24 *Requirement to assess the lease as unsuitable*

- 25 (1) The licensee must assess that the consumer lease will be unsuitable
26 for the consumer if the lease will be unsuitable for the consumer
27 under subsection (2).
- 28 Note: Even if the lease will not be unsuitable for the consumer under
29 subsection (2), the licensee may still assess that the lease will be
30 unsuitable for other reasons.

1 *Particular circumstances when the lease will be unsuitable*

- 2 (2) The lease will be unsuitable for the consumer if, at the time of the
3 assessment, it is likely that:
- 4 (a) the consumer will be unable to comply with the consumer's
5 financial obligations under the lease, or could only comply
6 with substantial hardship, if the lease is entered in the period
7 covered by the assessment; or
 - 8 (b) the lease will not meet the consumer's requirements or
9 objectives if the lease is entered in the period covered by the
10 assessment; or
 - 11 (c) if the regulations prescribe circumstances in which a
12 consumer lease is unsuitable—those circumstances will apply
13 to the lease if the lease is entered in the period covered by the
14 assessment.

15 Civil penalty: 2,000 penalty units.

- 16 (3) For the purposes of paragraph (2)(a), it is presumed that, if the
17 consumer could only comply with the consumer's financial
18 obligations under the lease by selling the consumer's principal
19 place of residence, the consumer could only comply with those
20 obligations with substantial hardship, unless the contrary is proved.

21 *Information to be used to determine if lease will be unsuitable*

- 22 (4) For the purposes of determining under subsection (2) whether the
23 lease will be unsuitable, only information that satisfies both of the
24 following paragraphs is to be taken into account:
- 25 (a) the information is about the consumer's financial situation,
26 requirements or objectives, or any other matter prescribed by
27 the regulations under paragraph 153(1)(d) or (e);
 - 28 (b) at the time of the preliminary assessment:
 - 29 (i) the licensee had reason to believe that the information
30 was true; or
 - 31 (ii) the licensee would have had reason to believe that the
32 information was true if the licensee had made the
33 inquiries or verification under section 153.

Section 155

1 **155 Giving the consumer the assessment**

2 *Requirement to give assessment if requested*

- 3 (1) If, before entering the consumer lease, the consumer requests the
4 licensee for a copy of the assessment, the licensee must give the
5 consumer a written copy of the assessment before entering the
6 lease.

7 Note: The licensee is not required to give the consumer a copy of the
8 assessment if the lease is not entered.

9 Civil penalty: 2,000 penalty units.

- 10 (2) If, during the period that:

11 (a) starts on the day (the *lease day*) the consumer lease is
12 entered; and

13 (b) ends 7 years after that day;

14 the consumer requests the licensee for a copy of the assessment,
15 the licensee must give the consumer a written copy of the
16 assessment:

17 (c) if the request is made within 2 years of the lease day—before
18 the end of 7 business days after the day the licensee receives
19 the request; and

20 (d) otherwise—before the end of 21 business days after the day
21 the licensee receives the request.

22 Civil penalty: 2,000 penalty units.

23 *Manner of giving assessment*

- 24 (3) The licensee must give the consumer the copy of the assessment in
25 the manner (if any) prescribed by the regulations.

26 *No payment for assessment*

- 27 (4) The licensee must not request or demand payment of an amount for
28 giving the consumer a copy of the assessment.

29 Civil penalty: 2,000 penalty units.

1

Strict liability offence

2

(5) A person commits an offence if:

3

(a) the person is subject to a requirement under subsection (1),
(2) or (4); and

4

5

(b) the person engages in conduct; and

6

(c) the conduct contravenes the requirement.

7

Criminal penalty: 50 penalty units.

8

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

9

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

Section 156

1

2 **Division 4—Prohibition on entering unsuitable consumer**
3 **leases**

4 **156 Prohibition on entering unsuitable consumer leases**

5 *Prohibition on entering unsuitable lease*

6 (1) A licensee must not enter a consumer lease with a consumer who
7 will be the lessee under the lease if the lease is unsuitable for the
8 consumer under subsection (2).

9 Civil penalty: 2,000 penalty units.

10 *When the lease is unsuitable*

11 (2) The lease is unsuitable for the consumer if, at the time it is entered:

12 (a) it is likely that the consumer will be unable to comply with
13 the consumer's financial obligations under the lease, or could
14 only comply with substantial hardship; or

15 (b) the lease does not meet the consumer's requirements or
16 objectives; or

17 (c) if the regulations prescribe circumstances in which a
18 consumer lease is unsuitable—those circumstances apply to
19 the lease.

20 (3) For the purposes of paragraph (2)(a), it is presumed that, if the
21 consumer could only comply with the consumer's financial
22 obligations under the lease by selling the consumer's principal
23 place of residence, the consumer could only comply with those
24 obligations with substantial hardship, unless the contrary is proved.

25 *Information to be used to determine if lease is unsuitable*

26 (4) For the purposes of determining under subsection (2) whether the
27 lease is unsuitable, only information that satisfies both of the
28 following paragraphs is to be taken into account:

- 1 (a) the information is about the consumer's financial situation,
2 requirements or objectives, or any other matter prescribed by
3 the regulations under paragraph 153(1)(d) or (e);
4 (b) at the time the lease is entered:
5 (i) the licensee had reason to believe that the information
6 was true; or
7 (ii) the licensee would have had reason to believe that the
8 information was true if the licensee had made the
9 inquiries or verification under section 153.

10 *Consumer lease not unsuitable under regulations*

- 11 (5) The regulations may prescribe particular situations in which a
12 consumer lease is taken not to be unsuitable for a consumer,
13 despite subsection (2).

14 *Offence*

- 15 (6) A person commits an offence if:
16 (a) the person is subject to a requirement under subsection (1);
17 and
18 (b) the person engages in conduct; and
19 (c) the conduct contravenes the requirement.

20 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
21 both.

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2 **Part 3-5—Credit representatives**

3 **Division 1—Introduction**

4 **157 Guide to this Part**

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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.

8

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10

Division 2 requires a credit representative to give its credit guide to a consumer. The credit guide has information about the credit representative.

1

2 **Division 2—Credit guide of credit representatives**

3 **158 Credit guide of credit representatives**

4 *Requirement to give credit guide*

5 (1) If a credit representative of a licensee gives a consumer the
6 licensee's credit guide when acting on behalf of the licensee under
7 Part 3-1, 3-2, 3-3 or 3-4, the credit representative must at the same
8 time give the consumer the credit representative's credit guide in
9 accordance with subsection (2).

10 Civil penalty: 2,000 penalty units.

11 (2) The credit representative's credit guide must:

12 (a) be in writing; and

13 (b) be in the form (if any) prescribed by the regulations; and

14 (c) specify the credit representative's name and contact details;
15 and

16 (d) specify the credit representative's credit representative
17 number; and

18 (e) give information about:

19 (i) any fees that are payable by a consumer to the credit
20 representative for acting as a credit representative; and

21 (ii) any charges that are payable by a consumer to the credit
22 representative for matters associated with acting as a
23 credit representative; and

24 (iii) the method for working out the amount of the fees and
25 charges; and

26 (f) give information about:

27 (i) if there are 6 or fewer licensees for whom the credit
28 representative is a credit representative—the names of
29 those licensees; and

30 (ii) if there are more than 6 licensees for whom the credit
31 representative is a credit representative—the names of
32 the 6 licensees for whom the credit representative
33 reasonably believes it conducts the most business; and

Section 158

- 1 (iii) the credit activities the credit representative is
2 authorised to engage in on behalf of the licensees
3 referred to in subparagraph (i) or (ii); and
4 (g) give information about:
5 (i) any commissions the credit representative is likely to
6 receive, directly or indirectly, from those licensees; and
7 (ii) a reasonable estimate of the amounts of those
8 commissions or the range of those amounts; and
9 (iii) the method for working out those amounts; and
10 (h) give information about the credit representative's procedure
11 for resolving disputes with a consumer, including contact
12 details for a consumer to access the approved external dispute
13 resolution scheme of which the credit representative's is a
14 member; and
15 (i) comply with any other requirements prescribed by the
16 regulations.
- 17 (3) The regulations may prescribe:
18 (a) information that need not be included in the credit guide,
19 despite subsection (2); and
20 (b) for the purposes of paragraph (2)(g):
21 (i) the method for working out amounts of commissions;
22 and
23 (ii) how commissions or amounts of commissions must be
24 described.

25 *Manner of giving credit guide*

- 26 (4) The credit representative must give the consumer the credit
27 representative's credit guide in the manner (if any) prescribed by
28 the regulations.

29 *Strict liability offence*

- 30 (5) A person commits an offence if:
31 (a) the person is subject to a requirement under subsection (1);
32 and
33 (b) the person engages in conduct; and
34 (c) the conduct contravenes the requirement.

Section 158

- 1 Criminal penalty: 50 penalty units.
- 2 (6) Subsection (5) is an offence of strict liability.
- 3 Note: For strict liability, see section 6.1 of the *Criminal Code*.

1

2 **Part 3-6—Debt collectors**

3 **Division 1—Introduction**

4 **159 Guide to this Part**

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8

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.

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10

Division 2 requires the person to give the person's credit guide to the consumer. The credit guide has information about the person.

1

2 **Division 2—Credit guide of debt collectors**

3 **160 Credit guide of debt collectors**

4 *Requirement to give credit guide*

5 (1) A person who is a licensee or credit representative must, as soon as
6 practicable after it becomes authorised by a credit provider to
7 collect, on the credit provider's behalf, repayments made by a
8 debtor under a credit contract, give the debtor the person's credit
9 guide in accordance with subsection (3).

10 Civil penalty: 2,000 penalty units.

11 (2) A person who is a licensee or credit representative must, as soon as
12 practicable after it becomes authorised by a lessor to collect, on the
13 lessor's behalf, payments made by a lessee under a consumer lease,
14 give the lessee the person's credit guide in accordance with
15 subsection (3).

16 Civil penalty: 2,000 penalty units.

17 (3) The person's credit guide must:

18 (a) be in writing; and

19 (b) be in the form (if any) prescribed by the regulations; and

20 (c) specify the person's name and contact details; and

21 (d) if the person is a licensee—specify the person's Australian
22 credit licence number; and

23 (e) if the person is a credit representative—specify the person's
24 credit representative number; and

25 (f) give information about the person's procedure for resolving
26 disputes with a consumer, including contact details for a
27 consumer to access:

28 (i) if the person is a licensee—the person's internal dispute
29 resolution procedure; and

30 (ii) in all cases—the approved external dispute resolution
31 scheme of which the person is a member; and

Section 160

1 (g) comply with any other requirements prescribed by the
2 regulations.

3 (4) The regulations may prescribe information that need not be
4 included in the credit guide, despite subsection (3).

5 *Manner of giving credit guide*

6 (5) The person must give the consumer the person's credit guide in the
7 manner (if any) prescribed by the regulations.

8 *Strict liability offence*

9 (6) A person commits an offence if:

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

12 (b) the person engages in conduct; and

13 (c) the conduct contravenes the requirement.

14 Criminal penalty: 50 penalty units.

15 (7) Subsection (6) is an offence of strict liability.

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

1

2 **Part 3-7—Exemptions and modifications relating to**
3 **this Chapter**

4 **Division 1—Introduction**

5 **161 Guide to this Part**

6

This Part is about exemptions from, and modifications of, the provisions of this Chapter.

7

8

Division 2 deals with how exemptions and modifications may be made by ASIC or by the regulations.

9

Section 162

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2 **Division 2—Exemptions and modifications relating to this**
3 **Chapter**

4 **162 Provisions to which this Part applies**

5 The provisions to which this Part applies are:

- 6 (a) this Chapter; and
7 (b) definitions in this Act, as they apply to references in this
8 Chapter; and
9 (c) instruments made for the purposes of this Chapter.

10 **163 Exemptions and modifications by ASIC**

11 (1) ASIC may:

- 12 (a) exempt a person from all or specified provisions to which
13 this Part applies; or
14 (b) exempt a credit contract from all or specified provisions to
15 which this Part applies; or
16 (c) exempt a consumer lease from all or specified provisions to
17 which this Part applies; or
18 (d) declare that provisions to which this Part applies apply in
19 relation to a person, credit contract or consumer lease as if
20 specified provisions were omitted, modified or varied as
21 specified in the declaration.

22 (2) An exemption or declaration under subsection (1) is not a
23 legislative instrument.

24 (3) ASIC may, by legislative instrument:

- 25 (a) exempt a class of persons from all or specified provisions to
26 which this Part applies; or
27 (b) exempt a class of credit contracts from all or specified
28 provisions to which this Part applies; or
29 (c) exempt a class of consumer leases from all or specified
30 provisions to which this Part applies; or

- 1 (d) declare that provisions to which this Part applies apply in
2 relation to a class of persons, credit contracts or consumer
3 leases, as if specified provisions were omitted, modified or
4 varied as specified in the declaration.
- 5 (4) An exemption may apply unconditionally or subject to specified
6 conditions. A person to whom a condition specified in an
7 exemption applies must comply with the condition. The court may
8 order the person to comply with the condition in a specified way.
9 Only ASIC may apply to the court for the order.
- 10 (5) An exemption or declaration under subsection (1) must be in
11 writing and ASIC must publish notice of it on its website.
- 12 (6) If conduct (including an omission) of a person would not have
13 constituted an offence if a particular declaration under
14 paragraph (1)(d) or (3)(d) had not been made, that conduct does not
15 constitute an offence unless, before the conduct occurred:
16 (a) the text of the declaration was published by ASIC on its
17 website; or
18 (b) ASIC gave written notice setting out the text of the
19 declaration to the person;
20 (in addition to complying with the requirements of the *Legislative*
21 *Instruments Act 2003* if the declaration is made under
22 subsection (3)).
- 23 (7) In a prosecution for an offence to which subsection (6) applies, the
24 prosecution must prove that paragraph (6)(a) or (b) was complied
25 with before the conduct occurred.

26 **164 Exemptions and modifications by the regulations**

- 27 The regulations may:
- 28 (a) exempt a person or class of persons from all or specified
29 provisions to which this Part applies; or
30 (b) exempt a credit contract or a class of credit contracts from all
31 or specified provisions to which this Part applies; or
32 (c) exempt a consumer lease or a class of consumer leases from
33 all or specified provisions to which this Part applies; or

Chapter 3 Responsible lending conduct

Part 3-7 Exemptions and modifications relating to this Chapter

Division 2 Exemptions and modifications relating to this Chapter

Section 164

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(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.

1

Chapter 4—Remedies

2

Part 4-1—Civil penalty provisions

3

Division 1—Introduction

4

165 Guide to this Part

5

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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.

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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.

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Division 3 has general provisions relating to civil penalty provisions, including rules about evidence and procedure.

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Chapter 4 Remedies

Part 4-1 Civil penalty provisions

Division 2 Declarations and pecuniary penalty orders for contraventions of civil penalty provisions

Section 166

1

2 **Division 2—Declarations and pecuniary penalty orders for**
3 **contraventions of civil penalty provisions**

4 **166 Declaration of contravention of civil penalty provision**

5 *Application for declaration of contravention*

- 6 (1) Within 6 years of a person contravening a civil penalty provision,
7 ASIC may apply to the court for a declaration that the person
8 contravened the provision.

9 *Declaration of contravention*

- 10 (2) The court must make the declaration if it is satisfied that the person
11 has contravened the provision.
- 12 (3) The declaration must specify the following:
13 (a) the court that made the declaration;
14 (b) the civil penalty provision that was contravened;
15 (c) the person who contravened the provision;
16 (d) the conduct that constituted the contravention.

17 *Declaration of contravention conclusive evidence*

- 18 (4) The declaration is conclusive evidence of the matters referred to in
19 subsection (3).

20 **167 Court may order person to pay pecuniary penalty for**
21 **contravening civil penalty provision**

22 *Application for order*

- 23 (1) Within 6 years of a person contravening a civil penalty provision,
24 ASIC may apply to the court for an order that the person pay the
25 Commonwealth a pecuniary penalty.

Section 167

1 *Court may order person to pay pecuniary penalty*

2 (2) If a declaration has been made under section 166 that the person
3 has contravened the provision, the court may order the person to
4 pay to the Commonwealth a pecuniary penalty that the court
5 considers is appropriate (but not more than the amount specified in
6 subsection (3)).

7 *Determining amount of pecuniary penalty*

8 (3) The pecuniary penalty must not be more than:
9 (a) if the person is a natural person—the maximum number of
10 penalty units referred to in the civil penalty provision; or
11 (b) if the person is a body corporate, a partnership or multiple
12 trustees—5 times the maximum number of penalty units
13 referred to in the civil penalty provision.

14 Note: This Act treats partnerships and multiple trustees as if they were
15 persons (see sections 14 and 15).

16 *Recovery of penalty as a debt*

17 (4) The pecuniary penalty may be recovered as a debt due to the
18 Commonwealth.

Section 168

1

2 **Division 3—General provisions relating to civil penalty**
3 **provisions**

4 **168 Contravening a civil penalty provision is not an offence**

5 A contravention of a civil penalty provision is not an offence.

6 **169 Involvement in contravention treated in same way as actual**
7 **contravention**

8 A person who is involved in a contravention of a civil penalty
9 provision is taken to have contravened that provision.

10 **170 Civil evidence and procedure rules for proceedings relating to**
11 **civil penalty provisions**

12 The court must apply the rules of evidence and procedure for civil
13 matters when hearing proceedings relating to a contravention, or
14 proposed contravention, of a civil penalty provision.

15 **171 Criminal proceedings before civil proceedings**

16 The court must not make a declaration of contravention or a
17 pecuniary penalty order against a person for a contravention of a
18 civil penalty provision if the person has been convicted of an
19 offence constituted by conduct that is substantially the same as the
20 conduct constituting the contravention.

21 **172 Criminal proceedings during civil proceedings**

22 (1) Proceedings for a declaration of contravention or a pecuniary
23 penalty order against a person for a contravention of a civil penalty
24 provision are stayed if:

25 (a) criminal proceedings are brought or have already been
26 brought against the person for an offence; and

1 (b) the offence is constituted by conduct that is substantially the
2 same as the conduct in relation to which the declaration or
3 order would be made.

4 (2) The proceedings for the declaration or order may be resumed if the
5 person is not convicted of the offence. Otherwise, the proceedings
6 for the declaration or order are dismissed.

7 **173 Criminal proceedings after civil proceedings**

8 Criminal proceedings may be brought against a person for conduct
9 that is substantially the same as conduct constituting a
10 contravention of a civil penalty provision regardless of whether a
11 declaration of contravention or a pecuniary penalty order has been
12 made against the person under this Division.

13 **174 Evidence given in proceedings for pecuniary penalty not** 14 **admissible in criminal proceedings**

15 (1) Evidence of information given, or evidence of production of
16 documents, by a natural person is not admissible in criminal
17 proceedings against the natural person if:

18 (a) the natural person previously gave the information or
19 produced the documents in proceedings for a declaration of
20 contravention or a pecuniary penalty order against the natural
21 person for a contravention of a civil penalty provision
22 (whether or not the declaration or order was made); and

23 (b) the conduct alleged to constitute the offence is substantially
24 the same as the conduct in relation to which the declaration
25 or order was sought.

26 (2) However, this does not apply to criminal proceedings in relation to
27 the falsity of the evidence given by the natural person in the
28 proceedings for the declaration or order.

29 **175 Civil double jeopardy**

30 If a person is ordered to pay a pecuniary penalty under a civil
31 penalty provision in relation to particular conduct, the person is not
32 liable to be ordered to pay a pecuniary penalty under some other

Chapter 4 Remedies

Part 4-1 Civil penalty provisions

Division 3 General provisions relating to civil penalty provisions

Section 175

1 provision of a law of the Commonwealth in relation to that
2 conduct.

3 Note: A court may make other orders, such as an order for compensation, in
4 relation to particular conduct even if the court has made a pecuniary
5 penalty order in relation to that conduct (see section 184).

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

3 **Division 1—Introduction**

4 **176 Guide to this Part**

5

This Part is about the remedies the court may grant.

6

Division 2 authorises the court to grant a range of remedies,
7 including injunctions, compensation orders and other orders
8 against those who engage in credit activities unlawfully.

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2 **Division 2—Power of the court to grant remedies**

3 **177 Injunctions**

4

(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:

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(a) a contravention of this Act; or

8

(b) attempting to contravene this Act; or

9

(c) aiding, abetting, counselling or procuring a person to contravene this Act; or

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11

(d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or

12

13

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or

14

15

(f) conspiring with others to contravene this Act;

16

the court may grant an injunction on such terms as the court considers appropriate.

17

18

(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).

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(3) The court may, if the court considers it appropriate, grant an interim injunction pending determination of an application under subsection (1).

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(4) The court may revoke or vary an injunction granted under subsection (1) or (3).

28

29

(5) The power of the court to grant an injunction restraining a person from engaging in conduct may be exercised:

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(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

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33

- 1 (b) whether or not the person has previously engaged in conduct
2 of that kind; and
3 (c) whether or not there is an imminent danger of substantial
4 damage to another person if the person engages in conduct of
5 that kind.
- 6 (6) The power of the court to grant an injunction requiring a person to
7 do an act or thing may be exercised:
8 (a) whether or not it appears to the court that the person intends
9 to refuse or fail again, or to continue to refuse or fail, to do
10 that act or thing; and
11 (b) whether or not the person has previously refused or failed to
12 do that act or thing; and
13 (c) whether or not there is an imminent danger of substantial
14 damage to another person if the person refuses or fails to do
15 that act or thing.
- 16 (7) If ASIC applies to the court for the grant of an injunction under
17 this section, the court must not require ASIC or another person, as
18 a condition of granting an interim injunction, to give an
19 undertaking as to damages.
- 20 (8) If the court has power under this section to grant an injunction
21 against a person, the court may, either in addition to or in
22 substitution for the grant of the injunction, order the person to pay
23 damages to another person.

24 **178 Compensation orders**

25 *Court may order person to pay compensation*

- 26 (1) The court may order a person (the *defendant*) to compensate
27 another person (the *plaintiff*) for loss or damage suffered by the
28 plaintiff if:
29 (a) the defendant has contravened a civil penalty provision or has
30 committed an offence against this Act (other than the
31 National Credit Code); and
32 (b) the loss or damage resulted from the contravention or
33 commission of the offence.
34 The order must specify the amount of compensation.
-

Chapter 4 Remedies

Part 4-2 Power of the court to grant remedies

Division 2 Power of the court to grant remedies

Section 179

1 *When order may be made*

- 2 (2) The court may make the order only if:
- 3 (a) the plaintiff or ASIC (on behalf of the plaintiff) applies for an
- 4 order under this section; and
- 5 (b) the application is made within 6 years of the day the cause of
- 6 action that relates to the contravention or commission of the
- 7 offence accrued.

8 *Applications for order*

- 9 (3) For the purposes of paragraph (2)(a), ASIC may make an
- 10 application on behalf of the plaintiff, but only if the plaintiff has
- 11 given consent in writing before the application is made.

12 *Recovery of compensation as a debt*

- 13 (4) If the court makes the order, the amount of compensation specified
- 14 in the order that is to be paid to the plaintiff may be recovered as a
- 15 debt due to the plaintiff.

16 **179 Other orders to compensate loss or damage**

17 *Court may make other orders to compensate loss or damage*

- 18 (1) If:
- 19 (a) a person (the *defendant*) has contravened a civil penalty
- 20 provision or has committed an offence against this Act (other
- 21 than the National Credit Code); and
- 22 (b) another person (the *plaintiff*) has suffered, or is likely to
- 23 suffer, loss or damage as a result of the contravention or
- 24 commission of the offence;
- 25 the court may make such order as the court considers appropriate
- 26 against the defendant to:
- 27 (c) compensate the plaintiff, in whole or in part, for the loss or
- 28 damage; or
- 29 (d) prevent or reduce the loss or damage suffered, or likely to be
- 30 suffered, by the plaintiff.

- 1 (2) Without limiting subsection (1), examples of orders the court may
2 make include:
- 3 (a) an order declaring the whole or any part of a contract, deed or
4 arrangement made between the defendant and the plaintiff to
5 be void and, if the court considers it appropriate, to have been
6 void from the time it was entered or at all times on and after a
7 specified day before the order is made; and
- 8 (b) an order varying such a contract, deed or arrangement in such
9 manner as is specified in the order and, if the court considers
10 it appropriate, declaring the contract, deed or arrangement to
11 have had effect as so varied on and after a specified day
12 before the order is made; and
- 13 (c) an order refusing to enforce any or all of the terms of such a
14 contract, deed or arrangement; and
- 15 (d) an order directing the defendant to refund money or return
16 property to the plaintiff; and
- 17 (e) an order directing the defendant to pay to the plaintiff the
18 amount of loss or damage the plaintiff suffered; and
- 19 (f) an order directing the defendant, at the defendant's own
20 expense, to supply specified services to the plaintiff.

21 *When order may be made*

- 22 (3) The court may make the order only if:
- 23 (a) the plaintiff or ASIC (on behalf of the plaintiff) applies for an
24 order under this section; and
- 25 (b) the application is made within 6 years of the day the cause of
26 action that relates to the contravention or commission of the
27 offence accrued.

28 *Applications for order*

- 29 (4) For the purposes of paragraph (3)(a), ASIC may make an
30 application on behalf of the plaintiff, but only if the plaintiff has
31 given consent in writing before the application is made.

Section 180

1 *Recovery of amount as a debt*

- 2 (5) If the court makes an order that the defendant pay an amount
3 specified in the order to the plaintiff, the plaintiff may recover the
4 amount as a debt due to the plaintiff.

5 **180 Orders in relation to unlawful credit activities**

6 *Court may make orders in relation to unlawful credit activities*

- 7 (1) If:
- 8 (a) a person (the *defendant*) engages in a credit activity in
9 relation to another person (the *plaintiff*); and
- 10 (b) the engaging in the activity contravenes section 29 (which
11 requires the holding of licence);
- 12 the court may make such order as the court considers appropriate
13 against the defendant:
- 14 (c) to prevent the defendant from profiting from the plaintiff by
15 engaging in that activity; or
- 16 (d) to compensate the plaintiff, in whole or in part, for any loss
17 or damage suffered as a result of the defendant engaging in
18 that activity; or
- 19 (e) to prevent or reduce the loss or damage suffered, or likely to
20 be suffered, by the plaintiff as a result of the defendant
21 engaging in that activity.
- 22 (2) Without limiting subsection (1), examples of orders the court may
23 make include:
- 24 (a) an order declaring the whole or any part of a contract, deed or
25 arrangement made between the defendant and the plaintiff to
26 be void and, if the court considers it appropriate, to have been
27 void from the time it was entered or at all times on and after a
28 specified day before the order is made; and
- 29 (b) an order varying such a contract, deed or arrangement in such
30 manner as is specified in the order and, if the court considers
31 it appropriate, declaring the contract, deed or arrangement to
32 have had effect as so varied on and after a specified day
33 before the order is made; and

Section 181

- 1 (c) an order refusing to enforce any or all of the terms of such a
2 contract, deed or arrangement; and
3 (d) an order directing the defendant to refund money or return
4 property to the plaintiff; and
5 (e) an order directing the defendant to pay to the plaintiff the
6 amount of loss or damage the plaintiff suffered; and
7 (f) an order directing the defendant, at the defendant's own
8 expense, to supply specified services to the plaintiff.

9 *When order may be made*

- 10 (3) The court may make the order only if:
11 (a) the plaintiff or ASIC (on behalf of the plaintiff) applies for an
12 order under this section; and
13 (b) the application is made within 6 years of the day the cause of
14 action that relates to the contravention or commission of the
15 offence accrued.

16 *Applications for order*

- 17 (4) For the purposes of paragraph (3)(a), ASIC may make an
18 application on behalf of the plaintiff, but only if the plaintiff has
19 given consent in writing before the application is made.

20 *Recovery of amount as a debt*

- 21 (5) If the court makes an order that the defendant pay an amount
22 specified in the order to the plaintiff, the plaintiff may recover the
23 amount as a debt due to the plaintiff.

24 **181 Preference must be given to compensate consumers**

25 If the court considers that:

- 26 (a) it is appropriate to make a pecuniary penalty order against a
27 person in relation to a contravention of a civil penalty
28 provision or impose a fine against a person in relation to a
29 commission of an offence against this Act (other than the
30 National Credit Code); and

Section 182

- 1 (b) it is appropriate to make an order under 178, 179 or 180 that
2 the person pay compensation to a consumer who has suffered
3 loss or damage in relation to the contravention; and
4 (c) the person does not have sufficient financial resources to pay
5 both the pecuniary penalty or fine and the compensation;
6 the court must give preference to making the order for
7 compensation.

8 **182 Adverse publicity orders**

- 9 (1) The court may, on application by ASIC, make an adverse publicity
10 order against a person who has:
11 (a) contravened a civil penalty provision; or
12 (b) committed an offence against this Act.
- 13 (2) An *adverse publicity order* is an order that:
14 (a) requires a person to disclose, in the way and to the persons
15 specified in the order, such information as is so specified,
16 being information that the person has possession of or access
17 to; or
18 (b) requires a person to publish, at the person's expense and in
19 the way specified in the order, an advertisement in the terms
20 specified in, or determined in accordance with, the order.
- 21 (3) The court may make the order only if:
22 (a) ASIC applies for an order under this section; and
23 (b) the application is made within 6 years of the contravention or
24 the commission of the offence.

25 **183 Relief from liability for contravention of civil penalty provision**

- 26 (1) If:
27 (a) proceedings for a contravention of a civil penalty provision
28 are brought against a person; and
29 (b) in the proceedings it appears to the court that the person has,
30 or may have, contravened a civil penalty provision but that:
31 (i) the person has acted honestly; and
32 (ii) having regard to all the circumstances of the case, the
33 person ought fairly to be excused for the contravention;

Section 184

1 the court may relieve the person either wholly or partly from a
2 liability to which the person would otherwise be subject, or that
3 might otherwise be imposed on the person, because of the
4 contravention.

5 (2) If a person considers that proceedings for a contravention of a civil
6 penalty provision will or may be brought against the person, the
7 person may apply to the court for relief.

8 (3) On an application under subsection (2), the court may grant relief
9 under subsection (1) as if the proceedings had been begun in the
10 court.

11 **184 Multiple remedies may be granted**

12 To avoid doubt, the court may make an order under a provision of
13 this Act in addition to one or more orders under another provision
14 of this Act.

Section 185

1

2 **Part 4-3—Jurisdiction and procedure of courts**

3 **Division 1—Introduction**

4 **185 Guide to this Part**

5

This Part is about court jurisdiction and procedure.

6

Division 2 deals with civil proceedings. It confers jurisdiction on the Federal Court, the Federal Magistrates 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).

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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.

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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).

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2 **Division 2—Civil proceedings**

3 **Subdivision A—Application of this Division**

4 **186 Application of this Division**

- 5 (1) This Division applies to the exclusion of:
6 (a) the *Jurisdiction of Courts (Cross-vesting) Act 1987*; and
7 (b) section 39B of the *Judiciary Act 1903*.
- 8 (2) This Division does not limit the application of the provisions of the
9 *Judiciary Act 1903* (other than section 39B). In particular, it does
10 not limit the application of subsection 39(2) of that Act in relation
11 to matters arising under this Act.
- 12 (3) Nothing in this Division affects any other jurisdiction of any court.
- 13 (4) Despite anything else in this Division, jurisdiction is conferred on
14 the courts of a Territory only to the extent that the Constitution
15 permits.

16 **Subdivision B—Conferral of civil jurisdiction**

17 **187 Civil jurisdiction of courts**

- 18 (1) Jurisdiction is conferred on a court referred to in an item in the
19 following table in relation to civil matters arising under this Act,
20 subject to the limits on the court's jurisdiction (if any) specified in
21 the item:

22

Civil jurisdiction of courts

Item	Court on which civil jurisdiction is conferred	Limits of jurisdiction
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1	The Federal Court	No specified limits.
2	The Federal Magistrates Court	The court does not have jurisdiction to award an amount for loss or damage that exceeds:

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Civil jurisdiction of courts

Item	Court on which civil jurisdiction is conferred	Limits of jurisdiction
		(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.

1 (2) This section has effect subject to section 188.

2 **188 Jurisdiction—decisions to prosecute and related criminal justice**
3 **process decisions made by Commonwealth officers**

- 4 (1) If a decision to prosecute a person for an offence against this Act
5 has been made by an officer of the Commonwealth, and the
6 prosecution is proposed to be brought in a court of a State or
7 Territory:
- 8 (a) the Federal Court does not have jurisdiction in relation to any
9 matter in which a person seeks a writ of mandamus or
10 prohibition, or an injunction, against the officer in relation to
11 that decision; and
 - 12 (b) jurisdiction in relation to any such matter is conferred on the
13 Supreme Court of the State or Territory in which the
14 prosecution is proposed to be brought.
- 15 (2) Subject to subsection (4), at any time when:
- 16 (a) a prosecution for an offence against this Act is before a court
17 of a State or Territory; or
 - 18 (b) an appeal arising out of such a prosecution is before a court
19 of a State or Territory;
- 20 the following apply:
- 21 (c) the Federal Court does not have jurisdiction in relation to any
22 matter in which the person who is or was the defendant in the
23 prosecution seeks a writ of mandamus or prohibition, or an

- 1 injunction, against an officer of the Commonwealth in
2 relation to a related criminal justice process decision;
- 3 (d) jurisdiction in relation to any such matter is conferred on the
4 Supreme Court of the State or Territory in which the
5 prosecution or appeal is before a court.
- 6 (3) A ***related criminal justice process decision***, in relation to an
7 offence, means a decision (other than a decision to prosecute)
8 made in the criminal justice process in relation to the offence,
9 including:
- 10 (a) a decision in connection with the investigation, committal for
11 trial or prosecution of the defendant; and
- 12 (b) a decision in connection with the appointment of
13 investigators or inspectors for the purposes of such an
14 investigation; and
- 15 (c) a decision in connection with the issue of a warrant,
16 including a search warrant or a seizure warrant; and
- 17 (d) a decision requiring the production of documents, the giving
18 of information or the summoning of persons as witnesses;
19 and
- 20 (e) a decision in connection with an appeal arising out of the
21 prosecution.
- 22 (4) Subsection (2) does not apply if a person has applied for a writ of
23 mandamus or prohibition, or an injunction, against an officer of the
24 Commonwealth in relation to a related criminal justice process
25 decision before the commencement of a prosecution for an offence
26 against a law of the Commonwealth, or of a State or a Territory.
- 27 (5) If subsection (4) applies, the prosecutor may apply to the court for
28 a permanent stay of the proceedings referred to in that subsection
29 and the court may grant such a stay if the court determines that:
- 30 (a) the matters that are the subject of the proceedings are more
31 appropriately dealt with in the criminal justice process; and
- 32 (b) a stay of proceedings will not substantially prejudice the
33 person.
- 34 (6) Subsections (1), (2), (4) and (5) have effect despite anything in this
35 Act or in any other law. In particular:
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Section 189

- 1 (a) neither this Act, nor any other law, has the effect of giving
2 the Federal Court jurisdiction contrary to subsection (1) or
3 (2); and
4 (b) neither section 9 of the *Administrative Decisions (Judicial
5 Review) Act 1977*, nor any other law, has the effect of
6 removing from the Supreme Court of a State or Territory the
7 jurisdiction given to that court by subsection (1) or (2).

8 **189 Cross-jurisdictional appeals**

9 The following table has effect:

10

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 Magistrates Court.
2	the Federal Magistrates 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 Magistrates 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 Magistrates Court; (c) a court of a State; (d) a court of another Territory.
5	a court of the Northern Territory	(a) the Federal Court; (b) the Federal Magistrates Court; (c) a court of a State; (d) a court of another Territory.

1 **190 Courts to act in aid of each other**

2 All of the following must severally act in aid of, and be auxiliary
3 to, each other in civil matters arising under this Act:

- 4 (a) courts on which jurisdiction is conferred under this Division;
5 (b) officers of, or under the control of, those courts.

6 **Subdivision C—Transfers between courts**

7 **191 Transfers—application of Subdivision**

8 *Scope of Subdivision*

- 9 (1) This Subdivision applies if all the following conditions are
10 satisfied:

- 11 (a) proceedings in relation to a civil matter arising under this Act
12 are pending, or have come, before a court (the *transferring*
13 *court*) on which jurisdiction is conferred under this Division
14 in relation to the matter;
15 (b) jurisdiction is also conferred on another court (the *receiving*
16 *court*) under this Division in relation to either of the
17 following (the *transfer matter*):
18 (i) the entire proceedings;
19 (ii) an application in the proceedings;
20 (c) the receiving court has the power to grant the remedies
21 sought before the transferring court in relation to the transfer
22 matter.

23 *Transfers to which other legislation applies*

- 24 (2) This Subdivision does not apply to a transfer between the Federal
25 Court and the Federal Magistrates Court, except as provided by
26 paragraph 192(2)(b).

27 Note 1: Paragraph 192(2)(b) gives the Federal Magistrates Court the power to
28 transfer a matter to the Federal Court with a recommendation that the
29 Federal Court transfer the matter to another superior court.

30 Note 2: Transfers from the Federal Court are covered by section 32AB of the
31 *Federal Court of Australia Act 1976* and transfers from the Federal
32 Magistrates Court are covered by section 39 of the *Federal*
33 *Magistrates Act 1999*.

Section 192

1 **192 Transfers—exercise of transfer power**

2 *General rule*

- 3 (1) If section 193 (which deals with the criteria for transfers) is
4 satisfied, the transferring court may transfer to the receiving court:
5 (a) the transfer matter; and
6 (b) if the transferring court considers it necessary or
7 convenient—any related application (or all related
8 applications) in the proceedings.

9 *Cross-jurisdictional transfers between lower courts and superior*
10 *courts*

- 11 (2) However, if the transferring court is a lower court, and the
12 transferring court considers that section 193 is satisfied in relation
13 to the transfer of a matter referred to in subsection (1) of this
14 section to a receiving court that is a superior court other than the
15 relevant superior court:
16 (a) the transferring court does not have the power to transfer the
17 matter to that receiving court; but
18 (b) the transferring court may:
19 (i) transfer the matter to the relevant superior court; and
20 (ii) give the relevant superior court a recommendation that
21 the matter be transferred to that receiving court by the
22 relevant superior court.

23 **193 Transfers—criteria for transfer**

24 *General*

- 25 (1) The transferring court may make a transfer under section 192 only
26 if it appears to the transferring court, taking into account the
27 considerations covered by subsection (2) of this section, that:
28 (a) the transfer matter arises out of, or is related to, other
29 proceedings pending, or that have come, before the receiving
30 court; or
31 (b) it is otherwise in the interests of justice that the transfer
32 matter be determined by the receiving court.

1 *Relevant considerations*

- 2 (2) The considerations covered by this subsection include the
3 following:
- 4 (a) the principal location, or place of business, of the parties in
5 relation to the transfer matter;
 - 6 (b) where the event (or events) that are the subject of the transfer
7 matter took place;
 - 8 (c) if the transfer matter involves secured real property—the
9 jurisdiction in which the real property is located;
 - 10 (d) the desirability of related proceedings being heard in the
11 same State or Territory;
 - 12 (e) any relevant recommendation received under subsection
13 192(2);
 - 14 (f) the suitability (taking into account the considerations referred
15 to in paragraphs (a) to (e) and any other consideration) of
16 having the transfer matter determined by the receiving court.

17 **194 Transfers—how initiated**

18 A court may make a transfer under section 192:

- 19 (a) on the application of a party made at any stage; or
- 20 (b) at the court’s own initiative.

21 **195 Transfers—documents and procedure**

22 If the transferring court transfers proceedings or an application to
23 the receiving court under section 192:

- 24 (a) the Registrar (or other proper officer) of the transferring court
25 must give the Registrar (or other proper officer) of the
26 receiving court all documents filed in the transferring court in
27 relation to the proceedings or application; and
- 28 (b) the receiving court must proceed as if:
 - 29 (i) the proceedings or application had been originally
30 brought or made in the receiving court; and
 - 31 (ii) the same proceedings had been taken in the receiving
32 court as were taken in the transferring court.

Section 196

1 **196 Transfers—conduct of proceedings**

- 2 (1) Subject to any applicable rules of court, in dealing with the transfer
3 matter transferred to the court under section 192, the receiving
4 court must apply rules of evidence and procedure that:
5 (a) are applied in any superior court; and
6 (b) the court considers appropriate to be applied in the
7 circumstances.
- 8 (2) If proceedings are transferred under section 192 from the
9 transferring court to the receiving court, the receiving court must
10 deal with the proceedings as if, subject to any order of the
11 transferring court, the steps that had been taken for the purposes of
12 the proceedings in the transferring court (including the making of
13 an order), or similar steps, had been taken in the receiving court.

14 **197 Transfers—entitlement to practise as a lawyer**

- 15 (1) If proceedings (the *transferred proceedings*) in the transferring
16 court are transferred to the receiving court under section 192, a
17 person who is entitled to practise as a lawyer (however described)
18 in the transferring court has the same entitlements to practise in
19 relation to the matters covered by subsection (2) in the receiving
20 court that the person would have if the receiving court were a
21 federal court exercising federal jurisdiction.
- 22 (2) This subsection covers the following matters:
23 (a) the transferred proceedings;
24 (b) any other proceedings out of which the transferred
25 proceedings arise or to which the transferred proceedings are
26 related, if the other proceedings are to be determined together
27 with the transferred proceedings.

28 **198 Transfers—limitation on appeals**

- 29 An appeal does not lie from a decision of a court:
30 (a) in relation to the transfer of proceedings under section 192;
31 or
32 (b) as to which rules of evidence and procedure are to be applied
33 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 Magistrates Court for an order covered by subsection (2); and
- (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, guarantee or 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.
3	Subsection 38(7) of the National	the value of the credit contract,

Section 199

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) ...
	Credit Code	mortgage, guarantee or 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.
4	Section 74 of the National Credit Code	not applicable.
5	Section 75 of the National Credit Code	not applicable.
6	Section 76 of the National Credit Code	the value of the credit contract, mortgage, guarantee or 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.
7	Section 78 of the National Credit Code	the value of the credit contract, mortgage, guarantee or 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.
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, guarantee or consumer lease to which the order relates is not more than: (a) \$40,000; or (b) if a higher amount is prescribed

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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.
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 by the regulations—that higher amount.
12	Section 108 of the National Credit Code	the value of the credit contract, mortgage, guarantee or 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.
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.

- 1 (3) The *value of a credit contract, mortgage, guarantee or consumer*
 2 *lease* is:
 3 (a) worked out in accordance with the regulations; or
 4 (b) if there are no regulations in force for the purposes of
 5 paragraph (a):

Section 199

- 1 (i) for a credit contract—the amount of credit that has been,
2 or may be, provided under the contract; and
3 (ii) for a mortgage—the amount of credit that has been, or
4 may be, provided under the credit contract to which the
5 mortgage relates; and
6 (iii) for a guarantee—the amount of credit that has been, or
7 may be, provided under the credit contract to which the
8 guarantee relates; and
9 (iv) for a consumer lease—the amount payable under the
10 consumer lease, as referred to in paragraph 170(1)(b) of
11 the National Credit Code.

12 *Court may make ancillary or consequential orders*

- 13 (4) To avoid doubt, the court may make any ancillary or consequential
14 orders it considers appropriate in relation to the orders made under
15 the provisions referred to in subsection (2). The limits referred to in
16 column 3 of the table do not apply to those ancillary or
17 consequential orders.

18 *Procedure*

- 19 (5) In small claims proceedings, the court is not bound by any rules of
20 evidence and procedure and may act:
21 (a) in an informal manner; and
22 (b) without regard to legal forms and technicalities.
- 23 (6) At any stage of the small claims proceedings, the court may amend
24 the papers commencing the proceedings if sufficient notice is given
25 to any party adversely affected by the amendment.

26 *Legal representation*

- 27 (7) A party to small claims proceedings may be represented in the
28 proceedings by a lawyer only with the leave of the court.
- 29 (8) If the court grants leave for a party to the proceedings to be
30 represented by a lawyer, the court may, if it considers appropriate,
31 do so subject to conditions designed to ensure that no other party is
32 unfairly disadvantaged.

- 1 (9) For the purposes of this section, a person is taken not to be
2 represented by a lawyer if the lawyer is an employee or officer of
3 the person.

4 **200 Costs only if proceedings brought vexatiously etc.**

- 5 (1) In proceedings that:
6 (a) are dealt with as small claims proceedings (see section 199);
7 or
8 (b) relate to section 74 or 96 of the National Credit Code (which
9 deal with hardship and postponement orders);
10 a party to the proceedings may be ordered by the court to pay costs
11 incurred by another party to the proceedings only in accordance
12 with subsection (2).
- 13 (2) The party may be ordered to pay the costs only if:
14 (a) the court is satisfied that the party brought the proceedings
15 vexatiously or without reasonable cause; or
16 (b) the court is satisfied that the party's unreasonable act or
17 omission caused the other party to incur the costs.

18 **201 Civil proceedings not to be stayed**

19 No civil proceedings under this Act are to be stayed merely
20 because the proceedings disclose, or arise out of, the commission
21 of an offence.

22 **202 Standard of proof in civil proceedings**

- 23 If, in proceedings (other than proceedings for an offence), it is
24 necessary to establish, or for the court to be satisfied, for any
25 purpose relating to a matter arising under this Act, that:
26 (a) a person has contravened a provision of this Act; or
27 (b) default has been made in complying with a provision of this
28 Act; or
29 (c) an act or omission was unlawful because of a provision of
30 this Act; or
31 (d) a person has been in any way, by act or omission, directly or
32 indirectly, knowingly concerned in or party to a

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Division 2 Civil proceedings

Section 202

1 contravention, or a default in complying with, a provision of
2 this Act;
3 it is sufficient if the matter referred to in paragraph (a), (b), (c) or
4 (d) is established, or the court is so satisfied on the balance of
5 probabilities.

1

2 **Division 3—Criminal proceedings**

3 **Subdivision A—Application of this Division**

4 **203 Application of this Division**

5 (1) This Division applies to the exclusion of sections 68, 70 and 70A
6 of the *Judiciary Act 1903*.

7 (2) However, this Division does not limit the application of the
8 provisions of the *Judiciary Act 1903* (other than sections 68, 70
9 and 70A). In particular, it does not limit the application of
10 subsection 39(2) of that Act in relation to criminal matters arising
11 under this Act.

12 (3) Despite anything else in this Division, jurisdiction is conferred on
13 the courts of a Territory only to the extent that the Constitution
14 permits.

15 **Subdivision B—Conferral of criminal jurisdiction**

16 **204 Criminal jurisdiction of courts**

17 *Cross-vesting of criminal jurisdiction of courts*

18 (1) Subject to this section, if a court of a State or Territory exercises
19 jurisdiction in relation to a matter covered by subsection (2) in
20 relation to offenders or persons (*State offenders*) charged with
21 offences against the laws of the State or Territory, the court has the
22 equivalent jurisdiction in relation to offenders or persons charged
23 with offences against this Act.

24 (2) The matters covered by this subsection are as follows:
25 (a) the summary conviction of State offenders;
26 (b) their examination and commitment for trial on indictment;
27 (c) their trial and conviction on indictment;
28 (d) their sentencing, punishment and release;

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- 1 (e) the liability to make reparation in connection with their
2 offences;
3 (f) the forfeiture of property in connection with their offences;
4 (g) the proceeds of their crimes;
5 (h) the hearing and determination of:
6 (i) proceedings connected with; or
7 (ii) appeals arising out of; or
8 (iii) appeals arising out of proceedings connected with;
9 any trial or conviction referred to in paragraph (a), (b) or (c),
10 or any matter of a kind referred to in paragraph (d), (e), (f) or
11 (g).

12 *Certain aspects of jurisdiction to be exercised only by magistrate*

- 13 (3) Only a magistrate may exercise the jurisdiction conferred by
14 subsection (1) in relation to the summary conviction, or
15 examination and commitment for trial, of any person.

16 *Person who pleads guilty to an indictable offence may be*
17 *sentenced or otherwise dealt with without trial*

- 18 (4) The jurisdiction conferred by subsection (1) includes jurisdiction in
19 accordance with provisions of a relevant criminal law of a State or
20 Territory, and:
21 (a) the reference in paragraph (2)(h) to “any trial or conviction”
22 includes a reference to any conviction or sentencing in
23 accordance with the provisions of a relevant criminal law;
24 and
25 (b) unless the contrary intention appears, a reference to
26 jurisdiction conferred by subsection (1) includes a reference
27 to such included jurisdiction.

- 28 (5) **Relevant criminal law** means a law providing that if, in
29 proceedings before a court, a person pleads guilty to a charge for
30 which the person could be prosecuted on indictment, the person
31 may be committed, to a court having jurisdiction to try offences on
32 indictment, to be sentenced or otherwise dealt with without being
33 tried in that last-mentioned court.

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- 1 (6) A person may be dealt with in accordance with a relevant criminal
2 law even if, apart from this section, the offence concerned:
3 (a) would be required to be prosecuted on indictment; or
4 (b) would be required to be prosecuted either summarily or on
5 indictment.

- 6 (7) For the purposes of the application of a relevant criminal law as
7 provided by subsection (4):
8 (a) a reference in that law to an indictable offence is taken to
9 include a reference to an offence that may be prosecuted on
10 indictment; and
11 (b) in order to determine the sentence that may be imposed on a
12 person by a court pursuant to the relevant criminal law, the
13 person is taken to have been prosecuted and convicted on
14 indictment in that court.

15 *Jurisdiction in relation to summary offences is unlimited*

- 16 (8) Subject to subsection (10), the jurisdiction conferred on a court of a
17 State or Territory by subsection (1) is conferred despite any limits
18 as to locality of the jurisdiction of that court under the law of that
19 State or Territory.

20 *Court may decline to exercise jurisdiction in relation to summary*
21 *offences*

- 22 (9) If:
23 (a) jurisdiction is conferred on a court of a State or Territory in
24 relation to the summary conviction of persons charged with
25 offences against this Act by subsection (1); and
26 (b) the court is satisfied that it is appropriate to do so, having
27 regard to all the circumstances (including the public interest);
28 the court may decline to exercise that jurisdiction in relation to an
29 offence committed in another State or Territory.

30 *Limits on jurisdiction in relation to indictable offences*

- 31 (10) The jurisdiction conferred on a court of a State or Territory by
32 subsection (1) in relation to:
33 (a) the examination and commitment for trial on indictment; and
-

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- 1 (b) the trial and conviction on indictment;
2 of offenders or persons charged with offences against this Act is
3 conferred only in relation to:
4 (c) offences committed outside Australia (not including the
5 coastal sea); and
6 (d) offences committed, begun or completed in the State or the
7 Territory concerned.

8 **205 Criminal proceedings—laws to be applied**

9 *Laws to be applied*

- 10 (1) Subject to this Division, the laws of a State or Territory in relation
11 to:
12 (a) the arrest and custody in the State or Territory of offenders or
13 persons charged with offences; and
14 (b) criminal procedure in the State or Territory in relation to such
15 persons; and
16 (c) the rules of evidence applied in criminal procedure in the
17 State or Territory in relation to such persons;
18 apply in the State or Territory, so far as they are applicable, to
19 persons who are charged with offences against this Act.

20 *Meaning of criminal procedure*

- 21 (2) **Criminal procedure** means the procedure for:
22 (a) the summary conviction; and
23 (b) the examination and commitment for trial on indictment; and
24 (c) the trial and conviction on indictment; and
25 (d) the hearing and determination of appeals arising out of any
26 such trial or conviction or out of any related proceedings;
27 of offenders or persons charged with offences, and includes the
28 procedure for holding accused persons to bail.

29 **206 Criminal proceedings—how taken**

- 30 (1) In any proceedings for an offence against this Act, any
31 information, charge, complaint or application may be laid or made
32 by:

- 1 (a) ASIC; or
2 (b) a delegate of ASIC; or
3 (c) another person authorised in writing by the Minister to bring
4 the proceedings.
- 5 (2) A delegation for the purposes of paragraph (1)(b), or an
6 authorisation for the purposes of paragraph (1)(c), may relate to all
7 offences, or to specified offences, against this Act.
- 8 (3) Nothing in this section affects the operation of the *Director of*
9 *Public Prosecutions Act 1983*.

10 **207 Certain persons to assist in prosecutions**

- 11 (1) If a prosecution in relation to an offence against this Act has been
12 brought, or ASIC is of the opinion that a prosecution in relation to
13 an offence against this Act ought to be brought, against a person
14 (the *defendant*), ASIC may:
15 (a) if the defendant is a natural person—require any person who
16 is or was a partner, employee or agent of the defendant; or
17 (b) if the defendant is a body corporate—require any person who
18 is or was an officer (within the meaning of the *Corporations*
19 *Act 2001*), employee or agent of the defendant;
20 to assist in the prosecution, and the person who is so required must
21 give all assistance in connection with the prosecution that that
22 person is reasonably able to give.
- 23 (2) A person commits an offence if:
24 (a) the person is subject to a requirement under subsection (1);
25 and
26 (b) the person engages in conduct; and
27 (c) the conduct contravenes the requirement.
- 28 Penalty: 5 penalty units.
- 29 (3) Subsection (2) is an offence of strict liability.
- 30 Note: For strict liability, see section 6.1 of the *Criminal Code*.
- 31 (4) For the purposes of subsection (2), it is a defence if the person:
32 (a) is the defendant; or

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1 (b) is or has been the defendant's lawyer.

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

4 (5) If a person (other than the defendant or a person who is, or has
5 been, the defendant's lawyer) does not comply with a requirement
6 under subsection (1), the court may, on the application of ASIC,
7 order the person to comply with the requirement within such time,
8 and in such manner, as the court orders.

9 (6) If ASIC makes a requirement under subsection (1) in writing, the
10 requirement is not a legislative instrument.

11 **208 Privilege against self-incrimination not available to bodies**
12 **corporate in criminal proceedings**

13 (1) In proceedings in a court when exercising jurisdiction in relation to
14 a criminal matter arising under this Act, a body corporate is not
15 entitled to refuse or fail to comply with a requirement:

16 (a) to answer a question or give information; or

17 (b) to produce a book or any other thing; or

18 (c) to do any other act whatever;

19 on the ground that the answer or information, production of the
20 book or other thing, or doing that other act might tend:

21 (d) to incriminate the body (whether in relation to an offence to
22 which the proceedings relate or otherwise); or

23 (e) to make the body liable to a penalty (whether in relation to
24 anything to which the proceedings relate or otherwise).

25 (2) Subsection (1) applies whether or not the body concerned is a
26 defendant in the proceedings or in any other proceedings.

1

2 **Division 4—Proceedings generally**

3 **209 ASIC’s power to intervene in proceedings**

- 4 (1) ASIC may intervene in any proceedings relating to a matter arising
5 under this Act.
- 6 (2) If ASIC intervenes in proceedings referred to in subsection (1),
7 ASIC is taken to be a party to the proceedings and, subject to this
8 Act, has all the rights, duties and liabilities of such a party.
- 9 (3) Without limiting subsection (2), ASIC may appear and be
10 represented in any proceedings in which it wishes to intervene
11 pursuant to subsection (1):
- 12 (a) by an ASIC staff member; or
 - 13 (b) by a natural person to whom, or by an officer or employee of
14 a person or body to whom or to which, ASIC has delegated
15 its functions and powers under this Act or such of those
16 functions and powers as relate to a matter to which the
17 proceedings relate; or
 - 18 (c) by a lawyer.

19 **210 Evidence of contravention**

- 20 For the purposes of this Act, a certificate that:
- 21 (a) purports to be signed by the Registrar or other proper officer
22 of an Australian court; and
 - 23 (b) states:
 - 24 (i) that a person was convicted by that court on a specified
25 day of a specified offence; or
 - 26 (ii) that a person charged before that court with a specified
27 offence was, on a specified day, found in that court to
28 have committed the offence but that the court did not
29 proceed to convict the person of the offence;
- 30 is, unless it is proved that the conviction was quashed or set aside,
31 or that the finding was set aside or reversed, as the case may be,
32 conclusive evidence:

Chapter 4 Remedies

Part 4-3 Jurisdiction and procedure of courts

Division 4 Proceedings generally

Section 211

- 1 (c) if subparagraph (b)(i) applies—that the person was convicted
2 of the offence on that day; and
3 (d) if the offence was constituted by a contravention of a
4 provision of a law—that the person contravened that
5 provision.

6 **211 Power of court to punish for contempt of court**

- 7 Nothing in a provision of this Act that provides:
8 (a) that a person must not contravene an order of the court; or
9 (b) that a person who contravenes an order of the court
10 contravenes a provision of this Act or commits an offence;
11 affects the powers of the court in relation to the punishment of
12 contempts of the court.

1

Chapter 5—Administration

2

Part 5-1—Registers relating to credit activities

3

Division 1—Introduction

4

212 Guide to this Part

5

6

This Part is about registers relating to credit activities that must be established and maintained by ASIC.

7

8

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.

9

10

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Section 213

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2 **Division 2—Registers relating to credit activities**

3 **213 Credit registers**

4 *ASIC must establish and maintain credit registers*

5 (1) ASIC must establish and maintain one or more registers (the *credit*
6 *registers*) relating to credit activities.

7 *How credit registers are to be maintained*

8 (2) The regulations may prescribe the way in which the credit registers
9 must be established or maintained, including the details that ASIC
10 must enter in the credit registers in relation to the following
11 persons:

12 (a) licensees;

13 (b) persons registered to engage in credit activities under the
14 Transitional Act;

15 (c) credit representatives of licensees or persons registered to
16 engage in credit activities under the Transitional Act;

17 (d) persons against whom a banning order or disqualification
18 order is made under Part 2-4;

19 (e) persons who are banned from engaging in a credit activity
20 under a law of a State or Territory;

21 (f) any other persons prescribed by the regulations.

22 (3) Without limiting subsection (2), the credit registers:

23 (a) may be maintained in an electronic form; and

24 (b) may be maintained as part of, or together with, any register in
25 relation to financial services maintained under section 922A
26 of the *Corporations Act 2001*.

27 *Credit register is not a legislative instrument*

28 (4) A credit register established under this section is not a legislative
29 instrument.

1 **214 Inspection and public availability of credit registers**

- 2 (1) A person may inspect the credit registers and may make copies of,
3 or take extracts from, them.
- 4 (2) ASIC may make the credit registers, or any part of them, available
5 to the public on its website or by other means.
- 6 (3) Any disclosure necessary for the purposes of this section is
7 authorised by this section.

Section 215

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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).

1

2 **Division 2—Lodgment of documents with ASIC**

3 **216 When documents are lodged with ASIC**

- 4 (1) A document is *lodged with ASIC* under this Act if the document:
5 (a) is transmitted to ASIC in an electronic format approved by
6 ASIC; or
7 (b) if ASIC approves another manner for the lodgment of a
8 document with ASIC—is given to ASIC in that manner.

- 9 (2) However, a document is not *lodged with ASIC* under this Act if
10 ASIC refuses to receive the document under subsection 218(1).

11 Note: Subsection 232(3) provides for when a compliance certificate under
12 section 53 is taken not to be lodged with ASIC.

- 13 (3) If a document is lodged with ASIC, then any other material that is
14 lodged with the document as required by this Act or an approved
15 form is taken to be included in that document.

16 Note: For example, this subsection means that a person will contravene
17 section 225 if the person makes a false or misleading statement in the
18 other material.

19 **217 Approved forms for documents to be lodged with ASIC**

- 20 (1) A document that this Act requires to be lodged with ASIC in an
21 approved form must, if ASIC has approved a form for the
22 document:
23 (a) be in the approved form; and
24 (b) include the information, statements, explanations or other
25 matters required by the form; and
26 (c) be accompanied by any other material required by the form.

- 27 (2) If:
28 (a) this Act requires a document to be lodged with ASIC in an
29 approved form; and
30 (b) a provision of this Act either specifies, or provides for
31 regulations to prescribe, information, statements,
32 explanations or other matters that must be included in the

Section 218

1 document, or other material that must accompany the
2 document;
3 that other provision is not taken to exclude or limit the operation of
4 subsection (1) in relation to the approved form (and so the
5 approved form may also require information etc. to be included in
6 the form or material to accompany the form).

7 **218 ASIC may refuse to receive document etc.**

8 *ASIC may refuse to receive document etc.*

- 9 (1) If ASIC considers that a document submitted to ASIC for lodgment
10 under this Act:
- 11 (a) contains matter contrary to law; or
 - 12 (b) contains matter that, in a material particular, is false or
13 misleading in the form or context in which it is included; or
 - 14 (c) is incomplete; or
 - 15 (d) contravenes this Act; or
 - 16 (e) contains an error, alteration or erasure;

17 ASIC may refuse to receive the document and may make a request
18 under subsection (2).

19 Note: The effect of ASIC refusing to receive the document is that the
20 document is not lodged with ASIC (see subsection 216(2)).

- 21 (2) For the purposes of subsection (1), ASIC may request:
- 22 (a) that the document be appropriately amended or completed
23 and resubmitted; or
 - 24 (b) that a fresh document be submitted in its place; or
 - 25 (c) if the document is incomplete—that a supplementary
26 document in the approved form be lodged.

27 *Notice to provide further document or information*

- 28 (3) ASIC may give a written notice to a person who submits a
29 document (the *first document*) for lodgment under this Act,
30 requiring the person to:
- 31 (a) give to ASIC any other document; or
 - 32 (b) give to ASIC any information;

1 that ASIC considers necessary in order to form an opinion as to
2 whether it may refuse to receive the first document.

3 *Notice must specify day by which person must comply*

4 (4) The notice must specify the day by which the person must comply
5 with the notice (which must be a reasonable period after the notice
6 is given). ASIC may extend the day by giving a written notice to
7 the person.

8 *Requirement to comply with notice*

9 (5) The person must comply with the notice within the time specified
10 in the notice.

11 Civil penalty: 2,000 penalty units.

12 *Strict liability offence*

13 (6) A person commits an offence if:
14 (a) the person is subject to a requirement under subsection (5);
15 and
16 (b) the person engages in conduct; and
17 (c) the conduct contravenes the requirement.

18 Criminal penalty: 50 penalty units, or 1 year imprisonment, or
19 both.

20 (7) Subsection (6) is an offence of strict liability.

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

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2 **Division 3—ASIC's register of documents**

3 **219 Register of documents lodged with ASIC**

4 *ASIC may maintain document registers*

- 5 (1) ASIC may establish and maintain one or more registers (the
6 **document registers**) of documents that have been lodged with
7 ASIC under this Act.

8 *How document registers to be maintained*

- 9 (2) ASIC may establish and maintain the document registers in any
10 form it considers appropriate.
- 11 (3) Without limiting subsection (2), the document registers may be
12 maintained in an electronic form.

13 *No entitlement to inspect document registers*

- 14 (4) ASIC is not required to:
- 15 (a) permit persons to inspect the document registers, or make
16 copies of, or take extracts from, the document registers; or
17 (b) make any part of the document registers available to the
18 public.

19 *Document register is not a legislative instrument*

- 20 (5) A document register established under this section is not a
21 legislative instrument.

22 **220 ASIC may require person to give information for document**
23 **registers**

24 *Notice to person to give information*

- 25 (1) If information about a person is included on the document
26 registers, ASIC may, at any time, give the person a written notice
27 requiring the person to give to ASIC specified information about

Section 221

1 the person, being information of the kind included on the document
2 registers.

3 *Notice must specify day by which person must comply*

4 (2) The notice must specify the day by which the person must comply
5 with the notice (which must be a reasonable period after the notice
6 is given). ASIC may extend the day by giving a written notice to
7 the person.

8 *Requirement to comply with notice*

9 (3) The person must comply with the notice within the time specified
10 in the notice.

11 Civil penalty: 2,000 penalty units.

12 *Strict liability offence*

13 (4) A person commits an offence if:
14 (a) the person is subject to a requirement under subsection (3);
15 and
16 (b) the person engages in conduct; and
17 (c) the conduct contravenes the requirement.

18 Criminal penalty: 50 penalty units, or 1 year imprisonment, or
19 both.

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

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

22 **221 Written document setting out information from document**
23 **registers is prima facie evidence of matters**

24 (1) ASIC may, by using a mechanical, electronic or other device for
25 processing data, prepare a written document that sets out
26 information obtained by ASIC from the document registers.

27 (2) In proceedings in a court, a written document that purports to be a
28 document prepared by ASIC under subsection (1) is admissible as
29 prima facie evidence of the matters in the document.

Chapter 5 Administration

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

Division 3 ASIC's register of documents

Section 221

- 1 (3) A written document need not be certified by ASIC, or signed, in
2 order to be taken to purport to have been prepared by ASIC.

1

2 **Division 4—Other provisions relating to documents lodged**
3 **with ASIC or required under this Act**

4 **222 Certified copy or extract of document lodged with ASIC is**
5 **admissible in evidence**

- 6 (1) In proceedings in a court, a copy of, or extract from, any document
7 lodged with ASIC under this Act, and certified by ASIC, is
8 admissible in evidence as of equal validity with the original
9 document.
- 10 (2) The reference in subsection (1) to a document includes, if a copy of
11 that document has been included in the document register by
12 ASIC, a reference to that copy.

13 **223 ASIC may destroy or dispose of certain documents**

14 ASIC may destroy or otherwise dispose of any document that is
15 lodged with ASIC under this Act if:

- 16 (a) ASIC considers that it is no longer necessary or desirable to
17 retain it; and
- 18 (b) either of the following apply:
- 19 (i) it has been in ASIC's possession for the period
20 prescribed by the regulations;
- 21 (ii) a copy of the document has been included in the
22 document register.

23 **224 Court may order lodgment of document etc.**

- 24 (1) If a person has failed to comply with:
- 25 (a) any provision of this Act that requires the lodgment of any
26 document with ASIC; or
- 27 (b) any request of ASIC under subsection 218(2) (which deals
28 with requests to resubmit documents etc.);
- 29 ASIC may give the person a written notice requiring the person to
30 comply with the requirement or request within 14 days.

Chapter 5 Administration

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

Division 4 Other provisions relating to documents lodged with ASIC or required under this Act

Section 225

- 1 (2) If the person does not comply with the notice within 14 days, the
2 court may, on an application by ASIC, make an order directing the
3 person to comply with the requirement or request.
- 4 (3) The order may provide that all costs of and incidental to the
5 application are to be borne by one or more of the following:
- 6 (a) the person;
- 7 (b) if the person is a body corporate—a director, secretary or
8 senior manager of the body corporate who is responsible for
9 the failure to comply;
- 10 (c) if the person is a partnership or the trustees of a trust—a
11 partner or trustee who is responsible for the failure to
12 comply.

225 Offences relating to documents lodged with ASIC etc.

Documents this section applies to

- 14
- 15 (1) This section applies to the following documents:
- 16 (a) any document required under or for the purposes of this Act;
- 17 (b) any document lodged with or submitted to ASIC under or for
18 the purposes of this Act.

Requirement where person knows matter is false or misleading

- 19
- 20 (2) A person must not:
- 21 (a) make, or authorise the making of, a statement in the
22 document if the person knows, or is reckless as to whether,
23 the statement:
- 24 (i) is false in a material particular or materially misleading;
25 or
- 26 (ii) has omitted from it a matter or thing the omission of
27 which renders the document materially misleading; or
- 28 (iii) is based on information that is false in a material
29 particular or materially misleading, or has omitted from
30 it a matter or thing the omission of which renders the
31 document materially misleading; or
- 32 (b) omit, or authorise the omission of, a matter from the
33 document if the person knows, or is reckless as to whether,

Section 225

1 without the matter, the document is false in a material
2 particular or materially misleading.

3 Civil penalty: 2,000 penalty units.

4 *Offences*

5 (3) A person commits an offence if:

6 (a) the person makes, or authorises the making of, a statement in
7 the document; and

8 (b) the person knows that the statement:

9 (i) is false in a material particular or materially misleading;
10 or

11 (ii) has omitted from it a matter or thing the omission of
12 which renders the document materially misleading; or

13 (iii) is based on information that is false in a material
14 particular or materially misleading, or has omitted from
15 it a matter or thing the omission of which renders the
16 document materially misleading.

17 Criminal penalty: 200 penalty units, or imprisonment for 5
18 years, or both.

19 (4) A person commits an offence if:

20 (a) the person omits, or authorises the omission of, a matter from
21 the document; and

22 (b) the person knows that, without the matter, the document is
23 false in a material particular or materially misleading.

24 Criminal penalty: 200 penalty units, or imprisonment for 5
25 years, or both.

26 *Requirement to take reasonable steps*

27 (5) A person must take reasonable steps to ensure that the person does
28 not:

29 (a) make, or authorise the making of, a statement in the
30 document that:

31 (i) is false in a material particular or materially misleading;
32 or

Chapter 5 Administration

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

Division 4 Other provisions relating to documents lodged with ASIC or required under this Act

Section 225

- 1 (ii) has omitted from it a matter or thing the omission of
2 which renders the document materially misleading; or
3 (iii) is based on information that is false in a material
4 particular or materially misleading, or has omitted from
5 it a matter or thing the omission of which renders the
6 document materially misleading; or
7 (b) omit, or authorise the omission of, a matter from the
8 document, without which the document is false in a material
9 particular or materially misleading.

10 Civil penalty: 2,000 penalty units.

11 *Offence*

- 12 (6) A person commits an offence if:
13 (a) the person is subject to a requirement under subsection (5);
14 and
15 (b) the person engages in conduct; and
16 (c) the conduct contravenes the requirement.

17 Criminal penalty: 5 penalty units.

- 18 (7) Subsection (6) is an offence of strict liability.

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

20 *Approval of document taken to be authorisation*

- 21 (8) For the purposes of this section, if a person votes in favour of a
22 resolution approving, or otherwise approves, the document, the
23 person is taken to have authorised:
24 (a) the making of any statement in the document; and
25 (b) the omission of any matter from the document.

1

2 **Part 5-3—Concealment or falsification of credit**
3 **books**

4 **Division 1—Introduction**

5 **226 Guide to this Part**

6

This Part deals with the concealment or falsification of credit books.

7

8

Division 2 includes requirements not to conceal or falsify credit books, and a requirement to take precautions against the falsification of credit books.

9

10

Section 227

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2 **Division 2—Prohibitions relating to the concealment or**
3 **falsification of credit books**

4 **227 Concealing etc. of credit books**

5 *Prohibition on concealing credit books etc.*

- 6 (1) A person must not:
7 (a) conceal, destroy, mutilate or alter a credit book; or
8 (b) send a credit book out of this jurisdiction.

9 Civil penalty: 2,000 penalty units.

10 *Offence*

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

16 Criminal penalty: 50 penalty units, or 6 months imprisonment,
17 or both.

18 *Defence*

- 19 (3) For the purposes of subsections (1) and (2), it is a defence if the
20 person did not act with intent to:
21 (a) defraud; or
22 (b) prevent, delay or obstruct the carrying out of an examination,
23 investigation or audit, or the exercise of a power, under this
24 Act.

25 Note: For the purposes of subsection (2), a defendant bears an evidential
26 burden in relation to the matter in subsection (3) (see subsection
27 13.3(3) of the *Criminal Code*).

1 *Meaning of credit book*

2 (4) **Credit book** means:

- 3 (a) a book (by whatever name it is known) that this Act requires
4 to be kept; or
5 (b) a document that is:
6 (i) prepared; or
7 (ii) lodged with or submitted to ASIC; or
8 (iii) given to a person;
9 under, or for the purposes of, this Act; or
10 (c) a book relating to the credit activities engaged in by a
11 licensee or a credit representative; or
12 (d) a financial record.

13 **228 Falsification of credit books**

14 *Requirements in relation to falsification of credit books*

15 (1) A person must not engage in conduct that results in the falsification
16 of a credit book.

17 Civil penalty: 2,000 penalty units.

18 *Offence*

19 (2) A person commits an offence if:

- 20 (a) the person engages in conduct; and
21 (b) the conduct results in the falsification of a credit book.

22 Criminal penalty: 50 penalty units, or 6 months imprisonment,
23 or both.

24 *Defence*

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

- 26 (a) the person acted honestly; and
27 (b) in all the circumstances, the act or omission constituting the
28 offence should be excused.

Chapter 5 Administration

Part 5-3 Concealment or falsification of credit books

Division 2 Prohibitions relating to the concealment or falsification of credit books

Section 229

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

4 **229 Precautions against falsification of credit books**

5 *Requirement to take precautions against falsification*

- 6 (1) A person who is required by this Act to keep a credit book must
7 take reasonable steps to:
8 (a) guard against the falsification of the credit book; and
9 (b) facilitate the discovery of any falsification of the credit book.

10 Civil penalty: 2,000 penalty units.

11 *Offence*

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

17 Criminal penalty: 50 penalty units, or 6 months imprisonment,
18 or both.

1

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

4 **Division 1—Introduction**

5 **230 Guide to this Part**

6

This Part deals with fees imposed by the *National Consumer
Credit Protection (Fees) Act 2009*.

7

8

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.

9
10

Section 231

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2 **Division 2—Fees imposed by the National Consumer**
3 **Credit Protection (Fees) Act 2009**

4 **231 Fees are payable to the Commonwealth**

5 The fees imposed under the *National Consumer Credit Protection*
6 *(Fees) Act 2009* in relation to this Act are payable to the
7 Commonwealth.

8 **232 Lodgment of document without payment of fee**

- 9 (1) This section applies where:
- 10 (a) a fee is payable under section 231 for the lodgment of a
11 document under this Act; and
- 12 (b) the document was submitted for lodgment without payment
13 of the fee.
- 14 (2) The document is not taken not to have been lodged merely because
15 of non-payment of the fee.
- 16 (3) Despite subsection (2), a compliance certificate that is required to
17 be lodged under section 53 is taken not to have been lodged until
18 the fee is paid.

19 **233 Doing act without payment of fee**

20 If a fee is payable under section 231 for a matter involving the
21 doing of an act by the Minister or ASIC under this Act, the
22 Minister or ASIC may refuse to do that act until the fee is paid.

23 **234 Effect of sections 232 and 233**

24 Sections 232 and 233 have effect despite anything in another Part
25 of this Act.

1 **235 Waiver and refund of fees**

2 Nothing in this Division or the *National Consumer Credit*
3 *Protection (Fees) Act 2009* prevents the Commonwealth from:

- 4 (a) waiving or reducing, in a particular case or in particular
5 classes of cases, fees that would otherwise be payable under
6 this Act; or
7 (b) refunding, in whole or in part, in a particular case or in
8 particular classes of cases, fees paid under this Act.

9 **236 Debts due to the Commonwealth**

10 ASIC may, on behalf of the Commonwealth, recover a debt due
11 under this Division.

12 **237 Payment of fee does not give right to inspect or search**

13 To avoid doubt, nothing in this Division, and nothing done under
14 this Division:

- 15 (a) imposes on ASIC a duty to allow the inspection or search of
16 a register or document, or to make available information; or
17 (b) confers a right to inspect or search a register or document or
18 to have information made available;

19 under this Act except so far as such a duty or right would, but for
20 the effect of section 233, exist under a provision of another Part of
21 this Act or under some other law.

Section 238

1

2 **Part 5-5—Other administrative matters**

3 **Division 1—Introduction**

4 **238 Guide to this Part**

5

6

This Part includes miscellaneous provisions relating to administrative matters.

1

2 **Division 2—Other administrative matters**

3 **239 ASIC has general administration of this Act**

4 Subject to the ASIC Act, ASIC has the general administration of
5 this Act.

6 **240 Obstructing or hindering ASIC etc.**

7 (1) A person must not engage in conduct that results in the obstruction
8 or hindering of ASIC, or any other person, in the performance of a
9 function or the exercise of a power under this Act.

10 Civil penalty: 2,000 penalty units.

11 (2) A person commits an offence if:

12 (a) the person engages in conduct; and

13 (b) the conduct results in the obstruction or hindering of ASIC,
14 or any other person, in the performance of a function or the
15 exercise of a power under this Act.

16 Criminal penalty: 100 penalty units, or imprisonment for 2
17 years, or both.

18 (3) For the purposes of subsections (1) and (2), it is a defence if the
19 person has a reasonable excuse.

20 Note: For the purposes of subsection (2), a defendant bears an evidential
21 burden in relation to the matter in subsection (3) (see subsection
22 13.3(3) of the *Criminal Code*).

23 **241 Approved codes of conduct**

24 (1) ASIC may, on application, approve codes of conduct that relate to
25 any aspect of the activities of:

26 (a) licensees; or

27 (b) credit representatives;

28 being activities in relation to which ASIC has a regulatory
29 responsibility. The approval must be in writing.

Section 242

- 1 (2) ASIC may, on application, approve a variation of an approved code
2 of conduct. The approval must be in writing.
- 3 (3) ASIC must not approve a code of conduct, or a variation of a code
4 of conduct, unless it is satisfied that:
- 5 (a) the code of conduct, or the code of conduct as proposed to be
6 varied, is not inconsistent with this Act or any other law of
7 the Commonwealth under which ASIC has regulatory
8 responsibilities; and
- 9 (b) it is appropriate to approve the code of conduct or variation,
10 having regard to the following matters:
- 11 (i) the ability of the applicant to ensure that persons who
12 hold out that they comply with the code of conduct will
13 comply with the code of conduct as in force from time
14 to time;
- 15 (ii) the desirability of codes of conduct being harmonised to
16 the greatest extent possible;
- 17 (iii) any other matter ASIC considers relevant.
- 18 (4) ASIC may revoke an approval of a code of conduct:
- 19 (a) on application by the person who applied for the approval; or
20 (b) if ASIC is no longer satisfied as referred to in subsection (3).
21 The revocation must be in writing.
- 22 (5) The following are legislative instruments:
- 23 (a) an approval of a code of conduct under subsection (1);
24 (b) an approval of a variation of a code of conduct under
25 subsection (2);
26 (c) a revocation of a code of conduct under subsection (4).

27 **242 ASIC may arrange for use of computer programs to make**
28 **decisions**

- 29 (1) ASIC may arrange for the use, under ASIC's control, of computer
30 programs for any purposes for which ASIC may make decisions
31 under this Act.

- 1 (2) A decision made by the operation of a computer program under an
2 arrangement made under subsection (1) is taken to be a decision
3 made by ASIC.

4 **243 Qualified privilege for information given to ASIC**

- 5 (1) A person has qualified privilege in relation to the giving of any
6 information to ASIC:
7 (a) that the person is required or expressly permitted to give
8 under this Act; or
9 (b) that relates to a contravention, or possible contravention, of
10 the credit legislation; or
11 (c) that relates to a matter that is relevant to a decision of ASIC
12 under:
13 (i) section 37 (which deals with when ASIC must grant a
14 licence); or
15 (ii) section 54 or 55 (which deal with ASIC's powers to
16 suspend or cancel licences); or
17 (iii) subsection 80(1) (which deals with ASIC's power to
18 make banning orders).
- 19 (2) A person who has qualified privilege under subsection (1) in
20 relation to conduct is also not liable for any action based on breach
21 of confidence in relation to that conduct.
- 22 (3) The protections given by this section to a person in relation to
23 conduct extend to representatives of the person.

24 **244 ASIC certificate is prima facie evidence of matters**

- 25 (1) ASIC may issue a certificate stating that a requirement of this Act
26 specified in the certificate:
27 (a) had or had not been complied with at a date or within a
28 period specified in the certificate; or
29 (b) had been complied with at a date specified in the certificate
30 but not before that date.
- 31 (2) In proceedings in a court, a certificate issued by ASIC under
32 subsection (1) is admissible as prima facie evidence of the matters
33 stated in the certificate.

Section 245

1 **245 Operator of approved external dispute resolution scheme may**
2 **give information to ASIC**

3 The operator of an approved external dispute resolution scheme
4 may give information to ASIC about:

- 5 (a) a person becoming a member of the scheme; or
6 (b) a person ceasing to be a member of the scheme.

1

Chapter 6—Compliance and enforcement

2

3

Part 6-1—Investigations

4

Division 1—Introduction

5

246 Guide to this Part

6

This Part is about investigations made by ASIC.

7

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.

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Division 2 also deals with reports about investigations.

1

2 **Division 2—Investigations**

3 **247 General powers of investigation**

- 4 (1) ASIC may make such investigation as it considers expedient for
5 the due administration of the Commonwealth credit legislation if it
6 has reason to suspect that there may have been committed:
7 (a) a contravention of the credit legislation; or
8 (b) a contravention of a law of the Commonwealth, or of a law of
9 a referring State or a Territory, being a contravention that:
10 (i) concerns the management, conduct or affairs of a
11 licensee, credit representative or other person who
12 engages, or has engaged, in a credit activity; or
13 (ii) involves fraud or dishonesty and relates to a credit
14 activity engaged in by a person, or a credit contract,
15 mortgage, guarantee or consumer lease.

16 **248 Minister may direct investigations**

- 17 (1) If, in the Minister's opinion, it is in the public interest in relation to
18 this jurisdiction for a particular matter to which subsection (2)
19 applies to be investigated, he or she may by writing direct ASIC to
20 investigate that matter.
- 21 (2) This subsection applies to a matter relating to any of the following:
22 (a) an alleged or suspected contravention of the Commonwealth
23 credit legislation;
24 (b) an alleged or suspected contravention of a law of the
25 Commonwealth, or a law of a referring State or a Territory,
26 being a contravention that:
27 (i) concerns the management, conduct or affairs of a
28 licensee, credit representative or other person who
29 engages, or has engaged, in a credit activity; or
30 (ii) involves fraud or dishonesty and relates to a credit
31 activity engaged in by a person, or a credit contract,
32 mortgage, guarantee or consumer lease;
33 (c) a credit activity engaged in by a person.

- 1 (3) ASIC must comply with a direction under subsection (1).
2 (4) A direction under subsection (1) does not prevent ASIC from
3 delegating a function or power.
4 (5) A direction under subsection (1) is not a legislative instrument.

5 **249 Interim report on investigation**

- 6 (1) If, in the course of an investigation under this Part, ASIC forms the
7 opinion that:
8 (a) a serious contravention of a law of the Commonwealth, or a
9 law of a referring State or a Territory, has been committed; or
10 (b) to prepare an interim report about the investigation would
11 enable or assist the protection, preservation or prompt
12 recovery of property; or
13 (c) there is an urgent need for the Commonwealth credit
14 legislation to be amended;
15 it must prepare an interim report that relates to the investigation
16 and sets out:
17 (d) if paragraph (a) applies—its findings about the contravention,
18 and the evidence and other material on which those findings
19 are based; or
20 (e) if paragraph (b) applies—such matters as, in its opinion, will
21 so enable or assist; or
22 (f) if paragraph (c) applies—its opinion about amendment of
23 that legislation, and its reasons for that opinion;
24 and such other matters relating to, or arising out of, the
25 investigation as it considers appropriate.
26 (2) ASIC may prepare an interim report about an investigation under
27 this Part and must do so if the Minister so directs.
28 (3) A report under subsection (2) must set out such matters relating to,
29 or arising out of, the investigation as ASIC considers appropriate
30 or the Minister directs.
31 (4) An interim report prepared under this section is not a legislative
32 instrument.

Section 250

1 **250 Final report on investigation**

- 2 (1) At the end of an investigation under section 247, ASIC may
3 prepare a report about the investigation and must do so if the
4 Minister so directs.
- 5 (2) At the end of an investigation under section 248, ASIC must
6 prepare a report about the investigation.
- 7 (3) A report under this section must set out:
8 (a) ASIC's findings about the matters investigated; and
9 (b) the evidence and other material on which those findings are
10 based; and
11 (c) such other matters relating to, or arising out of, the
12 investigation as ASIC considers appropriate or the Minister
13 directs.
- 14 (4) A direction under subsection (1) is not a legislative instrument.
- 15 (5) A report prepared under this section is not a legislative instrument.

16 **251 Distribution of report**

- 17 (1) As soon as practicable after preparing a report under this Part,
18 ASIC must give a copy of the report to the Minister.
- 19 (2) If a report, or part of a report, under this Part relates to a serious
20 contravention of a law of the Commonwealth, or a law of a
21 referring State or a Territory, ASIC may give a copy of the whole
22 or a part of the report to:
23 (a) the Australian Federal Police; or
24 (b) the Chief Executive Officer of the Australian Crime
25 Commission or a member of the staff of the ACC (within the
26 meaning of the *Australian Crime Commission Act 2002*); or
27 (c) the Director of Public Prosecutions; or
28 (d) an agency, authority, body or person prescribed by the
29 regulations.
- 30 (3) If a report, or part of a report, under this Part relates to a person's
31 affairs to a material extent, ASIC may, at the person's request or of

Section 251

- 1 its own motion, give to the person a copy of the report or of part of
2 the report.
- 3 (4) The Minister may cause the whole or a part of a report under this
4 Part to be printed and published.

Chapter 6 Compliance and enforcement

Part 6-2 Examination of persons

Division 1 Introduction

Section 252

1

2 **Part 6-2—Examination of persons**

3 **Division 1—Introduction**

4 **252 Guide to this Part**

5

This Part is about the examination of persons by ASIC.

6

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.

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Division 2 also includes rules relating to the procedure for examination of persons by ASIC.

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2 **Division 2—Examination of persons**

3 **253 Notice requiring appearance for examination**

4 (1) This section applies if ASIC, on reasonable grounds, suspects or
5 believes that a person can give information relevant to a matter that
6 it is investigating, or is to investigate, under Part 6-1.

7 (2) ASIC may, by written notice in the approved form given to the
8 person, require the person:

9 (a) to give to ASIC all reasonable assistance in connection with
10 the investigation; and

11 (b) to appear before a specified ASIC member or ASIC staff
12 member for examination on oath and to answer questions.

13 Note: Failure to comply with a requirement made under this subsection is an
14 offence (see section 290).

15 (3) A notice given under subsection (2) must:

16 (a) state the general nature of the matter referred to in
17 subsection (1); and

18 (b) set out the effect of subsection 257(1) and section 295.

19 **254 Proceedings at examination**

20 The remaining provisions of this Part apply if, pursuant to a
21 requirement made under section 253 for the purposes of an
22 investigation under Part 6-1, a person (the *examinee*) appears
23 before another person (the *inspector*) for examination.

24 **255 Requirements made of examinee**

25 (1) The inspector may examine the examinee on oath or affirmation
26 and may, for that purpose:

27 (a) require the examinee to either take an oath or make an
28 affirmation; and

29 (b) administer an oath or affirmation to the examinee.

30 Note: Failure to comply with a requirement made under this subsection is an
31 offence (see section 290).

Chapter 6 Compliance and enforcement

Part 6-2 Examination of persons

Division 2 Examination of persons

Section 256

1 (2) An offence under subsection 290(2) relating to subsection (1) of
2 this section is an offence of strict liability.

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

4 (3) The oath or affirmation to be taken or made by the examinee for
5 the purposes of the examination is an oath or affirmation that the
6 statements that the examinee will make will be true.

7 (4) The inspector may require the examinee to answer a question that
8 is put to the examinee at the examination and is relevant to a matter
9 that ASIC is investigating, or is to investigate, under Part 6-1.

10 Note: Failure to comply with a requirement made under this subsection is an
11 offence (see section 290).

12 **256 Examination to take place in private**

13 (1) The examination must take place in private and the inspector may
14 give directions about who may be present during it, or during a part
15 of it.

16 (2) A person must not be present at the examination unless he or she:

17 (a) is the inspector, the examinee or an ASIC member; or

18 (b) is an ASIC staff member approved by ASIC; or

19 (c) is entitled to be present by virtue of:

20 (i) a direction under subsection (1); or

21 (ii) subsection 257(1).

22 Criminal penalty: 10 penalty units, or 3 months imprisonment,
23 or both.

24 (3) Subsection (2) is an offence of strict liability.

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

26 **257 Examinee's lawyer may attend**

27 (1) The examinee's lawyer may be present at the examination and
28 may, at such times during it as the inspector determines:

29 (a) address the inspector; and

30 (b) examine the examinee;

Section 258

1 about matters about which the inspector has examined the
2 examinee.

3 (2) If, in the inspector's opinion, a person is trying to obstruct the
4 examination by exercising rights under subsection (1), the
5 inspector may require the person to stop addressing the inspector,
6 or examining the examinee, as the case requires.

7 Note: Failure to comply with a requirement made under this subsection is an
8 offence (see section 290).

9 (3) An offence under subsection 290(3) relating to subsection (2) of
10 this section is an offence of strict liability.

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

258 Record of examination

13 (1) The inspector may, and must if the examinee so requests, cause a
14 record to be made of statements made at the examination.

15 (2) If a record made under subsection (1) is in writing or is reduced to
16 writing:

17 (a) the inspector may require the examinee to read it, or to have
18 it read to him or her, and may require him or her to sign it;
19 and

20 (b) the inspector must, if requested in writing by the examinee to
21 give to the examinee a copy of the written record, comply
22 with the request without charge but subject to such conditions
23 (if any) as the inspector imposes.

24 Note: Failure to comply with a requirement made under this subsection is an
25 offence (see section 290).

26 (3) An offence under subsection 290(2) relating to paragraph (2)(a) of
27 this section is an offence of strict liability.

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

259 Giving to other persons copies of record

30 (1) ASIC may give a copy of a written record of the examination, or
31 such a copy together with a copy of any related book, to a person's
32 lawyer if the lawyer satisfies ASIC that the person is carrying on,

Section 260

1 or is contemplating in good faith, proceedings in relation to a
2 matter to which the examination related.

3 (2) If ASIC gives a copy to a person under subsection (1), the person,
4 or any other person who has possession, custody or control of the
5 copy or a copy of it, must not, except in connection with preparing,
6 beginning or carrying on, or in the course of, proceedings:

7 (a) use the copy or a copy of it; or

8 (b) publish, or communicate to a person, the copy, a copy of it,
9 or any part of the copy's contents.

10 Criminal penalty: 10 penalty units, or 3 months imprisonment,
11 or both.

12 (3) Subsection (2) is an offence of strict liability.

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

14 (4) ASIC may, subject to such conditions (if any) as it imposes, give to
15 a person a copy of a written record of the examination, or such a
16 copy together with a copy of any related book.

17 **260 Copies given subject to conditions**

18 (1) If a copy is given to a person under subsection 258(2) or 259(4)
19 subject to conditions, the person, and any other person who has
20 possession, custody or control of the copy or a copy of it, must
21 comply with the conditions.

22 Criminal penalty: 10 penalty units, or 3 months imprisonment,
23 or both.

24 (2) Subsection (1) is an offence of strict liability.

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

26 **261 Record to accompany report**

27 (1) If a report about the investigation referred to in section 254 is
28 prepared under section 250, each record (if any) of the examination
29 must accompany the report.

30 (2) If:

Section 261

- 1 (a) in ASIC's opinion, a statement made at an examination is
2 relevant to any other investigation under Part 6-1; and
3 (b) a record of the statement was made under section 258; and
4 (c) a report about the other investigation is prepared under
5 section 250;
6 a copy of the record must accompany the report.

Section 262

1

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

4 **Division 1—Introduction**

5 **262 Guide to this Part**

6

This Part is about powers of ASIC in relation to the inspection of books and gathering of information about audits.

7

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Division 2 includes powers of ASIC to inspect books, and to require persons to produce books or documents, or give information, in some circumstances.

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Division 2 also allows ASIC to seize books in certain circumstances, and sets out procedures to be followed in relation to such a seizure, including in relation to the granting of warrants.

12

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

4 **263 When certain powers may be exercised**

5 A power conferred by this Part (other than sections 264, 265, 269
6 and 270) may only be exercised:

- 7 (a) for the purposes of the performance or exercise of any of
8 ASIC's functions and powers under the Commonwealth
9 credit legislation; or
10 (b) for the purposes of ensuring compliance with the
11 Commonwealth credit legislation; or
12 (c) in relation to an alleged or suspected contravention of the
13 credit legislation; or
14 (d) in relation to a contravention of a law of the Commonwealth,
15 or of a law of a referring State or a Territory, being a
16 contravention that:
17 (i) concerns the management, conduct or affairs of a
18 licensee, credit representative or other person who
19 engages, or has engaged, in a credit activity; or
20 (ii) involves fraud or dishonesty and relates to a credit
21 activity engaged in by a person, or a credit contract,
22 mortgage, guarantee or consumer lease; or
23 (e) for the purposes of an investigation under Part 6-1.

24 **264 ASIC may inspect books without charge**

- 25 (1) A book that the Commonwealth credit legislation requires a person
26 to keep must be open for inspection (without charge) by a person
27 authorised in writing by ASIC.
28 (2) A person (the *authorised person*) authorised under this section
29 may require a person in whose possession, custody or control the
30 book is to make the book available for inspection by the authorised
31 person.

32 Note: Failure to comply with a requirement made under this subsection is an
33 offence (see section 290).

Section 265

1 (3) An offence under subsection 290(2) relating to subsection (2) of
2 this section is an offence of strict liability.

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

4 (4) An authorisation under this section may be of general application
5 or may be limited by reference to the books to be inspected.

6 **265 Notice to auditors concerning information and books**

7 (1) Subject to subsection (2), ASIC may give an auditor who prepares
8 an audit report required under the Commonwealth credit legislation
9 a written notice requiring the auditor:

10 (a) to give specified information; or

11 (b) to produce specified books;

12 to a specified ASIC member or ASIC staff member at a specified
13 place and time.

14 Note: Failure to comply with a requirement made under this subsection is an
15 offence (see section 290).

16 (2) The power in subsection (1) may only be exercised:

17 (a) for the purposes of ascertaining compliance with audit
18 requirements under the Commonwealth credit legislation; or

19 (b) in relation to an alleged or suspected contravention of audit
20 requirements under the Commonwealth credit legislation; or

21 (c) in relation to an alleged or suspected contravention of a law
22 of the Commonwealth, or of a law of a referring State or a
23 Territory, being a contravention that:

24 (i) concerns the management, conduct or affairs of a
25 licensee, credit representative or other person who
26 engages, or has engaged, in a credit activity; or

27 (ii) involves fraud or dishonesty and relates to a credit
28 activity engaged in by a person, or a credit contract,
29 mortgage, guarantee or consumer lease; or

30 (d) for the purposes of an investigation under Part 6-1 relating to
31 a contravention referred to in paragraph (b) or (c).

32 (3) Without limiting subsection (1), a notice under that subsection may
33 specify information or books that relate to any or all of the
34 following:

- 1 (a) the policies relating to audit that the auditor has adopted or
2 proposes to adopt, or the procedures relating to audit that the
3 auditor has put in place or proposes to put in place;
4 (b) audits the auditor has conducted or proposes to conduct or in
5 which the auditor has participated or proposes to participate;
6 (c) any other matter pertaining to audit that is prescribed by the
7 regulations for the purposes of this paragraph.
- 8 (4) Without limiting subsection (1), a notice under that subsection may
9 require the auditor to give information or produce books even if
10 doing so would involve a breach of an obligation of confidentiality
11 that the auditor owes an audited person.
- 12 (5) ASIC may, by written notice to an auditor who has received a
13 notice under subsection (1), extend the period within which the
14 auditor must give the information or produce the books to which
15 the notice under that subsection relates.

16 **266 Notice to produce books about credit activities**

17 ASIC may give to:

- 18 (a) a person who engages in a credit activity (either alone or
19 together with any other person or persons); or
20 (b) a person who, in ASIC's opinion, has been a party to
21 engaging in a credit activity; or
22 (c) a representative, banker, lawyer or auditor of a person
23 referred to in paragraph (a) or (b);
24 a written notice requiring the production to a specified ASIC
25 member or ASIC staff member, at a specified place and time, of
26 specified books relating to:
27 (d) a credit activity engaged in by a person; or
28 (e) the character or financial situation of, or a business carried on
29 by, a person who engages, or has engaged, in a credit
30 activity.

31 Note: Failure to comply with a requirement made under this subsection is an
32 offence (see section 290).

Section 267

1 **267 Notice to produce documents in person's possession**

2 (1) ASIC may give to a person (the *recipient*) a written notice
3 requiring the production to a specified ASIC member or ASIC staff
4 member, at a specified place and time, of specified books that are
5 in the recipient's possession, custody or control and relate to:

- 6 (a) affairs of a licensee, credit representative or other person who
7 engages, or has engaged, in a credit activity; or
8 (b) a matter referred to in paragraph 266(1)(d) or (e).

9 (2) ASIC may give to a person (the *recipient*) a written notice
10 requiring the production to a specified ASIC member or ASIC staff
11 member, at a specified place and time, of specified books that are
12 in the recipient's possession, custody or control and that relate to
13 the question whether an auditor has complied with audit
14 requirements under the Commonwealth credit legislation.

15 Note: Failure to comply with a requirement made under this section is an
16 offence (see section 290).

17 **268 ASIC may authorise persons to require production of books,**
18 **giving of information etc.**

19 (1) ASIC may by writing authorise an ASIC member or ASIC staff
20 member (an *authorised person*) to make a requirement of a kind
21 that this Part empowers ASIC to make.

22 Note: Failure to comply with a requirement made under this subsection is an
23 offence (see section 290).

24 (2) An authorisation under this section may be of general application
25 or may be limited by reference to all or any of the following:

- 26 (a) the persons of whom requirements may be made;
27 (b) the books that may be required to be produced;
28 (c) the information that may be required to be given.

29 (3) If an authorisation of an authorised person is in force under this
30 section, the authorised person may make a requirement in
31 accordance with the authorisation as if, in sections 265, 266 and
32 267:

- 33 (a) a reference to ASIC were a reference to the authorised
34 person; and

- 1 (b) a reference to specified books were a reference to books that
2 the authorised person specifies, whether in the requirement or
3 not and whether orally or in writing, to the person of whom
4 the requirement is made; and
5 (c) a reference to specified information were a reference to
6 information that the authorised person specifies, whether in
7 the requirement or not and whether orally or in writing, to the
8 person of whom the requirement is made; and
9 (d) a reference to giving or producing to a specified person were
10 a reference to giving or producing to the authorised person.

11 **269 Application for warrant to seize books not produced**

- 12 (1) If an ASIC member or ASIC staff member has reasonable grounds
13 to suspect that there are, or may be within the next 3 days, on
14 particular premises in Australia, books:
15 (a) whose production has been required under this Part; and
16 (b) that have not been produced in compliance with that
17 requirement;
18 he or she may:
19 (c) lay before a magistrate an information on oath setting out
20 those grounds; and
21 (d) apply for the issue of a warrant to search the premises for
22 those books.
23 (2) On an application under this section, the magistrate may require
24 further information to be given, either orally or by affidavit, in
25 connection with the application.

26 **270 Grant of warrant**

- 27 (1) This section applies if, on an application under section 269, the
28 magistrate is satisfied that there are reasonable grounds to suspect
29 that there are, or may be within the next 3 days, on particular
30 premises, particular books:
31 (a) whose production has been required under this Part; and
32 (b) that have not been produced in compliance with that
33 requirement.

Section 271

- 1 (2) The magistrate may issue a warrant authorising a member of the
2 Australian Federal Police, whether or not named in the warrant,
3 together with any person so named, with such assistance, and by
4 such force, as is necessary and reasonable:
- 5 (a) to enter on or into the premises; and
6 (b) to search the premises; and
7 (c) to break open and search anything, whether a fixture or not,
8 in or on the premises; and
9 (d) to take possession of, or secure against interference, books
10 that appear to be any or all of those books.
- 11 (3) If the magistrate issues such a warrant, he or she must set out on
12 the information laid before him or her under subsection 269(2) for
13 the purposes of the application:
- 14 (a) which of the grounds set out in the information; and
15 (b) particulars of any other grounds;
16 he or she has relied on to justify the issue of the warrant.
- 17 (4) A warrant under this section must:
- 18 (a) specify the premises and books referred to in subsection (1);
19 and
20 (b) state whether entry is authorised to be made at any time of
21 the day or night or only during specified hours; and
22 (c) state that the warrant ceases to have effect on a specified day
23 that is not more than 7 days after the day of issue of the
24 warrant.

271 Powers if books produced or seized

- 25 (1) This section applies if:
- 26 (a) books are produced to a person under a requirement made
27 under this Part; or
28 (b) under a warrant issued under section 270, a person:
- 29 (i) takes possession of books; or
30 (ii) secures books against interference; or
31 (c) by virtue of a previous application of subsection (8) of this
32 section, books are delivered into a person's possession.
33

- 1 (2) If paragraph (1)(a) applies, the person may take possession of any
2 of the books.
- 3 (3) The person may inspect, and may make copies of, or take extracts
4 from, any of the books.
- 5 (4) The person may use, or permit the use of, any of the books for the
6 purposes of proceedings.
- 7 (5) The person may retain possession of any of the books for so long
8 as is necessary:
- 9 (a) for the purposes of exercising a power conferred by this
10 section (other than this subsection and subsection (7)); or
11 (b) for any of the purposes referred to in paragraphs 263(a), (b)
12 and (e) or 265(2)(a) and (d), as the case requires; or
13 (c) for a decision to be made about whether or not proceedings
14 (including proceedings under a law of the Commonwealth, or
15 a law of a referring State or a Territory) to which the books
16 concerned would be relevant should be begun; or
17 (d) for such proceedings to be begun and carried on.
- 18 (6) No-one is entitled, as against the person, to claim a lien on any of
19 the books, but such a lien is not otherwise prejudiced.
- 20 (7) While the books are in the possession of a person (the *possessor*),
21 the possessor:
- 22 (a) must permit another person to inspect at all reasonable times
23 such (if any) of the books as the other person would be
24 entitled to inspect if they were not in the possessor's
25 possession; and
26 (b) may permit another person to inspect any of the books.
- 27 (8) Unless subparagraph (1)(b)(ii) applies, the person may deliver any
28 of the books into the possession of ASIC or of a person authorised
29 by it to receive them.
- 30 (9) If paragraph (1)(a) or (b) applies, the person, or a person into
31 whose possession the person delivers any of the books under
32 subsection (8), may require:
- 33 (a) if paragraph (1)(a) applies—a person who so produced any of
34 the books; or
-

Chapter 6 Compliance and enforcement

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

Division 2 Inspection of books and audit information-gathering powers

Section 272

1 (b) in any case—a person who was a party to the compilation of
2 any of the books;
3 to explain any matter about the compilation of any of the books or
4 to which any of the books relate.

5 Note: Failure to comply with a requirement made under this subsection is an
6 offence (see section 290).

7 **272 Powers if books not produced**

8 If a person (the *first person*) fails or refuses to produce particular
9 books in compliance with a requirement made by another person
10 under this Part, the other person may require the first person to
11 state:

- 12 (a) if the books may be found; and
13 (b) who last had possession, custody or control of the books and
14 if that person may be found.

15 Note: Failure to comply with a requirement made under this subsection is an
16 offence (see section 290).

1

2 **Part 6-4—Proceedings after an investigation**

3 **Division 1—Introduction**

4 **273 Guide to this Part**

5

This Part is about criminal and civil proceedings that ASIC may bring after it has conducted an investigation under this Chapter.

6

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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.

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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.

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Section 274

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2 **Division 2—Proceedings after an investigation**

3 **274 ASIC may prosecute**

4

(1) This section applies if:

5

(a) as a result of an investigation; or

6

(b) from a record of an examination;

7

conducted under this Chapter, it appears to ASIC that a person:

8

(c) may have committed an offence against the Commonwealth credit legislation; and

9

10

(d) ought to be prosecuted for the offence.

11

(2) ASIC may cause a prosecution of the person for the offence to be brought and carried on.

12

13

(3) ASIC may make a requirement under subsection (4) if:

14

(a) ASIC, on reasonable grounds, suspects or believes that a person can give information relevant to a prosecution for the offence; or

15

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17

(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.

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(4) ASIC may, whether before or after a prosecution for the offence is begun, by writing given to any of the following persons:

22

23

(a) the person referred to in paragraph (3)(a);

24

(b) a representative, banker, lawyer or auditor of a person referred to in paragraph (3)(b);

25

26

require the person to give all reasonable assistance in connection with such a prosecution.

27

28

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

29

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(5) An offence under subsection 63(3) relating to subsection (4) of this section is an offence of strict liability.

31

32

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

- 1 (6) Subsection (4) does not apply in relation to:
2 (a) the person referred to in subsection (1); or
3 (b) a person who is or has been that person's lawyer.

4 Note: A defendant bears an evidential burden in relation to the matter in
5 subsection (6), see subsection 13.3(3) of the *Criminal Code*.

- 6 (7) A requirement made by ASIC under subsection (4) is not a
7 legislative instrument.

- 8 (8) Nothing in this section affects the operation of the *Director of*
9 *Public Prosecutions Act 1983*.

10 **275 ASIC may bring civil proceedings**

11 If, as a result of an investigation or from a record of an
12 examination (being an investigation or examination conducted
13 under this Chapter), it appears to ASIC to be in the public interest
14 for a person to bring and carry on proceedings (other than
15 proceedings under the Commonwealth credit legislation) for:

- 16 (a) the recovery of damages for fraud, negligence, default,
17 breach of duty, or other misconduct, committed in connection
18 with a matter to which the investigation or examination
19 related; or

- 20 (b) recovery of property of the person;

21 ASIC:

- 22 (c) if the person is a company (within the meaning of the
23 *Corporations Act 2001*)—may cause; or

- 24 (d) otherwise—may, with the person's written consent, cause;

25 such proceedings to be begun and carried on in the person's name.

1

2 **Part 6-5—Hearings**

3 **Division 1—Introduction**

4 **276 Guide to this Part**

5

This Part is about hearings held by ASIC.

6

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).

7

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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.

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2 **Division 2—Hearings**

3 **277 Power to hold hearings**

4 ASIC may hold hearings for the purposes of the performance or
5 exercise of any of its functions and powers under the
6 Commonwealth credit legislation, other than a function or power
7 conferred on it by Part 6-1 (which deals with investigations).

8 **278 General discretion to hold hearing in public or private**

- 9 (1) Subject to sections 279 and 280, ASIC may direct that a hearing
10 take place in public or take place in private.
- 11 (2) In exercising its discretion under subsection (1), ASIC must have
12 regard to:
- 13 (a) whether evidence that may be given, or a matter that may
14 arise, during the hearing is of a confidential nature or relates
15 to the commission, or to the alleged or suspected
16 commission, of an offence against a law of the
17 Commonwealth, a State or a Territory; and
- 18 (b) any unfair prejudice to a person's reputation that would be
19 likely to be caused if the hearing took place in public; and
- 20 (c) whether it is in the public interest that the hearing take place
21 in public; and
- 22 (d) any other relevant matter.

23 **279 Request by person appearing at hearing that it take place in**
24 **public**

- 25 (1) Subject to section 280, if:
- 26 (a) the Commonwealth credit legislation requires ASIC to give a
27 person an opportunity to appear at a hearing; and
- 28 (b) the person requests that the hearing or part of the hearing take
29 place in public;
- 30 the hearing or part must take place in public.

Section 280

1 (2) Despite subsection (1), if ASIC is satisfied, having regard to the
2 matters referred to in subsection 278(2), that it is desirable that a
3 hearing or part of a hearing take place in private, it may direct that
4 the hearing or part take place in private.

5 (3) If a direction given under subsection (2) is in writing, it is not a
6 legislative instrument.

7 **280 Certain hearings to take place in private**

8 If the Commonwealth credit legislation (other than this section)
9 requires a hearing to take place in private, the hearing must take
10 place in private.

11 **281 ASIC may restrict publication of certain material**

12 (1) If, at a hearing that is taking place in public or in private, ASIC is
13 satisfied that it is desirable to do so, ASIC may give directions
14 preventing or restricting the publication of evidence given before,
15 or of matters contained in documents lodged with, ASIC.

16 Note: Failure to comply with a direction given under this subsection is an
17 offence (see section 293).

18 (2) In determining whether or not to give a direction under
19 subsection (1), ASIC must have regard to:
20 (a) whether evidence that has been or may be given, or a matter
21 that has arisen or may arise, during the hearing is of a
22 confidential nature or relates to the commission, or to the
23 alleged or suspected commission, of an offence against a law
24 of the Commonwealth, a State or a Territory; and
25 (b) any unfair prejudice to a person's reputation that would be
26 likely to be caused unless ASIC exercises its powers under
27 this section; and
28 (c) whether it is in the public interest that ASIC exercises its
29 powers under this section; and
30 (d) any other relevant matter.

31 (3) If a direction given under subsection (1) is in writing, it is not a
32 legislative instrument.

282 Who may be present when hearing takes place in private

- 1
- 2 (1) ASIC may give directions about who may be present during a
- 3 hearing that is to take place in private.
- 4 (2) A direction under subsection (1) does not prevent:
- 5 (a) a person whom the Commonwealth credit legislation requires
- 6 to be given the opportunity to appear at a hearing; or
- 7 (b) a person representing under section 285:
- 8 (i) a person of a kind referred to in paragraph (a) of this
- 9 subsection; or
- 10 (ii) a person who, by virtue of such a direction, is entitled to
- 11 be present at a hearing;
- 12 from being present during the hearing.
- 13 (3) If ASIC directs that a hearing take place in private, a person must
- 14 not be present at the hearing unless he or she:
- 15 (a) is an ASIC member; or
- 16 (b) is an ASIC staff member approved by ASIC; or
- 17 (c) is entitled to be present by virtue of:
- 18 (i) a direction under subsection (1); or
- 19 (ii) subsection (2).

20 Criminal penalty: 10 penalty units or 3 months imprisonment or

21 both.

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

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

- 24 (5) If a direction given under subsection (1) is in writing, it is not a
- 25 legislative instrument.

283 Involvement of person entitled to appear at hearing

- 26
- 27 (1) This section applies if the Commonwealth credit legislation
- 28 requires ASIC to give a person an opportunity to appear at a
- 29 hearing and to make submissions and give evidence to it.
- 30 (2) ASIC must appoint a place and time for the hearing and cause
- 31 written notice of that place and time to be given to the person.

Section 284

- 1 (3) If the person does not wish to appear at the hearing, the person
2 may, before the day of the hearing, lodge with ASIC any written
3 submissions that the person wishes ASIC to take into account in
4 relation to the matter concerned.

5 **284 Power to summon witnesses and take evidence**

- 6 (1) An ASIC member may, by written summons in the approved form
7 given to a person:
8 (a) require the person to appear before ASIC at a hearing to give
9 evidence, to produce specified documents, or to do both; and
10 (b) require the person to attend from day to day unless excused,
11 or released from further attendance, by an ASIC member.

12 Note: Failure to comply with a requirement made under this subsection is an
13 offence (see section 290).

- 14 (2) At a hearing, ASIC may take evidence on oath or affirmation, and
15 for that purpose an ASIC member may:
16 (a) require a witness at the hearing to either take an oath or make
17 an affirmation; and
18 (b) administer an oath or affirmation to a witness at the hearing.

19 Note: Failure to comply with a requirement made under this subsection is an
20 offence (see section 290).

- 21 (3) The oath or affirmation to be taken or made by a person for the
22 purposes of this section is an oath or affirmation that the evidence
23 the person will give will be true.

- 24 (4) The ASIC member presiding at a hearing:
25 (a) may require a witness at the hearing to answer a question put
26 to the witness; and
27 (b) may require a person appearing at the hearing pursuant to a
28 summons issued under this section to produce a document
29 specified in the summons.

30 Note: Failure to comply with a requirement made under this subsection is an
31 offence (see section 290).

- 32 (5) An offence under subsection 290(2) relating to subsection (1), (2)
33 or (4) of this section is an offence of strict liability.

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

Section 285

- 1 (6) ASIC may permit a witness at a hearing to give evidence by
2 tendering, and if ASIC so requires, verifying by oath, a written
3 statement.

4 **285 Proceedings at hearings**

- 5 (1) A hearing must be conducted with as little formality and
6 technicality, and with as much expedition, as the requirements of
7 the Commonwealth credit legislation and a proper consideration of
8 the matters before ASIC permit.
- 9 (2) At a hearing, ASIC:
10 (a) is not bound by the rules of evidence; and
11 (b) may, on such conditions as it considers appropriate, permit a
12 person to intervene; and
13 (c) must observe the rules of natural justice.
- 14 (3) Subject to subsection (4), Division 4 of Part 4 of the ASIC Act
15 (other than section 104 of that Act) applies, so far as practicable, in
16 relation to a hearing as if the hearing were a meeting of ASIC.
- 17 (4) At a hearing before a Division of ASIC (established under
18 section 97 of the ASIC Act), 2 members of the Division form a
19 quorum.
- 20 (5) At a hearing, a natural person may appear in person or be
21 represented by an employee of the person approved by ASIC.
- 22 (6) A body corporate may be represented at a hearing by an officer
23 (within the meaning of section 5 of the ASIC Act) or employee of
24 the body corporate approved by ASIC.
- 25 (7) An unincorporated association, or a person in the person's capacity
26 as a member of an unincorporated association, may be represented
27 at a hearing by a member, officer (within the meaning of section 5
28 of the ASIC Act) or employee of the association approved by
29 ASIC.
- 30 (8) Any person may be represented at a hearing by a lawyer.

Section 286

1 **286 ASIC to take account of evidence and submissions**

2 ASIC must take into account:

- 3 (a) evidence given, or a submission made, to it at a hearing; or
4 (b) a submission lodged with it under section 283;
5 in making a decision on a matter to which the evidence or
6 submission relates.

7 **287 Reference to court of question of law arising at hearing**

8 (1) ASIC may, of its own motion or at a person's request, refer to the
9 court for decision a question of law arising at a hearing.

10 (2) If a question has been referred under subsection (1), ASIC must
11 not, in relation to a matter to which the hearing relates:

- 12 (a) give while the reference is pending a decision to which the
13 question is relevant; or
14 (b) proceed in a manner, or make a decision, that is inconsistent
15 with the court's opinion on the question.

16 (3) If a question is referred under subsection (1):

- 17 (a) ASIC must send to the court all documents that were before
18 ASIC in connection with the hearing; and
19 (b) at the end of the proceedings in the court in relation to the
20 reference, the court must cause the documents to be returned
21 to ASIC.

22 **288 Protection of ASIC members etc.**

23 (1) An ASIC member has, in the performance or exercise of any of his
24 or her functions and powers as an ASIC member in relation to a
25 hearing, the same protection and immunity as a Justice of the High
26 Court.

27 (2) A delegate of an ASIC member has, in the performance or exercise
28 of any delegated function or power in relation to a hearing, the
29 same protection and immunity as a Justice of the High Court.

Section 288

- 1 (3) A lawyer or other person appearing on a person's behalf at a
2 hearing has the same protection and immunity as a barrister has in
3 appearing for a party in proceedings in the High Court.
- 4 (4) Subject to this Act, a person who is required by a summons under
5 section 284 to appear at a hearing, or a witness at a hearing, has the
6 same protection as a witness in proceedings in the High Court.

1

2 **Part 6-6—Offences**

3 **Division 1—Introduction**

4 **289 Guide to this Part**

5

This Part is about offences for non-compliance with requirements of this Chapter, and other offences in relation to requirements made under this Chapter.

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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.

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Division 2 also includes rules in relation to self-incrimination and legal professional privilege.

14

1

2 **Division 2—Offences**

3 **290 Contraventions of requirements made under this Chapter**

4 (1) A person must not intentionally or recklessly refuse or fail to
5 comply with a requirement made under:

- 6 (a) section 253; or
- 7 (b) subsection 255(4); or
- 8 (c) section 265, 266, 267 or 268; or
- 9 (d) subsection 271(9); or
- 10 (e) section 272.

11 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
12 both.

13 (2) A person must not refuse or fail to comply with a requirement
14 made under subsection 255(1) or 264(2), paragraph 258(2)(a) or
15 subsection 274(4), 284(1), (2) or (4).

16 Criminal penalty: 10 penalty units, or 3 months imprisonment,
17 or both.

18 (3) A person must comply with a requirement made under subsection
19 257(2).

20 Criminal penalty: 5 penalty units.

21 (4) Subsections (1) and (2) do not apply to the extent that the person
22 has a reasonable excuse.

23 Note: A defendant bears an evidential burden in relation to the matter in
24 subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

25 (5) Paragraph (1)(d) does not apply to the extent that the person has
26 explained the matter to the best of his or her knowledge or belief.

27 Note: A defendant bears an evidential burden in relation to the matter in
28 subsection (5) (see subsection 13.3(3) of the *Criminal Code*).

29 (6) Paragraph (1)(e) does not apply to the extent that the person has
30 stated the matter to the best of his or her knowledge or belief.

Chapter 6 Compliance and enforcement

Part 6-6 Offences

Division 2 Offences

Section 291

1 Note: A defendant bears an evidential burden in relation to the matter in
2 subsection (6) (see subsection 13.3(3) of the *Criminal Code*).

3 **291 False information**

4 (1) A person must not:

5 (a) in purported compliance with a requirement made under this
6 Chapter; or

7 (b) in the course of an examination of the person;
8 give information, or make a statement, that is false or misleading in
9 a material particular.

10 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
11 both.

12 (2) A person must not, at a hearing, give evidence that is false or
13 misleading in a material particular.

14 Criminal penalty: 10 penalty units, or 3 months imprisonment,
15 or both.

16 (3) It is a defence to a prosecution for a contravention of subsection (1)
17 or (2) if it is proved that the defendant, when giving the
18 information or evidence or making the statement, believed on
19 reasonable grounds that it was true and not misleading.

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

22 **292 Obstructing person executing a warrant under this Chapter**

23 (1) A person must not engage in conduct that results in the obstruction
24 or hindering of a person who is executing a warrant issued under
25 section 270.

26 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
27 both.

28 (2) Subsection (1) does not apply to the extent that the person has a
29 reasonable excuse.

30 Note: A defendant bears an evidential burden in relation to the matter in
31 subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

Section 293

- 1 (3) The occupier, or person in charge, of premises that a person enters
 2 under a warrant issued under section 270 must not intentionally or
 3 recklessly refuse or fail to provide to that person all reasonable
 4 facilities and assistance for the effective exercise of his or her
 5 powers under the warrant.

6 Criminal penalty: 25 penalty units, or 6 months imprisonment,
 7 or both.

8 **293 Disrupting hearings**

- 9 (1) A person must not engage in conduct that results in the disruption
 10 of a hearing.

11 Criminal penalty: 50 penalty units, or 1 year imprisonment, or
 12 both.

- 13 (2) A person must not contravene a direction given under subsection
 14 281(1).

15 Criminal penalty: 50 penalty units, or 1 year imprisonment, or
 16 both.

- 17 (3) Subsection (2) does not apply to the extent that the person has a
 18 reasonable excuse.

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

- 21 (4) Subsection (2) is an offence of strict liability.

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

- 23 (5) An offence constituted by a contravention of subsection (1) or (2)
 24 is punishable on summary conviction.

25 **294 Concealing books relevant to investigation**

- 26 (1) If ASIC is investigating, or is about to investigate, a matter, a
 27 person must not:

28 (a) in any case—engage in conduct that results in the
 29 concealment, destruction, mutilation or alteration of a book
 30 relating to that matter; or

Section 295

1 (b) if a book relating to that matter is in a particular State or
2 Territory—engage in conduct that results in the taking or
3 sending of the book out of that State or Territory or out of
4 Australia.

5 Criminal penalty: 200 penalty units, or 5 years imprisonment, or
6 both.

7 (2) It is a defence to a prosecution for a contravention of subsection (1)
8 if it is proved that the defendant intended neither to defeat the
9 purposes of the Commonwealth credit legislation, nor to delay or
10 obstruct an investigation, or a proposed investigation, by ASIC.

11 Note: A defendant bears a legal burden in relation to a matter referred to in
12 subsection (2) (see section 13.4 of the *Criminal Code*).

13 **295 Self-incrimination**

14 (1) For the purposes of this Chapter, it is not a reasonable excuse for a
15 person to refuse or fail:

16 (a) to give information; or

17 (b) to sign a record; or

18 (c) to produce a book;

19 in accordance with a requirement made of the person, that the
20 information, signing the record or production of the book, as the
21 case may be, might tend to incriminate the person or make the
22 person liable to a penalty.

23 (2) Subsection (3) applies if:

24 (a) before:

25 (i) making an oral statement giving information; or

26 (ii) signing a record;

27 pursuant to a requirement made under this Chapter, a person
28 (other than a body corporate) claims that the statement, or
29 signing the record, as the case may be, might tend to
30 incriminate the person or make the person liable to a penalty;
31 and

32 (b) the statement, or signing the record, as the case may be,
33 might in fact tend to incriminate the person or make the
34 person so liable.

Section 296

- 1 (3) The statement, or the fact that the person has signed the record, as
2 the case may be, is not admissible in evidence against the person
3 in:
4 (a) criminal proceedings; or
5 (b) proceedings for the imposition of a penalty;
6 other than proceedings in relation to:
7 (c) in the case of the making of a statement—the falsity of the
8 statement; or
9 (d) in the case of the signing of a record—the falsity of any
10 statement contained in the record.

296 Legal professional privilege

- 11
12 (1) This section applies if:
13 (a) under this Chapter, a person requires a lawyer:
14 (i) to give information; or
15 (ii) to produce a book; and
16 (b) giving the information would involve disclosing, or the book
17 contains, as the case may be, a privileged communication
18 made by, on behalf of or to the lawyer in his or her capacity
19 as a lawyer.
- 20 (2) The lawyer is entitled to refuse to comply with the requirement
21 unless:
22 (a) if the person to whom, or by or on behalf of whom, the
23 communication was made is a body corporate that is being
24 wound up—the liquidator (within the meaning of section 9 of
25 the *Corporations Act 2001*) of the body; or
26 (b) otherwise—the person to whom, or by or on behalf of whom,
27 the communication was made;
28 consents to the lawyer complying with the requirement.
- 29 (3) If the lawyer so refuses, he or she must, as soon as practicable, give
30 to the person who made the requirement a written notice setting
31 out:
32 (a) if the lawyer knows the name and address of the person to
33 whom, or by or on behalf of whom, the communication was
34 made—that name and address; and

Chapter 6 Compliance and enforcement

Part 6-6 Offences

Division 2 Offences

Section 297

1 (b) if subparagraph (1)(a)(i) applies and the communication was
2 made in writing—sufficient particulars to identify the
3 document containing the communication; and

4 (c) if subparagraph (1)(a)(ii) applies—sufficient particulars to
5 identify the book, or the part of the book, containing the
6 communication.

7 Criminal penalty: 10 penalty units, or 3 months imprisonment,
8 or both.

9 **297 Powers of court relating to contraventions of this Chapter**

10 (1) This section applies if ASIC is satisfied that a person has, without
11 reasonable excuse, refused or failed to comply with a requirement
12 made under this Chapter, other than Part 6-7 (which deals with
13 ASIC's powers in relation to non-compliance with this Chapter).

14 (2) ASIC may by writing certify the refusal or failure to the court.

15 (3) If ASIC does so, the court may inquire into the case and may order
16 the person to comply with the requirement as specified in the order.

1

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

4 **Division 1—Introduction**

5 **298 Guide to this Part**

6

This Part is about powers of ASIC to in relation to non-compliance
with this Chapter.

7

8

Division 2 is about orders that ASIC may make in relation to credit
contracts, mortgages, guarantees and consumer leases.

9

Section 299

1

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

4 **299 Application of this Part**

5 This Part applies if, in ASIC's opinion, information about a credit
6 contract, mortgage, guarantee or consumer lease needs to be found
7 out for the purposes of the exercise of any of ASIC's powers under
8 this Chapter but cannot be found out because a person has refused
9 or failed to comply with a requirement made under this Chapter.

10 **300 Orders by ASIC relating to credit contracts, mortgages,**
11 **guarantees or consumer leases**

- 12 (1) ASIC may make one or more of the following:
- 13 (a) an order restraining a specified person from assigning any
14 interest in a credit contract, mortgage, guarantee or consumer
15 lease;
 - 16 (b) an order restraining a specified person from acquiring any
17 interest in a credit contract, mortgage, guarantee or consumer
18 lease;
 - 19 (c) an order restraining the exercise of rights under a credit
20 contract, mortgage, guarantee or consumer lease;
 - 21 (d) an order directing a:
 - 22 (i) credit provider under a credit contract; or
 - 23 (ii) mortgagee under a mortgage; or
 - 24 (iii) beneficiary of a guarantee under a guarantee; or
 - 25 (iv) lessor under a consumer lease;
- 26 in relation to which an order under this section is in force to
27 give written notice of that order to any person whom the
28 credit provider, mortgagee, beneficiary or lessor knows to be
29 entitled to exercise a right in relation to the credit contract,
30 mortgage, guarantee or consumer lease.
- 31 (2) An offence under subsection 301(4) relating to subsection (1) of
32 this section is an offence of strict liability.

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

2 (3) An order made under subsection (1) is not a legislative instrument.

3 **301 Orders under this Part**

4 (1) ASIC may make an order varying or revoking an order in force
5 under this Part.

6 (2) An order under this Part must be made by notice published in the
7 Gazette or on ASIC's website.

8 (3) If an order is made under this Part (other than subsection (1)),
9 ASIC must cause to be given to the person to whom the order is
10 directed:

11 (a) a copy of the order; and

12 (b) a copy of each order varying or revoking it.

13 (4) A person must comply with an order in force under this Part.

14 Criminal penalty: 25 penalty units, or 6 months imprisonment,
15 or both.

Section 302

1

2 **Part 6-8—Evidentiary use of certain material**

3 **Division 1—Introduction**

4 **302 Guide to this Part**

5

This Part is about the evidentiary use and value of certain material.

6

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.

7

8

1

2 **Division 2—Evidentiary use of certain material**

3 **303 Statements made at an examination: proceedings against**
4 **examinee**

- 5 (1) A statement that a person makes at an examination of the person is
6 admissible in evidence against the person in proceedings unless:
7 (a) because of subsection 295(3), the statement is not admissible
8 in evidence against the person in the proceedings; or
9 (b) the statement is not relevant to the proceedings and the
10 person objects to the admission of evidence of the statement;
11 or
12 (c) the statement (the *first statement*) is qualified or explained by
13 some other statement made at the examination, evidence of
14 the other statement is not tendered in the proceedings and the
15 person objects to the admission of evidence of the first
16 statement; or
17 (d) the statement discloses matter in relation to which the person
18 could claim legal professional privilege in the proceedings if
19 this subsection did not apply in relation to the statement, and
20 the person objects to the admission of evidence of the
21 statement.
- 22 (2) Subsection (1) applies in relation to proceedings against a person
23 even if it is heard together with proceedings against another
24 person.
- 25 (3) If a written record of an examination of a person is signed by the
26 person under subsection 258(2) or authenticated in any other
27 manner prescribed by the regulations, the record is, in proceedings,
28 prima facie evidence of the statements it records, but nothing in
29 this Chapter limits or affects the admissibility in the proceedings of
30 other evidence of statements made at the examination.

31 **304 Statements made at an examination: other proceedings**

32 If direct evidence by a person (the *absent witness*) of a matter
33 would be admissible in proceedings, a statement that the absent

Section 305

- 1 witness made at an examination of the absent witness and that
2 tends to establish that matter is admissible in the proceedings as
3 evidence of that matter:
- 4 (a) if it appears to the court or tribunal that:
- 5 (i) the absent witness is dead or is unfit, because of
6 physical or mental incapacity, to attend as a witness; or
7 (ii) the absent witness is outside the State or Territory in
8 which the proceedings is being heard and it is not
9 reasonably practicable to secure his or her attendance;
10 or
11 (iii) all reasonable steps have been taken to find the absent
12 witness but he or she cannot be found; or
- 13 (b) if it does not so appear to the court or tribunal—unless
14 another party to the proceedings requires the party tendering
15 evidence of the statement to call the absent witness as a
16 witness in the proceedings and the tendering party does not
17 so call the absent witness.

305 Weight of evidence admitted under section 304

- 18
- 19 (1) This section applies if evidence of a statement made by a person at
20 an examination of the person is admitted under section 304 in
21 proceedings.
- 22 (2) In deciding how much weight (if any) to give to the statement as
23 evidence of a matter, regard is to be had to:
- 24 (a) how long after the matters to which it related the statement
25 was made; and
26 (b) any reason the person may have had for concealing or
27 misrepresenting a material matter; and
28 (c) any other circumstances from which it is reasonable to draw
29 an inference about how accurate the statement is.
- 30 (3) If the person is not called as a witness in the proceedings:
- 31 (a) evidence that would, if the person had been so called, have
32 been admissible in the proceedings for the purpose of
33 destroying or supporting his or her credibility is so
34 admissible; and

- 1 (b) evidence is admissible to show that the statement is
2 inconsistent with another statement that the person has made
3 at any time.
- 4 (4) However, evidence of a matter is not admissible under this section
5 if, had the person been called as a witness in the proceedings and
6 denied the matter in cross-examination, evidence of the matter
7 would not have been admissible if adduced by the cross-examining
8 party.

9 **306 Objection to admission of statements made at examination**

- 10 (1) A party (the *adducing party*) to proceedings may, not less than 14
11 days before the first day of the hearing of the proceedings, give to
12 another party to the proceedings written notice that the adducing
13 party:
14 (a) will apply to have admitted in evidence in the proceedings
15 specified statements made at an examination; and
16 (b) for that purpose, will apply to have evidence of those
17 statements admitted in the proceedings.
- 18 (2) A notice under subsection (1) must set out, or be accompanied by
19 writing that sets out, the specified statements.
- 20 (3) Within 14 days after a notice is given under subsection (1), the
21 other party may give to the adducing party a written notice:
22 (a) stating that the other party objects to specified statements
23 being admitted in evidence in the proceedings; and
24 (b) specifies, in relation to each of those statements, the grounds
25 of objection.
- 26 (4) The period prescribed by subsection (3) may be extended by the
27 court or tribunal or by agreement between the parties concerned.
- 28 (5) On receiving a notice given under subsection (3), the adducing
29 party must give to the court or tribunal a copy of:
30 (a) the notice under subsection (1) and any writing that
31 subsection (2) required to accompany that notice; and
32 (b) the notice under subsection (3).
- 33 (6) If subsection (5) is complied with, the court or tribunal may either:
-

Section 307

- 1 (a) determine the objections as a preliminary point before the
2 hearing of the proceedings begins; or
3 (b) defer determination of the objections until the hearing.
- 4 (7) If a notice has been given in accordance with subsections (1) and
5 (2), the other party is not entitled to object at the hearing of the
6 proceedings to a statement specified in the notice being admitted in
7 evidence in the proceedings, unless:
8 (a) the other party has, in accordance with subsection (3),
9 objected to the statement being so admitted; or
10 (b) the court or tribunal gives the other party leave to object to
11 the statement being so admitted.

12 **307 Copies of, or extracts from, certain books**

- 13 (1) A copy of, or an extract from, a book relating to:
14 (a) affairs of a licensee, credit representative or other person who
15 engages, or has engaged, in a credit activity; or
16 (b) a matter referred to in paragraph 266(1)(d) or (e);
17 is admissible in evidence in proceedings as if the copy were the
18 original book, or the extract were the relevant part of the original
19 book, as the case may be, whether or not the copy or extract was
20 made under section 271.
- 21 (2) A copy of, or an extract from, a book is not admissible in evidence
22 under subsection (1) unless it is proved that the copy or extract is a
23 true copy of the book, or of the relevant part of the book, as the
24 case may be.
- 25 (3) For the purposes of subsection (2), a person who has compared:
26 (a) a copy of a book with the book; or
27 (b) an extract from a book with the relevant part of the book;
28 may give evidence, either orally or by an affidavit or statutory
29 declaration, that the copy or extract is a true copy of the book or
30 relevant part, as the case may be.

1 **308 Report under Part 6-1**

2 Subject to section 309, if a copy of a report under Part 6-1 purports
3 to be certified by ASIC as a true copy of such a report, the copy is
4 admissible in proceedings (other than criminal proceedings) as
5 prima facie evidence of any facts or matters that the report states
6 ASIC to have found to exist.

7 **309 Exceptions to admissibility of report**

- 8 (1) This section applies if a party to proceedings tenders a copy of a
9 report as evidence against another party.
- 10 (2) The copy is not admissible under section 308 in the proceedings as
11 evidence against the other party unless the court or tribunal is
12 satisfied that:
- 13 (a) a copy of the report has been given to the other party; and
14 (b) the other party, and the other party's lawyer, have had a
15 reasonable opportunity to examine that copy and to take its
16 contents into account in preparing the other party's case.
- 17 (3) Before or after the copy referred to in subsection (1) is admitted in
18 evidence, the other party may apply to cross-examine, in relation to
19 the report, a specified person who, or 2 or more specified persons
20 each of whom:
- 21 (a) was concerned in preparing the report or making a finding
22 about a fact or matter that the report states ASIC to have
23 found to exist; or
24 (b) whether or not pursuant to a requirement made under this
25 Part, gave information, or produced a book, on the basis of
26 which, or on the basis of matters including which, such a
27 finding was made.
- 28 (4) The court or tribunal must grant an application made under
29 subsection (3) unless it considers that, in all the circumstances, it is
30 not appropriate to do so.
- 31 (5) If:
- 32 (a) the court or tribunal grants an application or applications
33 made under subsection (3); and

Section 310

- 1 (b) a person to whom the application or any of the applications
2 relate, or 2 or more such persons, is or are unavailable, or
3 does not or do not attend, to be cross-examined in relation to
4 the report; and
5 (c) the court or tribunal is of the opinion that to admit the copy
6 under section 308 in the proceedings as evidence against the
7 other party without the other party having the opportunity so
8 to cross-examine the person or persons would unfairly
9 prejudice the other party;
10 the court or tribunal must refuse so to admit the copy, or must treat
11 the copy as not having been so admitted, as the case requires.

12 **310 Material otherwise admissible**

13 Nothing in this Part renders evidence inadmissible in proceedings
14 in circumstances if it would have been admissible in those
15 proceedings if this Part had not been enacted.

1

2 **Part 6-9—Miscellaneous provisions relating to**
3 **compliance and enforcement**

4 **Division 1—Introduction**

5 **311 Guide to this Part**

6

This Part includes miscellaneous provisions relating to this
7 Chapter.

7

Section 312

1

2 **Division 2—Miscellaneous provisions relating to**
3 **compliance and enforcement**

4 **312 Requirement made of a body corporate**

5 If a provision of this Chapter empowers a person to make a
6 requirement of a body corporate, the provision also empowers the
7 person to make that requirement of a person who is or has been an
8 officer (within the meaning of section 5 of the ASIC Act) or
9 employee of the body.

10 **313 Evidence of authority**

- 11 (1) A person (the *inspector*), other than ASIC, who is about to make,
12 or has made, a requirement of another person under this Chapter
13 (other than Part 6-5) must, if the other person requests evidence of
14 the inspector's authority to make the requirement, produce to the
15 other person:
- 16 (a) a current identity card that was issued to the inspector by
17 ASIC and incorporates a photograph of the inspector; and
 - 18 (b) if the requirement will be, or was, made under an
19 authorisation by ASIC—a document that was issued by ASIC
20 and sets out the effect of so much of the authorisation as is
21 relevant to making the requirement; and
 - 22 (c) otherwise—such evidence (if any) of the inspector's
23 authority to make the requirement as ASIC determines.
- 24 (2) An identity card under paragraph (1)(a) is not a legislative
25 instrument.

26 **314 Giving documents to natural persons**

27 Section 109X of the *Corporations Act 2001* applies for the
28 purposes of this Chapter as if a reference in subsection (2) of that
29 section to leaving a document at an address were a reference to
30 leaving it at that address with a person whom the person leaving
31 the document believes on reasonable grounds:

- 1 (a) to live or work at that address; and
2 (b) to have attained the age of 16 years.

3 **315 Place and time for production of books**

4 A provision of this Chapter that empowers a person to require the
5 production of books at a place and time specified by the person is
6 taken:

- 7 (a) to require the person to specify a place and time that are
8 reasonable in all the circumstances; and
9 (b) if it is reasonable in all the circumstances for the person to
10 require the books to be produced forthwith—to empower the
11 person to require the books to be produced forthwith.

12 **316 Application of Crimes Act and Evidence Act**

- 13 (1) For the purposes of Part III of the *Crimes Act 1914*, an examination
14 or a hearing is a judicial proceeding.
15 (2) Part 2.2, sections 69, 70, 71 and 147 and Division 2 of Part 4.6 of
16 the *Evidence Act 1995* apply to an examination in the same way
17 that they apply to proceedings to which that Act applies under
18 section 4 of that Act.

19 **317 Allowances and expenses**

- 20 (1) A person who, pursuant to a requirement made under section 253,
21 appears for examination is entitled to the allowances and expenses
22 prescribed by the regulations (if any).
23 (2) A person who, pursuant to a summons issued under section 284,
24 appears at a hearing is entitled to be paid:
25 (a) if the summons was issued at another person's request—by
26 that other person; or
27 (b) otherwise—by ASIC;
28 allowances and expenses prescribed by the regulations (if any).
29 (3) ASIC may pay such amount as it considers reasonable on account
30 of the costs and expenses (if any) that a person incurs in complying
31 with a requirement made under this Chapter.
-

Section 318

1 **318 Expenses of investigation under Part 6-1**

2 Subject to section 319, ASIC must pay the expenses of an
3 investigation.

4 **319 Recovery of expenses of investigation**

5 (1) If:

6 (a) a person is convicted of an offence against a law of the
7 Commonwealth, or a law of a referring State or a Territory,
8 in a prosecution; or

9 (b) a judgment is awarded, or a declaration or other order is
10 made, against a person in proceedings in a court or tribunal
11 of this jurisdiction;

12 brought as a result of an investigation under Part 6-1, ASIC may
13 make one of the following orders:

14 (c) an order that the person pay the whole, or a specified part, of
15 the expenses of the investigation;

16 (d) an order that the person reimburse ASIC to the extent of a
17 specified amount of such of the expenses of the investigation
18 as ASIC has paid;

19 (e) an order that the person pay, or reimburse ASIC in relation
20 to, the whole, or a specified part, of the cost to ASIC of
21 making the investigation, including the remuneration of an
22 ASIC member or ASIC staff member concerned in the
23 investigation.

24 (2) An order under this section must be in writing and must specify
25 when and how the payment or reimbursement is to be made.

26 (3) A person must comply with an order under this section that is
27 applicable to the person.

28 Criminal penalty: 50 penalty units, or 1 year imprisonment, or
29 both.

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

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

- 1 (5) ASIC may recover in a court of competent jurisdiction as a debt
2 due to ASIC so much of the amount payable under an order made
3 under this section as is not paid in accordance with the order.
- 4 (6) A report under Part 6-1 may include recommendations about the
5 making of orders under this section.
- 6 (7) An order made under this section is not a legislative instrument.

7 **320 Compliance with this Chapter**

8 A person is neither liable to proceedings, nor subject to a liability,
9 merely because the person has complied, or proposes to comply,
10 with a requirement made, or purporting to have been made, under
11 this Chapter.

12 **321 Effect of this Chapter**

- 13 (1) Except as expressly provided, nothing in this Chapter limits the
14 generality of anything else in this Chapter.
- 15 (2) The functions and powers that this Chapter confers are in addition
16 to, and do not derogate from, any other function or power
17 conferred by a law of the Commonwealth, a State or a Territory.

18 **322 Enforcement of undertakings**

- 19 (1) ASIC may accept a written undertaking given by a person in
20 connection with a matter in relation to which ASIC has a function
21 or power under the Commonwealth credit legislation.
- 22 (2) The person may withdraw or vary the undertaking at any time, but
23 only with ASIC's consent.
- 24 (3) If ASIC considers that the person who gave the undertaking has
25 breached any of its terms, ASIC may apply to the court for an order
26 under subsection (4).
- 27 (4) If the court is satisfied that the person has breached a term of the
28 undertaking, the court may make all or any of the following orders:
29 (a) an order directing the person to comply with that term of the
30 undertaking;

Chapter 6 Compliance and enforcement

Part 6-9 Miscellaneous provisions relating to compliance and enforcement

Division 2 Miscellaneous provisions relating to compliance and enforcement

Section 322

- 1 (b) an order directing the person to pay to the Commonwealth an
2 amount up to the amount of any financial benefit that the
3 person has obtained directly or indirectly and that is
4 reasonably attributable to the breach;
- 5 (c) any order that the court considers appropriate directing the
6 person to compensate any other person who has suffered loss
7 or damage as a result of the breach;
- 8 (d) any other order that the court considers appropriate.

1
2 **Chapter 7—Miscellaneous**

3 **Part 7-1—Miscellaneous**

4 **Division 1—Introduction**

5 **323 Guide to this Part**

6 This Part deals with miscellaneous matters.

7 Division 2 deals with when a person will be liable for the conduct
8 of others (usually the person's employee or agent).

9 Division 3 provides for AAT review of ASIC's decisions.

10 Division 4 provides for regulations to be made.

11 Division 5 has other miscellaneous provisions (such as Ministerial
12 delegations).

Section 324

1

2 **Division 2—Liability of persons for conduct of their agents**
3 **etc.**

4 **324 Liability for bodies corporate for conduct of their agents,**
5 **employees etc.**

6 *Liability of bodies corporate*

7 (1) Any conduct engaged in on behalf of a body corporate:

8 (a) by a director, employee or agent (an **official**) of the body
9 within the scope of the person's actual or apparent authority;
10 or

11 (b) by any other person at the direction or with the consent or
12 agreement (whether express or implied) of an official of the
13 body, if the giving of the direction, consent or agreement is
14 within the scope of the actual or apparent authority of the
15 official;

16 is taken, for the purposes of this Act (other than the National Credit
17 Code), to have been engaged in also by the body.

18 (2) Any conduct engaged in by a person (for example, the giving of
19 money) in relation to:

20 (a) an official of the body acting within the scope of his or her
21 actual or apparent authority; or

22 (b) any other person acting at the direction or with the consent or
23 agreement (whether express or implied) of an official of the
24 body, if the giving of the direction, consent or agreement is
25 within the scope of the actual or apparent authority of the
26 official;

27 is taken, for the purposes of this Act (other than the National Credit
28 Code), to have been engaged in also in relation to the body.

29 *State of mind of a body corporate*

30 (3) If, for the purposes of this Act (other than the National Credit
31 Code), it is necessary to establish the state of mind of the body
32 corporate in relation to particular conduct, it is enough to show:

- 1 (a) that the conduct was engaged in by a person referred to in
2 paragraph (1)(a) or (b); and
3 (b) that the person had that state of mind.

4 *Disapplication of Part 2.5 of the Criminal Code*

- 5 (4) Part 2.5 of the *Criminal Code* does not apply to an offence against
6 this Act.

7 Note: Part 2.5 of the *Criminal Code* deals with corporate criminal
8 responsibility, but this section instead deals with that for the purposes
9 of this Act (other than the National Credit Code), and section 199 of
10 the National Credit Code deals with that for the purpose of that Code.

11 **325 Liability of persons (other than bodies corporate) for the**
12 **conduct of their agents, employees etc.**

13 *Liability of principals*

- 14 (1) Any conduct engaged in on behalf of a person (the *principal*) who
15 is not a body corporate:
16 (a) by any of the following persons (an *official*) within the scope
17 of the person's actual or apparent authority:
18 (i) an employee or agent of the principal;
19 (ii) if the principal is a partnership—a partner;
20 (iii) if the principal is the trustees of a trust—a trustee; or
21 (b) by any other person at the direction or with the consent or
22 agreement (whether express or implied) of an official of the
23 principal, if the giving of the direction, consent or agreement
24 is within the scope of the actual or apparent authority of the
25 official;
26 is taken, for the purposes of this Act (other than the National Credit
27 Code), to have been engaged in also by the principal.
- 28 (2) Any conduct engaged in by a person (for example, the giving of
29 money) in relation to:
30 (a) an official of the principal acting within the scope of his or
31 her actual or apparent authority; or
32 (b) any other person acting at the direction or with the consent or
33 agreement (whether express or implied) of an official of the

Chapter 7 Miscellaneous

Part 7-1 Miscellaneous

Division 2 Liability of persons for conduct of their agents etc.

Section 326

1 principal, if the giving of the direction, consent or agreement
2 is within the scope of the actual or apparent authority of the
3 official;
4 is taken, for the purposes of this Act (other than the National Credit
5 Code), to have been engaged in also in relation to the principal.

6 *State of mind of the principal*

- 7 (3) If, for the purposes of this Act (other than the National Credit
8 Code), it is necessary to establish the state of mind of the principal
9 in relation to particular conduct, it is enough to show:
10 (a) that the conduct was engaged in by a person referred to in
11 paragraph (1)(a) or (b); and
12 (b) that the person had that state of mind.

13 **326 Regulations for the purposes of this Division**

14 The regulations may modify this Division for the purposes
15 prescribed in the regulations.

1

2 **Division 3—Review of ASIC's decisions**

3 **327 Review by Administrative Appeals Tribunal of decisions by**
4 **ASIC under this Act**

- 5 (1) An application may be made to the Administrative Appeals
6 Tribunal for review of a decision (within the meaning of the
7 *Administrative Appeals Tribunal Act 1975*) made by ASIC under
8 this Act other than:
9 (a) a decision of ASIC under section 241 (dealing with approved
10 codes of conduct); or
11 (b) a decision to make a determination under subsection 328(3).
12 (2) Section 27A of the *Administrative Appeals Tribunal Act 1975* does
13 not apply to the decision.

14 **328 Notice of reviewable decision and review rights**

- 15 (1) This section applies if ASIC makes a decision to which section 327
16 applies.
17 (2) Subject to subsection (3), ASIC must take such steps as are
18 reasonable in the circumstances to give to each person whose
19 interests are affected by the decision notice, in writing or
20 otherwise:
21 (a) of the making of the decision; and
22 (b) of the person's right to have the decision reviewed by the
23 Administrative Appeals Tribunal.
24 (3) Subsection (2) does not require ASIC to give notice to a person
25 affected by the decision or to the persons in a class of persons
26 affected by the decision, if ASIC determines that giving notice to
27 the person or persons is not warranted, having regard to:
28 (a) the cost of giving notice to the person or persons; and
29 (b) the way in which the interests of the person or persons are
30 affected by the decision.

Chapter 7 Miscellaneous
Part 7-1 Miscellaneous
Division 3 Review of ASIC's decisions

Section 328

- 1 (4) A determination made under subsection (3) is not a legislative
2 instrument.
- 3 (5) A failure to comply with this section does not affect the validity of
4 the decision.

1

2 **Division 4—Regulations**

3 **329 Regulations**

- 4 The Governor-General may make regulations prescribing matters:
5 (a) required or permitted by this Act to be prescribed; or
6 (b) necessary or convenient to be prescribed for carrying out or
7 giving effect to this Act.

8 **330 Regulations—where proceedings may be brought**

- 9 The regulations may prescribe the location for where court
10 proceedings in relation to the following must be brought:
11 (a) matters arising under this Act;
12 (b) credit contracts;
13 (c) mortgages;
14 (d) guarantees;
15 (e) consumer leases.

16 **331 Regulations—infringement notices**

17 *Infringement notices for civil penalties*

- 18 (1) The regulations may provide for a person who is alleged to have
19 contravened a civil penalty provision to pay a penalty to the
20 Commonwealth as an alternative to civil proceedings.
21 (2) The penalty must not exceed one-fourtieth of the maximum penalty
22 that a court could impose on the person for contravention of that
23 provision.

24 *Infringement notices for offences*

- 25 (3) The regulations may provide for a person who is alleged to have
26 committed an offence against this Act that is stated to be an
27 offence of strict liability to pay a penalty to the Commonwealth as
28 an alternative to prosecution.

Chapter 7 Miscellaneous

Part 7-1 Miscellaneous

Division 4 Regulations

Section 331

- 1 (4) The penalty must not exceed one-fifth of the maximum penalty that
2 a court could impose on the person for that offence.

1

2 **Division 5—Other miscellaneous provisions**

3 **332 Civil penalty provisions contravened or offences committed**
4 **partly in and partly out of this jurisdiction**

5 If:

- 6 (a) a person does or omits to do an act outside this jurisdiction;
7 and
8 (b) if that person had done or omitted to do that act in this
9 jurisdiction, the person would, by reason of also having done
10 or omitted to do an act in this jurisdiction, have contravened
11 a civil penalty provision or committed an offence against this
12 Act;

13 the person contravenes that provision or commits that offence.

14 **333 Contravention of Act does not generally affect validity of**
15 **transactions etc.**

- 16 (1) A failure to comply with any requirement of this Act does not
17 affect the validity or enforceability of any transaction, contract,
18 instrument or other arrangement.
- 19 (2) Subsection (1) has effect subject to any express provision to the
20 contrary in:
21 (a) this Act (including regulations made under this Act); or
22 (b) regulations referred to in subsection (3).
- 23 (3) Regulations may provide that a failure to comply with a specified
24 requirement referred to in subsection (1) has a specified effect on
25 the validity or enforceability of a transaction, contract, instrument
26 or arrangement.

27 **334 Contracting out etc.**

- 28 (1) A provision of a contract or other instrument by which a person
29 seeks to avoid or modify the effect of this Act (other than the
30 National Credit Code) is void.

Chapter 7 Miscellaneous
Part 7-1 Miscellaneous
Division 5 Other miscellaneous provisions

Section 335

1 Note: A similar rule applies for the purposes of the National Credit Code
2 (see section 191 of that Code).

3 (2) A provision of a contract or other instrument by which a person
4 seeks to have:

- 5 (a) a debtor indemnify a credit provider; or
- 6 (b) a mortgagor indemnify a mortgagee; or
- 7 (c) a guarantor indemnify a beneficiary of a guarantee; or
- 8 (d) a lessee indemnify a lessor;

9 for any loss or liability arising under this Act (other than the
10 National Credit Code) is void.

11 Note: A similar rule applies for the purposes of the National Credit Code
12 (see section 191 of that Code).

13 (3) A person commits an offence if:

- 14 (a) the person is a credit provider, mortgagee, beneficiary of a
15 guarantee or lessor; and
- 16 (b) the person is a party to a contract or other instrument; and
- 17 (c) the contract or other instrument is void under subsection (1)
18 or (2).

19 Criminal penalty: 100 penalty units.

20 (4) Subsection (3) is an offence of strict liability:

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

22 (5) Subsection (2) does not affect the operation of subsection 60(2) of
23 the National Credit Code.

24 **335 Indemnities**

25 (1) An indemnity for any liability under this Act (other than the
26 National Credit Code) is not void, and cannot be declared void, on
27 the grounds of public policy, despite any rule of law to the
28 contrary.

29 Note: A similar rule applies for the purposes of the National Credit Code
30 (see section 192 of that Code).

31 (2) The liabilities to which this section applies include the following:

- 1 (a) a liability for any criminal or civil penalty incurred by any
2 person under this Act (other than the National Credit Code);
3 (b) a payment in settlement of a liability or alleged liability
4 under this Act (other than the National Credit Code);
5 (c) a liability under another indemnity for any liability under this
6 Act (other than the National Credit Code).
- 7 (3) This section is subject to subsection 334(2).
- 8 (4) This section does not derogate from any other rights and remedies
9 that exist apart from this section.

10 **336 Acquisition of property**

- 11 (1) A provision of this Act does not apply, and is taken never to have
12 applied, to the extent that the operation of the provision would
13 result in an acquisition of property from a person otherwise than on
14 just terms.
- 15 (2) In subsection (1), *acquisition of property* and *just terms* have the
16 same meanings as in paragraph 51(xxxi) of the Constitution.

17 **337 Minister may delegate prescribed functions and powers under** 18 **this Act**

- 19 (1) The Minister may, by signed instrument, delegate to:
20 (a) an ASIC member; or
21 (b) an ASIC staff member;
22 such of the Minister's functions and powers under this Act as are
23 prescribed.
- 24 (2) In performing functions or exercising powers under a delegation,
25 the delegate must comply with any directions of the Minister.

Section 1

1
2 **Schedule 1—National Credit Code**

3 Note: See section 3 of the National Credit Act.

4 **Part 1—Preliminary**
5

6 **1 Short title**

7 This Code may be cited as the *National Credit Code*.

8 **2 Interpretation generally**

- 9 (1) Part 13 contains the principal definitions of words and expressions
10 used in this Code.
- 11 (2) Part 14 contains other miscellaneous provisions relating to the
12 interpretation of this Code.

13 **3 Meaning of *credit* and *amount of credit***

- 14 (1) For the purposes of this Code, *credit* is provided if under a
15 contract:
- 16 (a) payment of a debt owed by one person (the *debtor*) to another
17 (the *credit provider*) is deferred; or
- 18 (b) one person (the *debtor*) incurs a deferred debt to another (the
19 *credit provider*).
- 20 (2) For the purposes of this Code, the *amount of credit* is the amount
21 of the debt actually deferred. The *amount of credit* does not
22 include:
- 23 (a) any interest charge under the contract; or
- 24 (b) any fee or charge:
- 25 (i) that is to be or may be debited after credit is first
26 provided under the contract; and
- 27 (ii) that is not payable in connection with the making of the
28 contract or the making of a mortgage or guarantee
29 related to the contract.

1 **4 Meaning of *credit contract***

2 For the purposes of this Code, a ***credit contract*** is a contract under
3 which credit is or may be provided, being the provision of credit to
4 which this Code applies.

5 **5 Provision of credit to which this Code applies**

6 (1) This Code applies to the provision of credit (and to the credit
7 contract and related matters) if when the credit contract is entered
8 into or (in the case of precontractual obligations) is proposed to be
9 entered into:

10 (a) the debtor is a natural person or a strata corporation; and

11 (b) the credit is provided or intended to be provided wholly or
12 predominantly:

13 (i) for personal, domestic or household purposes; or

14 (ii) to purchase, renovate or improve residential property for
15 investment purposes; or

16 (iii) to refinance credit that has been provided wholly or
17 predominantly to purchase, renovate or improve
18 residential property for investment purposes; and

19 (c) a charge is or may be made for providing the credit; and

20 (d) the credit provider provides the credit in the course of a
21 business of providing credit carried on in this jurisdiction or
22 as part of or incidentally to any other business of the credit
23 provider carried on in this jurisdiction.

24 (2) If this Code applies to the provision of credit (and to the credit
25 contract and related matters):

26 (a) this Code applies in relation to all transactions or acts under
27 the contract whether or not they take place in this
28 jurisdiction; and

29 (b) this Code continues to apply even though the credit provider
30 ceases to carry on a business in this jurisdiction.

31 (3) For the purposes of this section, investment by the debtor is not a
32 personal, domestic or household purpose.

33 (4) For the purposes of this section, the predominant purpose for
34 which credit is provided is:

Section 6

- 1 (a) the purpose for which more than half of the credit is intended
2 to be used; or
3 (b) if the credit is intended to be used to obtain goods or services
4 for use for different purposes, the purpose for which the
5 goods or services are intended to be most used.

6 **6 Provision of credit to which this Code does not apply**

7 *Short term credit*

- 8 (1) This Code does not apply to the provision of credit if, under the
9 contract:
10 (a) the provision of credit is limited to a total period that does
11 not exceed 62 days; and
12 (b) the maximum amount of credit fees and charges that may be
13 imposed or provided for does not exceed 5% of the amount
14 of credit; and
15 (c) the maximum amount of interest charges that may be
16 imposed or provided for does not exceed an amount
17 (calculated as if the Code applied to the contract) equal to the
18 amount payable if the annual percentage rate were 24% per
19 annum.
- 20 (2) For the purposes of paragraph (1)(b), credit fees and charges
21 imposed or provided for under the contract are taken to include the
22 following, whether or not payable under the contract:
23 (a) a fee or charge payable by the debtor to any person for an
24 introduction to the credit provider;
25 (b) a fee or charge payable by the debtor to any person for any
26 service if the person has been introduced to the debtor by the
27 credit provider;
28 (c) a fee or charge payable by the debtor to the credit provider
29 for any service related to the provision of credit, other than a
30 service mentioned in paragraph (b).
- 31 (3) For the purposes of paragraphs (2)(a) and (b), it does not matter
32 whether or not there is an association between the person and the
33 credit provider.

Section 6

1 *Credit without express prior agreement*

- 2 (4) This Code does not apply to the provision of credit if, before the
3 credit was provided, there was no express agreement between the
4 credit provider and the debtor for the provision of credit. For
5 example, when a cheque account becomes overdrawn but there is
6 no expressly agreed overdraft facility or when a savings account
7 falls into debit.

8 *Credit for which only account charge payable*

- 9 (5) This Code does not apply to the provision of credit under a
10 continuing credit contract if the only charge that is or may be made
11 for providing the credit is a periodic or other fixed charge that does
12 not vary according to the amount of credit provided. However, this
13 Code applies if the charge is of a nature prescribed by the
14 regulations for the purposes of this subsection or if the charge
15 exceeds the maximum charge (if any) so prescribed.

16 *Joint credit and debit facilities*

- 17 (6) This Code does not apply to any part of a credit contract under
18 which both credit and debit facilities are available to the extent that
19 the contract or any amount payable or other matter arising out of it
20 relates only to the debit facility.

21 *Bill facilities*

- 22 (7) This Code applies to the provision of credit arising out of a bill
23 facility, that is, a facility under which the credit provider provides
24 credit by accepting, drawing, discounting or endorsing a bill of
25 exchange or promissory note. However, it does not apply if:
26 (a) the credit is provided by an authorised deposit-taking
27 institution (within the meaning of subsection 5(1) of the
28 *Banking Act 1959*); or
29 (b) the regulations provide that the Code does not apply to the
30 provision of all or any credit arising out of such a facility.

Section 6

1 *Insurance premiums by instalments*

2 (8) This Code does not apply to the provision of credit by an insurer
3 for the purpose of the payment to the insurer of an insurance
4 premium by instalments, even though the instalments exceed the
5 total of the premium that would be payable if the premium were
6 paid in a lump sum, if on cancellation the insured would have no
7 liability to make further payments under the contract.

8 *Pawnbrokers*

9 (9) This Code does not apply to the provision of credit on the security
10 of pawned or pledged goods by a pawnbroker in the ordinary
11 course of a pawnbroker's business (being a business which is being
12 lawfully conducted by the pawnbroker) as long as it is the case
13 that, if the debtor is in default, the pawnbroker's only recourse is
14 against the goods provided as security for the provision of the
15 credit. However, sections 76 to 81 (Court may reopen unjust
16 transactions) apply to any such provision of credit.

17 *Trustees of estates*

18 (10) This Code does not apply to the provision of credit by the trustee
19 of the estate of a deceased person by way of an advance to a
20 beneficiary or prospective beneficiary of the estate. However,
21 sections 76 to 81 (Court may reopen unjust transactions) apply to
22 any such provision of credit.

23 *Employee loans*

24 (11) This Code (other than this Part, Part 4, Division 3 of Part 5,
25 Divisions 4 and 5 of Part 7 and Parts 12, 13 and 14) does not apply
26 to the provision of credit by an employer, or a related body
27 corporate within the meaning of the *Corporations Act 2001* of an
28 employer, to an employee or former employee (whether or not it is
29 provided to the employee or former employee with another
30 person). However, for a credit provider that provides credit to
31 which this Code applies in the course of a business of providing
32 credit to which this Code applies to employees or former
33 employees and to others, this subsection applies only to the
34 provision of credit on terms that are more favourable to the debtor

Section 6

1 than the terms on which the credit provider provides credit to
2 persons who are not employees or former employees of the credit
3 provider or a related body corporate.

4 *Margin loans*

5 (12) This Code does not apply to the provision of credit by way of a
6 margin loan (within the meaning of subsection 761EA(1) of the
7 *Corporations Act 2001*).

8 *Regulations may exclude credit*

9 (13) The regulations may exclude, from the application of all or any
10 provisions of this Code, the provision of credit of a class specified
11 in the regulations. In particular (but without limiting the generality
12 of the foregoing), the regulations may so exclude the provision of
13 credit if the amount of the credit exceeds or may exceed a specified
14 amount or if the credit is provided by a credit provider of a
15 specified class.

16 *ASIC may exclude credit*

17 (14) ASIC may exclude, from the application of all or any provisions of
18 this Code, a provision of credit specified by ASIC.

19 (15) Without limiting subsection (14), ASIC may exclude a provision of
20 credit if:

- 21 (a) the amount of the credit exceeds, or may exceed, a specified
22 amount; or
23 (b) the credit is provided by a specified credit provider.

24 (16) An exemption under subsection (14) is not a legislative instrument.

25 (17) ASIC may, by legislative instrument, exclude from the application
26 of all or any provisions of this Code, the provision of credit of a
27 class specified in the instrument.

28 (18) Without limiting subsection (17), ASIC may exclude a provision of
29 credit if:

- 30 (a) the amount of the credit exceeds, or may exceed, a specified
31 amount; or

Section 7

1 (b) the credit is provided by a specified credit provider, or a class
2 of credit providers.

3 (19) In this section:

4 *fee or charge* does not include a government fee, charge or duty of
5 any kind.

6 *security*, of pawned or pledged goods, means security by way of
7 bailment of the goods under which the title to the goods does not
8 pass, conditionally or unconditionally, to the bailee.

9 **7 Mortgages to which this Code applies**

10 (1) This Code applies to a mortgage if:

11 (a) it secures obligations under a credit contract or a related
12 guarantee; and

13 (b) the mortgagor is a natural person or a strata corporation.

14 (2) If any such mortgage also secures other obligations, this Code
15 applies to the mortgage to the extent only that it secures obligations
16 under the credit contract or related guarantee.

17 (3) The regulations may exclude, from the application of all or any
18 provisions of this Code, a mortgage of a class specified in the
19 regulations.

20 **8 Guarantees to which this Code applies**

21 (1) This Code applies to a guarantee if:

22 (a) it guarantees obligations under a credit contract; and

23 (b) the guarantor is a natural person or a strata corporation.

24 (2) If any such guarantee also guarantees other obligations, this Code
25 applies to the guarantee to the extent only that it guarantees
26 obligations under the credit contract.

27 (3) The regulations may exclude, from the application of all or any
28 provisions of this Code, a guarantee of a class specified in the
29 regulations.

Section 9

1 **9 Goods leases with option to purchase to be regarded as sale by**
2 **instalments**

- 3 (1) For the purposes of this Code, a contract for the hire of goods
4 under which the hirer has a right or obligation to purchase the
5 goods, is to be regarded as a sale of the goods by instalments if the
6 charge that is or may be made for hiring the goods, together with
7 any other amount payable under the contract (including an amount
8 to purchase the goods or to exercise an option to do so) exceeds the
9 cash price of the goods.

10 Note: A contract includes a series of contracts, or contracts and
11 arrangements (see Part 13).

- 12 (2) A debt is to be regarded as having been incurred, and credit
13 provided, in such circumstances.

- 14 (3) Accordingly, if because of subsection 5(1) the contract is a credit
15 contract, this Code (including Part 6) applies as if the contract had
16 always been a sale of goods by instalments, and for that purpose:
17 (a) the amounts payable under the contract are the instalments;
18 and
19 (b) the credit provider is the person who is to receive those
20 payments; and
21 (c) the debtor is the person who is to make those payments; and
22 (d) the property of the supplier in the goods passes under the
23 contract to the person to whom the goods are hired on
24 delivery of the goods or the making of the contract,
25 whichever occurs last; and
26 (e) the charge for providing the credit is the amount by which the
27 charge that is or may be made for hiring the goods, together
28 with any other amount payable under the contract (including
29 an amount to purchase the goods or to exercise an option to
30 do so), exceeds the cash price of the goods; and
31 (f) a mortgage containing the terms and conditions set out in the
32 regulations is taken to have been entered into in writing
33 between the person to whom the goods are hired under the
34 contract and the supplier as security for payment to the
35 supplier of the amount payable to the supplier by the person
36 to whom the goods are hired under the contract; and

Section 10

1 (g) any provision in the contract for hiring by virtue of which the
2 supplier is empowered to take possession, or dispose, of the
3 goods to which the contract relates is void.

4 (4) For the purposes of this section, the amount payable under the
5 contract includes any agreed or residual value of the goods at the
6 end of the hire period or on termination of the contract, but does
7 not include the following amounts:

8 (a) any amount payable in respect of services that are incidental
9 to the hire of goods under the contract;

10 (b) any amount that ceases to be payable on the termination of
11 the contract following the exercise of a right of cancellation
12 by the hirer at the earliest opportunity.

13 Note: Part 11 (Consumer leases) applies to the contracts specified in that
14 Part for the hire of goods under which the hirer does not have a right
15 or obligation to purchase the goods.

16 **10 Deciding application of Code to particular contracts for the sale**
17 **of land by instalments**

18 (1) This section applies to an executory contract for the sale of land if:

19 (a) under the contract, the purchaser:

20 (i) is entitled to enter into possession of the land before
21 becoming entitled to receive a conveyance or transfer of
22 the land; and

23 (ii) is bound to make a payment or payments (other than a
24 deposit or rent payment) to, or in accordance with the
25 instructions of, the vendor without becoming entitled to
26 receive a conveyance or transfer of the land in exchange
27 for the payment or payments; and

28 (b) the amount payable to purchase the land under the contract
29 exceeds the cash price of the land.

30 Note: *Cash price* is defined in Part 13 in terms of goods or services.
31 *Services* is defined in Part 13 to include rights in relation to, and
32 interests in, real property.

33 (2) For the purpose of deciding whether the contract is a credit
34 contract and, if it is a credit contract, of applying this Code
35 (including Part 6) to it:

Section 11

- 1 (a) a debt is to be regarded as having been incurred, and credit
2 provided, in the circumstances mentioned in subsection (1);
3 and
4 (b) the debtor is the purchaser under the contract; and
5 (c) the credit provider is the vendor under the contract; and
6 (d) the charge for providing the credit is the amount by which the
7 amount payable to purchase the land, together with any other
8 amount payable under the contract other than outgoings for
9 the land, exceeds the cash price of the land.

10 (3) This section does not affect the application of this Code to a
11 contract that is, apart from this section, a credit contract.

12 (4) In this section:

13 *deposit*, in relation to a contract, means an amount:

- 14 (a) not exceeding 10% of the amount payable to purchase the
15 land under the contract; and
16 (b) paid or payable in one or more amounts; and
17 (c) liable to be forfeited and retained by the vendor in the event
18 of a breach of contract by the purchaser.

19 *outgoings* includes rates, water charges and house and contents
20 insurance.

21 *rent payment*, under a contract, means a payment:

- 22 (a) made by the purchaser to the vendor in exchange for
23 possession of the land before becoming entitled to receive a
24 conveyance or transfer of the land; and
25 (b) that is not deductible from the amount payable to purchase
26 the land.

27 **11 Deciding application of Code to particular contracts for the sale**
28 **of goods by instalments**

29 (1) This section applies to a contract for the sale of goods if the
30 amount payable to purchase the goods under the contract:

- 31 (a) is payable by instalments; and
32 (b) exceeds the cash price of the goods.

Section 12

- 1 (2) This section does not apply to a contract for the hire of goods even
2 if the hirer has a right or obligation to purchase the goods.
- 3 (3) For the purpose of deciding whether the contract is a credit
4 contract and, if it is a credit contract, of applying this Code
5 (including Part 6) to it:
- 6 (a) a debt is to be regarded as having been incurred, and credit
7 provided, in the circumstances mentioned in subsection (1);
8 and
- 9 (b) the debtor is the person who is to make the payments; and
- 10 (c) the credit provider is the person who is to receive the
11 payments; and
- 12 (d) the charge for providing the credit is the amount by which the
13 amount payable to purchase the goods, together with any
14 other amount payable under the contract, exceeds the cash
15 price of the goods.
- 16 (4) This section does not affect the application of this Code to a
17 contract that is, apart from this section, a credit contract.

18 **12 Deciding application of Code to particular contracts for the sale**
19 **of goods by instalments under related contracts**

- 20 (1) For the purpose of this section, a contract is a *related contract* to a
21 contract for the sale of goods (the *goods contract*) if:
- 22 (a) the sale of goods is financed, wholly or partly, by the
23 provision of credit under the contract; and
- 24 (b) the credit provider under the contract is:
- 25 (i) the supplier of goods under the goods contract; or
- 26 (ii) a related body corporate within the meaning of the
27 *Corporations Act 2001* of the supplier of the goods
28 under the goods contract; and
- 29 (c) the amount payable under the contract is payable by
30 instalments.
- 31 (2) For the purpose of deciding whether a related contract to a goods
32 contract is a credit contract and, if it is a credit contract, of
33 applying this Code (including Part 6) to it, the charge for providing
34 the credit is the amount by which the amount payable to purchase

Section 13

1 the goods, together with any other amount payable under the
2 related contract, exceeds the cash price of the goods.

3 (3) This section does not affect the application of this Code to a
4 contract that is, apart from this section, a credit contract.

5 **13 Presumptions relating to application of Code**

6 (1) In any proceedings (whether brought under this Code or not) in
7 which a party claims that a credit contract, mortgage or guarantee
8 is one to which this Code applies, it is presumed to be such unless
9 the contrary is established.

10 (2) It is presumed for the purposes of this Code that credit is not
11 provided or intended to be provided under a contract wholly or
12 predominantly for any or all of the following purposes (a *Code*
13 *purpose*):

14 (a) for personal, domestic or household purposes;

15 (b) to purchase, renovate or improve residential property for
16 investment purposes;

17 (c) to refinance credit that has been provided wholly or
18 predominantly to purchase, renovate or improve residential
19 property for investment purposes;

20 if the debtor declares, before entering the contract, that the credit is
21 to be applied wholly or predominantly for a purpose that is not a
22 Code purpose, unless the contrary is established.

23 (3) However, the declaration is ineffective if, when the declaration was
24 made, the credit provider or a person (the *prescribed person*) of a
25 kind prescribed by the regulations:

26 (a) knew, or had reason to believe; or

27 (b) would have known, or had reason to believe, if the credit
28 provider or prescribed person had made reasonable inquiries
29 about the purpose for which the credit was provided, or
30 intended to be provided, under the contract;

31 that the credit was in fact to be applied wholly or predominantly
32 for a Code purpose.

33 (4) If the declaration is ineffective under subsection (3), paragraph
34 5(1)(b) is taken to be satisfied in relation to the contract.

Section 13

1 (5) A declaration under this section is to be substantially in the form (if
2 any) required by the regulations and is ineffective for the purposes
3 of this section if it is not.

4 (6) A person commits an offence if:
5 (a) the person engages in conduct; and
6 (b) the conduct induces a debtor to make a declaration under this
7 section that is false or misleading in a material particular; and
8 (c) the declaration is false or misleading in a material particular.

9 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
10 both.

11 (7) Strict liability applies to paragraph (6)(c).

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

1

2 **Part 2—Credit contracts**

3 **Division 1—Negotiating and making credit contracts**

4 **14 Credit contract to be in form of written contract document**

5 (1) A credit contract must be in the form of:

6 (a) a written contract document signed by the debtor and the
7 credit provider; or

8 (b) a written contract document signed by the credit provider and
9 constituting an offer to the debtor that is accepted by the
10 debtor in accordance with the terms of the offer.

11 (2) An offer may be accepted by the debtor for the purposes of
12 paragraph (1)(b):

13 (a) by the debtor or a person authorised by the debtor accessing
14 or drawing down credit to incur a liability; or

15 (b) by any other act of the debtor or of any such authorised
16 person that satisfies the conditions of the offer and constitutes
17 an acceptance of the offer at law.

18 (3) The credit provider, or a person associated with the credit provider,
19 may not be authorised by the debtor for the purposes of
20 subsection (2). However, this subsection does not prevent the
21 debtor authorising the credit provider to debit the debtor's account.

22 (4) In the case of a contract document consisting of more than one
23 document, it is sufficient compliance with this section if one of the
24 documents is duly signed and the other documents are referred to
25 in the signed document.

26 **15 Other forms of contract**

27 (1) The regulations may authorise other ways of making a credit
28 contract that do not involve a written document.

29 (2) In that case, the provisions of this Division apply with such
30 modifications as are prescribed by the regulations.

Section 16

1 **16 Precontractual disclosure**

- 2 (1) A credit provider must not enter into a credit contract unless the
3 credit provider has given the debtor:
- 4 (a) a precontractual statement setting out the matters required by
5 section 17 to be included in the contract document; and
6 (b) an information statement in the form required by the
7 regulations of the debtor's statutory rights and statutory
8 obligations.
- 9 (2) Those statements must be given:
- 10 (a) before the contract is entered into; or
11 (b) before the debtor makes an offer to enter into the contract;
12 whichever first occurs.
- 13 (3) Before entering into a credit contract, the credit provider may
14 inform the debtor of the comparison rate. If the credit provider
15 does so, the comparison rate must be calculated as prescribed by
16 the regulations and be accompanied by the warnings set out in the
17 regulations.
- 18 (4) The precontractual statement must contain the financial
19 information specified by the regulations in the form prescribed by
20 the regulations.
- 21 (5) The precontractual statement may be the proposed contract
22 document or be a separate document or documents.
- 23 (6) A document forming part of a precontractual statement consisting
24 of more than one document when the precontractual statement is
25 first given must indicate that it does not contain all of the required
26 precontractual information.
- 27 (7) A precontractual statement may be varied, within the time referred
28 to in subsection (2), by written notice containing particulars of the
29 variation given to the debtor.

30 **17 Matters that must be in contract document**

- 31 (1) The contract document must contain the following matters.

1 *Credit provider's name*

2 (2) The contract document must contain the credit provider's name.

3 *Amount of credit*

4 (3) The contract document must contain:

5 (a) if the amount of credit to be provided is ascertainable:

6 (i) that amount; and

7 (ii) the persons, bodies or agents (including the credit
8 provider) to whom it is to be paid and the amounts
9 payable to each of them, but only if both the person,
10 body or agent and the amount are ascertainable; and

11 (b) if the amount of the credit to be provided is not
12 ascertainable—the maximum amount of credit agreed to be
13 provided, or the credit limit under the contract, if any; and

14 (c) if the credit is provided by the supplier for a sale of land or
15 goods by instalments—a description of the land and its cash
16 price or of the goods and their cash price.

17 The requirement under paragraph (c) is in addition to, and does not
18 limit, the requirement under paragraph (a) or (b).

19 Note: A penalty may be imposed for contravention of a key requirement in
20 this subsection: see Part 6.

21 *Annual percentage rate or rates*

22 (4) The contract document must contain:

23 (a) the annual percentage rate or rates under the contract; and

24 (b) if there is more than one rate, how each rate applies; and

25 (c) if an annual percentage rate under the contract is determined
26 by referring to a reference rate:

27 (i) the name of the rate or a description of it; and

28 (ii) the margin or margins (if any) above or below the
29 reference rate to be applied to determine the annual
30 percentage rate or rates; and

31 (iii) where and when the reference rate is published or, if it
32 is not published, how the debtor may ascertain the rate;
33 and

34 (iv) the current annual percentage rate or rates.

Schedule 1 National Credit Code

Part 2 Credit contracts

Division 1 Negotiating and making credit contracts

Section 17

1 Note: A penalty may be imposed for contravention of a key requirement in
2 this subsection: see Part 6.

3 *Calculation of interest charges*

4 (5) The contract document must contain the method of calculation of
5 the interest charges payable under the contract and the frequency
6 with which interest charges are to be debited under the contract.

7 Note: A penalty may be imposed for contravention of a key requirement in
8 this subsection: see Part 6.

9 *Total amount of interest charges payable*

10 (6) The contract document must contain the total amount of interest
11 charges payable under the contract, if ascertainable (but only if the
12 contract would, on the assumptions under sections 180 and 182, be
13 paid out within 7 years of the date on which credit is first provided
14 under the contract).

15 Note: A penalty may be imposed for contravention of a key requirement in
16 this subsection: see Part 6.

17 *Repayments*

18 (7) The contract document must contain:
19 (a) if more than one repayment is to be made:
20 (i) the amount of the repayments or the method of
21 calculating the amount; and
22 (ii) if ascertainable, the number of the repayments; and
23 (iii) if ascertainable, the total amount of the repayments, but
24 only if the contract would, on the assumptions under
25 sections 180 and 182, be paid out within 7 years of the
26 date on which credit is first provided under the contract;
27 and
28 (iv) when the first repayment is to be paid, if ascertainable,
29 and the frequency of payment of repayments; and
30 (b) if the contract provides for a minimum repayment, the
31 amount of that repayment, if ascertainable, but, if not, the
32 method of calculation of the minimum repayment.

33 Paragraph (a) does not apply to minimum repayments under a
34 continuing credit contract.

1 *Credit fees and charges*

- 2 (8) The contract document must contain:
- 3 (a) a statement of the credit fees and charges that are, or may
- 4 become, payable under the contract, and when each such fee
- 5 or charge is payable, if ascertainable; and
- 6 (b) the amount of any such fee or charge if ascertainable, but, if
- 7 not, the method of calculation of the fee or charge, if
- 8 ascertainable; and
- 9 (c) the total amount of credit fees and charges payable under the
- 10 contract to the extent that it is ascertainable.

11 Note: A penalty may be imposed for contravention of a key requirement in

12 paragraph (a) or (b), but only in respect of retained credit fees and

13 charges: see Part 6.

14 *Changes affecting interest and credit fees and charges*

- 15 (9) If the annual percentage rate or rates or the amount or frequency of
- 16 payment of a credit fee or charge or instalment payable under the
- 17 contract may be changed, or a new credit fee or charge may be
- 18 imposed, the contract document must contain a statement or
- 19 statements to that effect and of the means by which the debtor will
- 20 be informed of the change or the new fee or charge.

21 Note: A penalty may be imposed for contravention of a key requirement in

22 this subsection: see Part 6.

23 *Statements of account*

- 24 (10) The contract document must contain the frequency with which
- 25 statements of account are to be provided to the debtor (except in
- 26 the case of a credit contract for which the annual percentage rate is
- 27 fixed for the whole term of the contract and under which there is
- 28 no provision for varying the rate).

29 *Default rate*

- 30 (11) The contract document must contain:
- 31 (a) if the contract is a contract under which a default rate of
- 32 interest may be charged when payments are in default—a
- 33 statement to that effect and the default rate and how it is to be
- 34 applied; and

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- 1 (b) if the default rate under the contract is determined by
2 referring to a reference rate:
3 (i) the name of the rate or a description of it; and
4 (ii) the margin or margins (if any) above or below the
5 reference rate to be applied to determine the default rate;
6 and
7 (iii) when and where the reference rate is published or, if it
8 is not published, how the debtor may ascertain the rate;
9 and
10 (iv) the current default rate.

11 Note: A penalty may be imposed for contravention of a key requirement in
12 this subsection: see Part 6.

13 *Enforcement expenses*

- 14 (12) The contract document must contain a statement that enforcement
15 expenses may become payable under the credit contract or
16 mortgage (if any) in the event of a breach.

17 *Mortgage or guarantee*

- 18 (13) The contract document must contain:
19 (a) if any mortgage or guarantee is to be or has been taken by the
20 credit provider—a statement to that effect; and
21 (b) in the case of a mortgage—a description of the property
22 subject to, or proposed to be subject to, the mortgage, to the
23 extent to which it is ascertainable.

24 *Commission*

- 25 (14) If a commission is to be paid by or to the credit provider for the
26 introduction of credit business or business financed by the contract,
27 the contract document must contain:
28 (a) a statement of that fact; and
29 (b) the person by whom the commission is payable; and
30 (c) the person to whom the commission is payable; and
31 (d) the amount if ascertainable.

32 **Commission** does not include fees payable by a supplier under a
33 merchant service agreement with a credit provider, an amount

1 payable in connection with a credit-related insurance contract or
2 commission paid to employees of the credit provider.

3 *Insurance financed by contract*

4 (15) If the credit provider knows that the debtor is to enter into a
5 credit-related insurance contract and that the insurance is to be
6 financed under the credit contract, the contract document must
7 contain:

- 8 (a) the name of the insurer; and
- 9 (b) the amount payable to the insurer or, if it is not ascertainable,
10 how it is calculated; and
- 11 (c) the kind of insurance and any other particulars that may be
12 prescribed by the regulations; and
- 13 (d) if the credit provider knows of any commission to be paid by
14 the insurer for the introduction of the insurance business—a
15 statement that it is to be paid and, if ascertainable, the amount
16 of the commission expressed either as a monetary amount or
17 as a proportion of the premium.

18 In the case of consumer credit insurance that includes a contract of
19 general insurance within the meaning of the *Insurance Contracts*
20 *Act 1984*:

- 21 (e) it is sufficient compliance with paragraphs (a) and (b) if the
22 contract document contains the name of the general insurer
23 and the total amount payable to the insurers (or, if it is not
24 ascertainable, how it is calculated); and
- 25 (f) it is sufficient compliance with paragraph (d) relating to the
26 amount of commission if the contract document contains the
27 total amount of commission (expressed as a monetary
28 amount or as a proportion of the premium) to be paid by the
29 insurers.

30 Note: A penalty may be imposed for contravention of a key requirement in
31 paragraph (a) or (b): see Part 6.

32 *Other information*

33 (16) The contract document must contain any information or warning
34 required by the regulations.

Section 18

1 Note: Sections 180 to 182 set out the tolerances and assumptions applicable
2 to matters required to be disclosed.

3 **18 Form and expression of contract document**

4 The contract document must conform to the requirements of the
5 regulations as to its form and the way it is expressed and, subject to
6 any such requirements, may consist of one or more separate
7 documents.

8 **19 Alteration of contract document**

- 9 (1) An alteration of (including an addition to) a contract document by
10 the credit provider after it is signed by the debtor is ineffective
11 unless the debtor has agreed in writing to the alteration.
- 12 (2) This section does not apply to an alteration having the effect of
13 reducing the debtor's liabilities under the credit contract.

14 **20 Copy of contract for debtor**

- 15 (1) If a contract document is to be signed by the debtor and returned to
16 the credit provider, the credit provider must give the debtor a copy
17 to keep.
- 18 (2) A credit provider must, not later than 14 days after a credit contract
19 is made, give a copy of the contract in the form in which it was
20 made to the debtor.
- 21 (3) Subsection (2) does not apply if the credit provider has previously
22 given the debtor a copy of the contract document to keep.

23 **21 When debtor may terminate contract**

- 24 (1) Although a credit contract has been made, the debtor may
25 nevertheless, by written notice to the credit provider, terminate the
26 contract unless:
27 (a) any credit has been obtained under the contract; or
28 (b) a card or other means of obtaining credit provided to the
29 debtor by the credit provider has been used to acquire goods

Section 22

1 or services for which credit is to be advanced under the
2 contract.

3 (2) Nothing in this section prevents the credit provider from retaining
4 or requiring payment of fees or charges incurred before the
5 termination and which would have been payable under the credit
6 contract.

7 **22 Offence for noncompliance**

8 (1) A credit provider must not:
9 (a) enter into a credit contract that contravenes a requirement of
10 this Division; or
11 (b) otherwise contravene a requirement of this Division.

12 Criminal penalty: 100 penalty units.

13 (2) Subsection (1) is an offence of strict liability.

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

Section 23

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2 **Division 2—Debtor's monetary obligations**

3 **23 Prohibited monetary obligations**

- 4 (1) A credit contract must not impose a monetary liability on the
5 debtor:
- 6 (a) in respect of a credit fee or charge prohibited by this Code; or
 - 7 (b) in respect of an amount of a fee or charge exceeding the
8 amount that may be charged consistently with this Code; or
 - 9 (c) in respect of an interest charge under the contract exceeding
10 the amount that may be charged consistently with this Code.

11 Note: A penalty may be imposed for contravention of a key requirement in
12 this subsection, but only at the time the credit contract is entered into:
13 see Part 6.

14 *Civil effect*

- 15 (2) Any provision of a credit contract that imposes a monetary liability
16 prohibited by subsection (1) is void to the extent that it does so. If
17 an amount that is prohibited by subsection (1) is paid, it may be
18 recovered.
- 19 (3) A credit fee or charge cannot be charged in respect of a credit
20 contract unless the contract authorises it to be charged.

21 *Civil effect*

- 22 (4) If an amount that is prohibited by subsection (3) is paid, it may be
23 recovered.

24 **24 Offences related to prohibited monetary obligations**

- 25 (1) A credit provider must not:
- 26 (a) enter into a credit contract on terms imposing a monetary
27 liability prohibited by subsection 23(1); or
 - 28 (b) require or accept payment of an amount in respect of a
29 monetary liability that cannot be imposed consistently with
30 this Code.

1 Criminal penalty: 100 penalty units.

2 (2) Subsection (1) is an offence of strict liability.

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

4 **25 Loan to be in money or equivalent**

5 (1) A credit provider must not under a credit contract pay an amount to
6 or in accordance with the instructions of the debtor unless the
7 payment is in cash or money's worth and is made in full without
8 deducting an amount for interest charges under the contract.

9 Criminal penalty: 100 penalty units.

10 (2) Subsection (1) is an offence of strict liability.

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

12 (3) The regulations may provide that subsection (1) does not apply to
13 the deduction of an amount for the first payment of interest charges
14 under the contract.

15 **26 Early payments and crediting of payments**

16 (1) A credit provider must accept any payment under a credit contract
17 that is made before it is payable under the contract unless the
18 contract prohibits its early payment.

19 Criminal penalty: 100 penalty units.

20 (2) A credit provider must credit each payment made under a credit
21 contract to the debtor as soon as practicable after receipt of the
22 payment.

23 Criminal penalty: 100 penalty units.

24 (3) Subsections (1) and (2) are offences of strict liability.

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

26 (4) Despite subsection (2), a credit provider is not required to credit a
27 payment under a credit contract before it is payable under the
28 contract if the contract prohibits its early payment and:

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- 1 (a) the credit provider informs the debtor, as soon as practicable
2 after the credit provider becomes aware of the payment, that
3 it will not be credited to the debtor (or that any credit will be
4 reversed) until it becomes payable under the contract, and the
5 debtor elects to leave the payment with the credit provider; or
6 (b) the credit provider informs the debtor, before accepting the
7 payment, that it will not be credited to the debtor until it
8 becomes payable under the contract; or
9 (c) the credit provider refunds the payment to the debtor.
- 10 (5) A credit contract may not, under this section, prohibit the paying
11 out of the contract at any time under section 82.

1

2 **Division 3—Interest charges**

3 **27 Definitions relating to interest**

4 (1) In this Code:

5 *annual percentage rate* under a credit contract means a rate
6 specified in the contract as an annual percentage rate.

7 *daily percentage rate* means the rate determined by dividing the
8 annual percentage rate by 365.

9 *default rate* means a higher annual percentage rate permitted by
10 section 30.

11 *unpaid balance* under a credit contract at any time means the
12 difference between all amounts credited and all amounts debited to
13 the debtor under the contract at that time.

14 *unpaid daily balance* for a day under a credit contract means the
15 unpaid balance under the contract at the end of that day.

16 (2) A credit contract may specify, for the purposes of payments or any
17 other purposes under the contract, when a day ends. Different times
18 of the day may be specified for different purposes.

19 **28 Limit on interest charges**

20 (1) The maximum amount of an interest charge that may be imposed
21 or provided for under a credit contract is:

22 (a) where only one annual percentage rate applies to the unpaid
23 balances under the contract—the amount determined by
24 applying the daily percentage rate to the unpaid daily
25 balances; or

26 (b) in any other case—the sum of each of the amounts
27 determined by applying each daily percentage rate to that part
28 of the unpaid daily balances to which it applies under the
29 contract.

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Section 29

- 1 (2) However, an interest charge under a credit contract for a month, a
2 quarter or half a year may be determined by applying the annual
3 percentage rate or rates, divided by 12 (for a month), by 4 (for a
4 quarter) or by 2 (for half a year), to the whole or that part of the
5 average unpaid daily balances to which it applies. The regulations
6 may provide for the calculation of unpaid daily balances in these
7 circumstances.
- 8 (3) This section does not prevent the imposition of a default rate of
9 interest permitted by section 30.

10 **29 Early debit or payment of interest charges prohibited**

- 11 (1) A credit provider must not, at any time before the end of a day to
12 which an interest charge applies, require payment of or debit the
13 interest charge.
- 14 (2) A credit contract may provide for an interest charge to become
15 payable or be debited at any time after the day to which it applies.
- 16 (3) The regulations may provide that subsection (1) does not apply to
17 the first payment of interest charges under a credit contract.
- 18 (4) This section does not apply to the debit of an interest charge under
19 a credit contract before the end of the period to which the charge
20 applies if:
21 (a) the charge is debited on the last day of the period; and
22 (b) the amount debited is not treated by the credit provider as
23 part of the unpaid daily balance for that day for the purpose
24 of calculating interest charges under the contract.

25 **30 Default interest**

- 26 (1) A credit contract may not provide that an annual percentage rate
27 applicable under a credit contract to any part of the unpaid balance
28 will differ according to whether the debtor is in default under the
29 contract.
- 30 (2) However, a credit contract may provide for such a differential rate
31 if the higher rate is imposed only in the event of default in

Section 30

1 payment, in respect of the amount in default and while the default
2 continues.

Section 31

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2 **Division 4—Fees and charges**

3 **31 Prohibited credit fees or charges**

4 The regulations may specify credit fees or charges or classes of
5 credit fees or charges that are prohibited for the purposes of this
6 Code.

7 **32 Fees or charges passed on to other parties**

- 8 (1) A fee or charge payable by a debtor for an amount payable or to
9 reimburse an amount paid by the credit provider to another person,
10 body or agency is not to exceed the actual amount payable or paid
11 by the credit provider if that amount is ascertainable when the fee
12 or charge is paid by the debtor. The actual amount payable is to be
13 determined after taking into account any discount or other rebate or
14 other applicable allowance received or receivable by the credit
15 provider or a related body corporate within the meaning of the
16 *Corporations Act 2001*.
- 17 (2) If the actual amount paid by the credit provider to another person
18 was not ascertainable when the debtor paid an amount to the credit
19 provider for the fee or charge and is less than the amount paid by
20 the debtor, the credit provider must refund or credit the difference
21 to the debtor.
- 22 (3) Nothing in this section requires a rebate on tax payable by the
23 credit provider or a related body corporate to be taken into account
24 in determining the actual amount payable or paid by a credit
25 provider.

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2 **Division 5—Credit provider's obligation to account**

3 **33 Statements of account**

4 (1) A credit provider that provides credit must give to the debtor, or
5 arrange for the debtor to be given, periodic statements of account
6 in accordance with this Division.

7 Criminal penalty: 100 penalty units.

8 (2) The maximum period for a statement of account is:

9 (a) in the case of a continuing credit contract under which credit
10 is ordinarily obtained only by the use of a card—40 days; or

11 (b) in the case of any other continuing credit contract—40 days
12 or such longer period, not exceeding 3 months, as is agreed
13 by the credit provider and the debtor; or

14 (c) in any other case—6 months.

15 (3) A statement of account need not be given if:

16 (a) the credit is provided under a credit contract for which the
17 annual percentage rate is fixed for the whole term of the
18 contract and under which there is no provision for varying
19 the rate; or

20 (b) no amount has been debited or credited to the account during
21 the statement period (other than debits for government
22 charges, or duties, on receipts or withdrawals) and the
23 amount outstanding is zero or below a level fixed by the
24 regulations; or

25 (c) the credit provider wrote off the debt of the debtor under the
26 credit contract during the statement period and no further
27 amount has been debited or credited to the account during the
28 statement period; or

29 (d) the debtor was in default under the credit contract (not being
30 a continuing credit contract) during the statement period and
31 the credit provider has commenced enforcement proceedings;
32 or

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- 1 (e) the debtor was in default under a continuing credit contract
2 during the preceding 120 days, or during the statement period
3 and the 2 immediately preceding statement periods,
4 whichever is the shorter time, and the credit provider has,
5 before the commencement of the statement period, exercised
6 a right not to provide further credit under the contract and has
7 not provided further credit during the period; or
8 (f) the debtor has died or is insolvent and the debtor's personal
9 representative or trustee in bankruptcy has not requested a
10 statement of account.

11 (4) A separate statement of account may, but need not, be given in
12 respect of each or any number of the credit facilities provided
13 under a credit contract.

14 (5) Subsection (1) is an offence of strict liability.

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

16 **34 Information to be contained in statements of account**

17 (1) A statement of account must contain the following matters.

18 *Statement period*

19 (2) A statement of account must contain the dates on which the
20 statement period begins and ends.

21 *Balances*

22 (3) A statement of account must contain the opening and closing
23 balances (indicating the amount owed by the debtor at the
24 beginning and at the end of the statement period).

25 *Credit provided*

26 (4) A statement of account must contain particulars of each amount of
27 credit provided by the credit provider to the debtor during the
28 statement period.

1 *Identity of supplier*

- 2 (5) In the case of a continuing credit contract under which credit is
3 ordinarily obtained only by the use of a card, a statement of
4 account must contain the identity of the supplier if the credit was
5 provided for any cash, goods or services supplied by another
6 person.

7 *Interest charges*

- 8 (6) A statement of account must contain:
9 (a) the amount of the interest charge debited to the debtor's
10 account during the statement period and when the interest
11 was debited; and
12 (b) the annual percentage rate or rates and, if required by Part 4,
13 details of any change since the last statement period.

14 Note: A penalty may be imposed for contravention of a key requirement in
15 this subsection: see Part 6.

16 *Fees and charges*

- 17 (7) A statement of account must contain particulars of any fees and
18 charges debited to the debtor's account during the statement
19 period.

20 *Payments to or from account*

- 21 (8) A statement of account must contain:
22 (a) particulars of each amount paid by the debtor to the credit
23 provider, or credited to the debtor, during the statement
24 period; and
25 (b) particulars of any amount transferred to or from the account
26 to which the statement relates or to or from any other account
27 maintained under or for the purposes of the credit contract.

28 *Amounts payable by debtor*

- 29 (9) If a minimum amount is payable by the debtor under a continuing
30 credit contract, a statement of account must contain a statement of
31 the amount and the date by which it is due.

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Insurance payments

(10) If payment to an insurer is made during the statement period under a credit-related insurance contract that is agreed to be financed under the credit contract, a statement of account must contain:

(a) the name of the insurer, the amount paid to the insurer and the kind of insurance; and

(b) if the credit provider is aware of any commission to be paid by the insurer in relation to the insurance contract—the amount of the commission expressed either as a monetary amount or as a proportion of the premium, if ascertainable when the statement is given;

(if not previously disclosed in accordance with this Code).

In the case of consumer credit insurance that includes a contract of general insurance within the meaning of the *Insurance Contracts Act 1984*:

(c) it is sufficient compliance with paragraph (a) if the statement of account contains the name of the general insurer, the total amount payable to the insurers and the kind of insurance; and

(d) it is sufficient compliance with paragraph (b) if the statement of account contains the total amount of commission (expressed as a monetary amount or as a proportion of the premium) to be paid by the insurers.

Alterations

(11) A statement of account must contain any correction of information in a previous statement of account.

Other

(12) A statement of account must contain any other information required by the regulations.

Note: Sections 180 to 182 set out the tolerances and assumptions applicable to matters required to be included in statements of accounts.

1 **35 Opening balance must not exceed closing balance of previous**
2 **statement**

- 3 (1) The opening balance shown in each successive statement of
4 account must not exceed the closing balance shown in the last
5 statement of account.

6 Note: A penalty may be imposed for contravention of a key requirement in
7 this section: see Part 6.

- 8 (2) However, if no statement of account was given for the previous
9 period, the next statement of account required to be given by this
10 Code may have an opening balance that exceeds the closing
11 balance for the previous statement and must provide the particulars
12 referred to in subsections 34(4) to (12) in relation to any
13 immediately preceding periods for which statements were not
14 given.

15 **36 Statement of amount owing and other matters**

- 16 (1) A credit provider must, at the request of a debtor or guarantor and
17 within the time specified by this section, provide a statement of all
18 or any of the following:
19 (a) the current balance of the debtor's account;
20 (b) any amounts credited or debited during a period specified in
21 the request;
22 (c) any amounts currently overdue and when each such amount
23 became due;
24 (d) any amount currently payable and the date it became due.

25 Criminal penalty: 100 penalty units.

- 26 (2) The statement must be given:
27 (a) within 14 days, if all information requested relates to a period
28 1 year or less before the request is given; or
29 (b) within 30 days, if any information requested relates to a
30 period more than 1 year before the request is given.
31 (3) A statement under this section may be given orally but if the
32 request for the statement is made in writing the statement must be
33 given in writing.

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- 1 (4) In the case of joint debtors or guarantors, the statement under this
2 section need only be given to a debtor or guarantor who requests
3 the statement and not, despite section 194, to each joint debtor or
4 guarantor.
- 5 (5) A credit provider is not required to provide a further written
6 statement under this section if it has, within the 3 months before
7 the request is given, given such a statement to the person
8 requesting it.
- 9 (6) Except where otherwise ordered by the court on the application of
10 the debtor or guarantor, a credit provider is not required to provide
11 information in a statement under this section about amounts
12 credited or debited, or which were overdue or payable, more than 7
13 years before the request is given unless those amounts are currently
14 overdue and payable.
- 15 (7) Subsection (1) is an offence of strict liability.

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

17 **37 Court may order statement to be provided**

18 If a statement is not provided within the time required by this
19 Division, the court may, on the application of the debtor or
20 guarantor, order the credit provider to provide the statement or
21 itself determine the amounts in relation to which the statement was
22 sought.

23 **38 Disputed accounts**

- 24 (1) If a debtor, by written notice to a credit provider, disputes a
25 particular liability entered against the debtor under a credit
26 contract, the credit provider must give the debtor a written notice
27 explaining in reasonable detail how the liability arises.
- 28 (2) A written notice need not be given if the credit provider agrees
29 with the debtor as to the disputed amount and gives the debtor a
30 written notice advising of the agreed liability.
- 31 (3) If in the case of a continuing credit contract the disputed entry
32 appears in a statement of account in which a date for payment of

Section 39

- 1 the amount of the account, or part of that amount, is shown, the
2 notice of dispute must be given to the credit provider on or before
3 that date.
- 4 (4) In the case of any other credit contract for which a statement of
5 account is given, the notice of dispute must be given to the credit
6 provider within 30 days of receiving the statement of account in
7 which the amount, or part of that amount, was first shown.
- 8 (5) In the case of a credit contract in respect of which a statement of
9 account need not be and is not given for the period to which the
10 disputed liability relates, the notice of dispute must be given to the
11 credit provider not later than 3 months after the end of the contract.
- 12 (6) The credit provider must not begin enforcement proceedings on the
13 basis of a default arising from the disputed liability until at least 30
14 days have elapsed from the time the written explanation or advice
15 as to agreement was given.
- 16 (7) A debtor or credit provider may apply to the court to have the court
17 determine a disputed liability and, if satisfied that a liability is
18 genuinely disputed, the court may determine the matters in dispute
19 and make such consequential orders as it thinks just.
- 20 (8) If an application is made to the court under this section within 30
21 days after the explanation is given, the credit provider must not,
22 without leave of the court, begin enforcement proceedings on the
23 basis of a default arising from the disputed liability.
- 24 Criminal penalty: 50 penalty units.
- 25 (9) Subsection (8) is an offence of strict liability.
- 26 Note: For strict liability, see section 6.1 of the *Criminal Code*.
- 27 (10) This section does not affect a dispute not dealt with, or not arising,
28 under this section.

29 **39 Dating and adjustment of debits and credits in accounts**

- 30 (1) For the purposes of this Code and the credit contract, a debit or a
31 credit made by a credit provider to a debtor's account is taken to

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- 1 have been made, and has effect, on the date assigned to the debit or
2 credit, not on the date on which it is processed.
- 3 (2) A credit provider may subsequently adjust debits or credits to a
4 debtor's account, and the account balances, so as to accurately
5 reflect the legal obligations of the debtor and the credit provider.
- 6 (3) However, subsections (1) and (2) do not permit a debit or a credit
7 to be assigned a date other than the date on which it is processed,
8 or the subsequent adjustment of a debit or a credit or account
9 balance, if:
- 10 (a) the assignment or adjustment is not consistent with the credit
11 contract; or
- 12 (b) the adjustment results in an interest charge that is more than
13 the maximum amount permitted by the Code, as calculated
14 on the basis of debits or credits to a debtor's account
15 consistent with the credit contract; or
- 16 (c) the assignment or adjustment results in a contravention of
17 section 26; or
- 18 (d) the assignment of the date on which an interest charge is
19 taken to be debited results in a debit being taken to be done
20 before a time permitted under this Code.
- 21 (4) An adjustment by a credit provider under subsection (2) does not
22 affect any liability of a credit provider under Part 6.

1

2 **Division 6—Certain transactions not to be treated as**
3 **contracts**

4 **40 Deferrals, waivers and changes under contracts**

5 (1) The provision of credit as a result of a change to an existing credit
6 contract, or a deferral or waiver of an amount under an existing
7 credit contract or a postponement relating to an existing credit
8 contract, is not to be treated as creating a new credit contract for
9 the purposes of this Code, if the change, deferral, waiver or
10 postponement is made in accordance with this Code or the existing
11 credit contract.

12 (2) In this section:

13 *existing credit contract* includes existing consumer lease.

Section 41

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2 **Part 3—Related mortgages and guarantees**

3 **Division 1—Mortgages**

4 **41 Application of Division**

5 This Division applies to a mortgage (under which the mortgagor is
6 a natural person or a strata corporation) which secures obligations
7 under a credit contract or related guarantee, whether or not it also
8 secures other obligations (see section 7).

9 **42 Form of mortgage**

- 10 (1) A mortgage must be in the form of a written mortgage document
11 that is signed by the mortgagor.
- 12 (2) It is sufficient compliance with subsection (1) if:
13 (a) the mortgage is contained in a credit contract signed by the
14 mortgagor; or
15 (b) one of the documents comprising the mortgage document is
16 signed by the mortgagor (and the other documents are
17 referred to in the signed document).
- 18 (3) However, a goods mortgage need not be in the form of a written
19 mortgage document if the credit provider lawfully had possession
20 of the goods that are subject to the mortgage before the mortgage
21 was entered into, otherwise than because the credit provider
22 supplied the goods (for example, the goods were held by way of
23 security).
- 24 (4) A mortgage is not enforceable unless it complies with this section.

25 **43 Copy of mortgage for mortgagor**

- 26 (1) If a mortgage is in the form of a written mortgage document and is
27 not part of a credit contract, the credit provider must give the
28 mortgagor a copy to keep, in the form in which it was made, within
29 14 days after it is made.

- 1 (2) This section does not apply if the credit provider has previously
2 given the mortgagor a copy of the mortgage document to keep.

3 **44 Mortgages over all property void**

- 4 (1) A mortgage that does not describe or identify the property which is
5 subject to the mortgage is void.
- 6 (2) Without limiting subsection (1), a provision in a mortgage that
7 charges all the property of the mortgagor is void.

8 **45 Restriction on mortgage of future property**

- 9 (1) A provision in a mortgage to the effect that the mortgagor creates
10 or agrees to create a mortgage over or in respect of property or a
11 class of property that is to be, or may be, acquired by the
12 mortgagor after the mortgage is entered into is void.
- 13 (2) However, this section does not apply:
- 14 (a) to a provision in a mortgage of property that is to be acquired
15 wholly or partly with the credit provided under the credit
16 contract secured by the mortgage; or
- 17 (b) to a provision in a mortgage relating to property or a class of
18 property (whether or not ascertained) described or identified
19 in the mortgage; or
- 20 (c) to a provision in a mortgage relating to goods acquired in
21 replacement for, or as additions or accessories to, other goods
22 subject to the mortgage; or
- 23 (d) to any other provision specified by the regulations.

24 **46 Mortgages and continuing credit contracts**

- 25 (1) A provision in a mortgage to the effect that goods supplied from
26 time to time under a continuing credit contract are subject to the
27 mortgage is void.
- 28 (2) However, this section does not apply to a provision in a mortgage
29 relating to specified goods securing payment of a debt under a
30 continuing credit contract.

Section 47

1 **47 All accounts mortgages**

- 2 (1) In addition to securing credit provided by the credit contract or
3 proposed credit contract, or securing obligations under a related
4 guarantee or proposed related guarantee, to which a mortgage
5 initially applies, the mortgage may contain a provision that secures
6 credit provided under another future credit contract or future
7 related guarantee.
- 8 (2) Any such mortgage is unenforceable in relation to such a future
9 credit contract or future related guarantee unless the credit provider
10 has:
- 11 (a) given the mortgagor a copy of the contract document of the
12 credit contract or proposed credit contract or a copy of the
13 guarantee or proposed guarantee to which the mortgage is to
14 relate; and
- 15 (b) subsequently obtained from the mortgagor a written
16 acceptance of the extension of the mortgage or obtained
17 acceptance in some other form provided for by the
18 regulations.
- 19 (3) Section 42 (Form of mortgage) does not apply to an extension of a
20 mortgage under this section.

21 **48 Third party mortgages prohibited**

- 22 (1) A credit provider must not enter into a mortgage to secure
23 obligations under a credit contract unless each mortgagor is a
24 debtor under the contract or a guarantor under a related guarantee.
- 25 (2) A credit provider must not enter into a mortgage to secure
26 obligations under a guarantee unless each mortgagor is a guarantor
27 under the guarantee or a debtor under the related credit contract.
- 28 (3) A mortgage which does not comply with this section is
29 unenforceable.
- 30 (4) The court may, on the application of a party to a mortgage that is
31 unenforceable because of this section, order that the credit provider
32 takes such steps as are necessary to discharge the mortgage.

- 1 (5) In this section, a reference to a credit contract or guarantee includes
2 a reference to a proposed credit contract or proposed guarantee.

3 **49 Maximum amount which may be secured**

- 4 (1) A mortgage is void to the extent that it secures an amount, in
5 relation to any credit contract which it secures, that exceeds the
6 sum of the amount of the liabilities of the debtor under the credit
7 contract and the reasonable enforcement expenses of enforcing the
8 mortgage.
- 9 (2) A mortgage is void to the extent that it secures an amount, in
10 relation to any guarantee which it secures, that exceeds the limit of
11 the guarantor's liability under the guarantee and the reasonable
12 enforcement expenses of enforcing the mortgage.
- 13 (3) This section does not affect a provision of a mortgage permitted by
14 section 47.

15 **50 Prohibited securities**

- 16 (1) A mortgage cannot be created over employees' remuneration or
17 employment benefits or benefits under a superannuation scheme
18 unless the regulations permit it to do so.
- 19 (2) A mortgage cannot be created over goods that are essential
20 household property unless:
21 (a) the mortgagee supplied the goods to the mortgagor as part of
22 a business carried on by the mortgagee of supplying goods
23 and the mortgagor has not, as a previous owner of the goods,
24 sold them to the mortgagee for the purposes of the supply; or
25 (b) the mortgagee is a linked credit provider of the person who
26 supplied the goods to the mortgagor.
- 27 (3) For the purposes of subsection (2), essential household property
28 includes goods of a type prescribed under the regulations.
- 29 (4) A type of goods may be prescribed under subsection (3) only if the
30 type is similar to a type of household property mentioned in
31 regulations made under subparagraph 116(2)(b)(i) of the
32 *Bankruptcy Act 1966*.

Section 51

- 1 (5) A mortgage cannot be created over goods that are property used by
2 the mortgagor in earning income by personal exertion if the goods
3 do not have a total value greater than the relevant limit.
- 4 (6) An obligation under a credit contract cannot be secured by a
5 cheque, or bill of exchange or promissory note, endorsed or issued
6 by the debtor or guarantor.
- 7 (7) A mortgage or security is void to the extent that it contravenes this
8 section.
- 9 (8) In this section:
- 10 *antique item* means an item of household property the market
11 value of which is substantially attributable to its age or historical
12 significance.
- 13 *essential household property* means household property as
14 prescribed under regulations made under subparagraph 116(2)(b)(i)
15 of the *Bankruptcy Act 1966*.
- 16 *goods* does not include antique items.
- 17 *relevant limit*, in relation to goods, means the limit prescribed from
18 time to time under the *Bankruptcy Regulations 1966* for the
19 purposes of subparagraph 116(2)(c)(i) of the *Bankruptcy Act 1966*
20 for goods of that type.

21 **51 Assignment or disposal of mortgaged property by mortgagor**

- 22 (1) A mortgagor must not assign or dispose of property that is subject
23 to a mortgage without the credit provider's consent or the authority
24 of the court under subsection (3).
- 25 Criminal penalty: 50 penalty units.
- 26 (2) The credit provider must not unreasonably withhold consent or
27 attach unreasonable conditions to the consent (but a condition
28 requiring security over property of an equivalent kind and value is
29 not to be regarded as unreasonable).

- 1 (3) The court may, on application by a mortgagor, authorise the
2 mortgagor to dispose of mortgaged property on conditions
3 determined by the court if:
4 (a) the credit provider fails within a reasonable time to reply to a
5 request for consent to do so by the mortgagor; or
6 (b) consent is unreasonably withheld, or unreasonable conditions
7 are attached to the consent.

- 8 (4) Subsection (1) is an offence of strict liability.

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

10 **52 Conditions on consent to assignment or disposal of property**
11 **subject to mortgage**

- 12 (1) As a condition of granting consent to an assignment or disposal of
13 property subject to a mortgage, the credit provider may make any
14 or all of the requirements set out in this section. This section does
15 not limit any other requirements that may be made by the credit
16 provider.
- 17 (2) The credit provider may require any breaches of the credit contract
18 to which the mortgage relates and of the mortgage to be remedied.
- 19 (3) The credit provider may require the mortgagor and the assignee or
20 person to whom the property is disposed to execute and deliver to
21 the credit provider an agreement relating to the assignment or
22 disposal in a form approved by the credit provider under which,
23 without prejudicing or affecting the liability of the mortgagor, the
24 assignee or person to whom the property is disposed agrees with
25 the credit provider:
26 (a) to be personally liable to pay the amounts due or that become
27 due under the mortgage; and
28 (b) to perform and observe all other requirements and conditions
29 of the mortgage.
- 30 (4) The credit provider may require the mortgagor and the assignee or
31 person to whom the property is disposed to pay the reasonable
32 costs (if any) incurred by the credit provider for:
33 (a) stamp duty in respect of the assignment or disposal
34 agreement, or any other document the credit provider

Section 53

- 1 reasonably requires to be executed in connection with the
2 assignment or disposal; and
3 (b) fees payable to a duly qualified lawyer.

4 **53 Offence for noncompliance**

- 5 (1) A credit provider must not:
6 (a) enter into a mortgage that contravenes a requirement of this
7 Division; or
8 (b) otherwise contravene a requirement of this Division.

9 Criminal penalty: 50 penalty units.

- 10 (2) A credit provider must not enter into a mortgage that is void or
11 unenforceable, or that includes a provision that is void or
12 unenforceable, because of this Division.

13 Criminal penalty: 50 penalty units.

- 14 (3) Subsections (1) and (2) are offences of strict liability.

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

1

2 **Division 2—Guarantees**

3 **54 Application of Division**

4 This Division applies to a guarantee (under which the guarantor is
5 a natural person or a strata corporation) to the extent to which it
6 guarantees obligations under a credit contract, whether or not it
7 also guarantees other obligations (see section 8).

8 **55 Form of guarantee**

- 9 (1) A guarantee must be in writing signed by the guarantor.
- 10 (2) It is sufficient compliance with subsection (1) if the guarantee is
11 contained in a mortgage signed by the guarantor.
- 12 (3) The regulations may make provision for or with respect to the
13 content of guarantees and the way they are expressed.
- 14 (4) A guarantee is not enforceable unless it complies with this section
15 and regulations made under this section.

16 **56 Disclosure**

- 17 (1) Before a guarantee is signed by the guarantor, the credit provider
18 must give to the prospective guarantor:
- 19 (a) a copy of the contract document of the credit contract or
20 proposed credit contract; and
- 21 (b) a document in the form prescribed by the regulations
22 explaining the rights and obligations of a guarantor.
- 23 (2) A guarantee is not enforceable unless paragraph (1)(a) is complied
24 with.

25 **57 Copies of documents for guarantor**

- 26 (1) A credit provider must, not later than 14 days after a guarantee is
27 signed and given to the credit provider, give the guarantor:
- 28 (a) a copy of the guarantee signed by the guarantor; and

Section 58

- 1 (b) a copy of the credit contract or proposed credit contract.
- 2 (2) Paragraph (1)(a) does not apply if the credit provider has
3 previously given the guarantor a copy of the guarantee document to
4 keep and paragraph (1)(b) does not apply if the credit provider has
5 previously given the guarantor a copy of the credit contract or
6 proposed credit contract to keep.

7 **58 Guarantor may withdraw before credit is provided**

- 8 (1) Although a guarantee has been made, the guarantor may
9 nevertheless, by written notice to the credit provider:
- 10 (a) withdraw from the guarantee at any time before credit is first
11 provided under the credit contract; or
- 12 (b) withdraw from the guarantee after credit is first provided
13 under the contract if the credit contract made differs in some
14 material respect from the proposed credit contract given to
15 the guarantor before the guarantee is signed.
- 16 (2) The guarantor may withdraw from a guarantee under this section to
17 the extent only that it guarantees obligations under the credit
18 contract.
- 19 (3) This section is subject to section 61.

20 **59 Extension of guarantee**

- 21 (1) In addition to guaranteeing obligations under a credit contract or
22 proposed credit contract to which a guarantee initially applies, a
23 guarantee may contain a provision that makes credit provided
24 under another future credit contract subject to the guarantee.
- 25 (2) Any such guarantee is unenforceable in relation to such a future
26 credit contract unless the credit provider has:
- 27 (a) given the guarantor a copy of the contract document of that
28 future credit contract; and
- 29 (b) subsequently obtained from the guarantor a written
30 acceptance of the extension of the guarantee or obtained
31 acceptance in some other form provided for by the
32 regulations.

- 1 (3) Section 55 (Form of guarantee) and section 56 (Disclosure) do not
2 apply to an extension of a guarantee under this section.

3 **60 Limitation of guarantor's liability**

4 *Total amount for which guarantor can be liable*

- 5 (1) A guarantee is void to the extent that it secures an amount, in
6 relation to a credit contract to which this Code applies, that exceeds
7 the sum of the amount of the liabilities of the debtor under the
8 credit contract and the reasonable expenses of enforcing the
9 guarantee, or any lesser amount agreed between the credit provider
10 and the guarantor.

11 *Unenforceable contracts*

- 12 (2) Nothing in subsection (1) prevents a credit provider from enforcing
13 a guarantee relating to liabilities under a credit contract that is
14 unenforceable solely because of the debtor's death, insolvency or
15 incapacity.

16 *Debtors under 18 years of age*

- 17 (3) A guarantee which guarantees the liability of a debtor who was
18 under 18 years of age when the liability was incurred cannot be
19 enforced against the guarantor unless it contains a prominent
20 statement to the effect that the guarantor may not be entitled to an
21 indemnity against the debtor.

22 *Guarantor may limit liabilities under continuing credit contract*

- 23 (4) In the case of a continuing credit contract, a guarantor may, by
24 notice to the credit provider, limit the guarantee so that it applies
25 only to liabilities related to credit previously provided to the debtor
26 under the credit contract (including any liabilities not yet debited to
27 the debtor's account) and such further amount (if any) as the
28 guarantor agrees to guarantee.

Section 61

1 *Guarantee must not limit indemnity*

- 2 (5) A guarantee is void to the extent that it limits the guarantor's right
3 to indemnity from the person whose liability the guarantor has
4 guaranteed or it postpones or otherwise purports to limit the
5 guarantor's right to enforce the indemnity against the person.

6 *Effect of section*

- 7 (6) This section does not affect a provision of a guarantee permitted by
8 section 59.

9 **61 Increase in guarantor's liabilities**

- 10 (1) If the terms of a credit contract are changed to increase or allow for
11 an increase in liabilities, the liabilities of a guarantor under a
12 guarantee that secures those liabilities are not increased unless:

- 13 (a) the credit provider gives to the guarantor a written notice
14 setting out particulars of the change in the terms of the credit
15 contract; and
16 (b) the credit provider has subsequently obtained from the
17 guarantor a written acceptance of the extension of the
18 guarantee to those increased liabilities or obtained acceptance
19 in some other form provided for by the regulations.

- 20 (2) This section does not apply to an increase in liabilities resulting
21 from:

- 22 (a) a change of a kind referred to in paragraph 63(2)(a) or (b); or
23 (b) a change of which notice is required to be given under
24 Division 1 of Part 4 (not being a change referred to in
25 subsection 67(4) or section 68); or
26 (c) a change under subsection 74(2) or a postponement under
27 subsection 96(2); or
28 (d) a deferral or waiver of a debtor's obligations for a period not
29 exceeding 90 days.

30 **62 Offence for noncompliance**

- 31 (1) A credit provider must not:

Section 62

- 1 (a) enter into a guarantee that contravenes a requirement of this
2 Division; or
3 (b) otherwise contravene a requirement of this Division.
- 4 (2) A credit provider must not enter into a guarantee that is void or
5 unenforceable, or that contains a provision that is void or
6 unenforceable, because of this Division.
- 7 Criminal penalty: 50 penalty units.
- 8 (3) Subsections (1) and (2) are offences of strict liability.
- 9 Note: For strict liability, see section 6.1 of the *Criminal Code*.

Section 63

1

2 **Part 4—Changes to obligations under credit**
3 **contracts, mortgages and guarantees**

4 **Division 1—Unilateral changes by credit provider**

5 **63 Application of Division**

6 (1) This Division applies only to changes made unilaterally by a credit
7 provider under a credit contract, mortgage or guarantee.

8 (2) This Division does not apply to the following changes under a
9 credit contract:

10 (a) a change to a new annual percentage rate payable under the
11 contract (not being a rate determined by referring to a
12 reference rate), if both the new rate and when it takes effect
13 are ascertainable from the contract;

14 (b) an increase in the amount of repayments, if the increase
15 occurs automatically, as specified by the contract, and both
16 the amount of the increase and when it takes effect are
17 ascertainable from the contract;

18 (c) an increase in the term of a credit contract, if the increase
19 occurs only because of an increase in the annual percentage
20 rate or rates payable under the contract;

21 (d) a change made under Division 3.

22 (3) Nothing in this Division confers on a credit provider or a debtor
23 any power or right to change the credit contract or its terms in
24 addition to those conferred by the contract.

25 **64 Interest rate changes**

26 *Notification of interest rate changes*

27 (1) A credit provider must, not later than the day on which a change in
28 the annual percentage rate or rates payable under a credit contract
29 takes effect, give to the debtor written notice setting out:

Section 64

- 1 (a) the new rate or rates or, if a rate is determined by referring to
2 a reference rate, the new reference rate; and
3 (b) any information required by the regulations.

4 Criminal penalty: 100 penalty units.

5 *Notification by publication*

- 6 (2) Notice under subsection (1) may be given by publishing the notice
7 in a newspaper circulating throughout each State and Territory. A
8 credit provider that gives notice in accordance with this subsection
9 must give to the debtor particulars of the change before or when
10 the next statement of account is sent to the debtor after the change
11 takes effect.

12 Criminal penalty: 100 penalty units.

13 *Changes in reference rates*

- 14 (3) Subsection (1) does not apply to a change in a rate that is
15 determined by referring to a reference rate if the changed reference
16 rate is notified (whether or not by the credit provider) in a
17 newspaper circulating throughout each State and Territory not later
18 than the date the change takes effect.

19 *Notification of other interest changes*

- 20 (4) A credit provider must, not later than 20 days before a change in
21 the manner in which interest is calculated or applied under a credit
22 contract (including a change in or abolition of any interest free
23 period under the contract) takes effect, give to the debtor written
24 notice setting out:
25 (a) particulars of the change; and
26 (b) any information required by the regulations.

27 Criminal penalty: 100 penalty units.

28 *Interest rate reductions*

- 29 (5) Subsections (1) and (4) do not apply to a change that reduces the
30 obligations of the debtor under the credit contract.

Section 65

1 *Strict liability offences*

2 (6) Subsections (1), (2) and (4) are offences of strict liability.

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

4 *Application*

5 (7) This section applies whether or not the change is a change to the
6 terms of the contract.

7 **65 Repayment changes**

8 *Notification of repayment changes*

9 (1) A credit provider must, not later than 20 days before a change in
10 the amount or frequency or time for payment of, or a change in the
11 method of calculation of, instalments or minimum repayments,
12 under a credit contract takes effect, give to the debtor written
13 notice setting out:

14 (a) particulars of the change; and

15 (b) any information required by the regulations.

16 Criminal penalty: 100 penalty units.

17 *Repayment reductions*

18 (2) Subsection (1) does not apply to a change that reduces the
19 obligations of the debtor, or extends the time for payment, under
20 the credit contract. The credit provider must, however, give
21 particulars of any such change before or when the next statement
22 of account is sent to the debtor after the change takes effect.

23 Criminal penalty: 100 penalty units.

24 (3) If the amount or frequency or time for payment of instalments or
25 minimum repayments is not specified in the credit contract but is
26 determined by a method of calculation so specified, this section
27 requires the credit provider to give particulars only of any change
28 in that method of calculation.

1 *Strict liability offences*

2 (4) Subsections (1) and (2) are offences of strict liability.

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

4 *Application*

5 (5) This section does not apply to a change that occurs while the credit
6 contract does not require any repayment of the amount of credit
7 provided.

8 (6) This section applies whether or not the change is a change to the
9 terms of the contract.

10 **66 Credit fees and charges changes**

11 *Notification of credit fees and charges changes*

12 (1) A credit provider must, not later than 20 days before a change in
13 the amount of a credit fee or charge (including a new credit fee or
14 charge), or a change in the frequency or time for payment of a
15 credit fee or charge, under a credit contract takes effect, give to the
16 debtor written notice setting out:

17 (a) particulars of the change; and

18 (b) any information required by the regulations.

19 Criminal penalty: 100 penalty units.

20 *Notification by publication*

21 (2) Notice relating to a change in the amount of a credit fee or charge
22 (including a new credit fee or charge) may be given by publishing
23 the notice in a newspaper circulating throughout each State and
24 Territory. A credit provider that gives notice in accordance with
25 this subsection must give particulars of the change before or when
26 the next statement of account is sent to the debtor after the change
27 takes effect.

28 Criminal penalty: 100 penalty units.

Schedule 1 National Credit Code

Part 4 Changes to obligations under credit contracts, mortgages and guarantees

Division 1 Unilateral changes by credit provider

Section 67

1 *Credit fee or charge reductions*

2 (3) Subsection (1) does not apply to a change that reduces the
3 obligations of the debtor, or extends the time for payment, under
4 the credit contract. The credit provider must, however, give
5 particulars of any such change before or when the next statement
6 of account is sent to the debtor after the change takes effect.

7 Criminal penalty: 100 penalty units.

8 *Strict liability offences*

9 (4) Subsections (1), (2) and (3) are offences of strict liability.

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

11 *Application*

12 (5) This section applies whether or not the change is a change to the
13 terms of the contract.

14 **67 Changes to credit limits etc. in continuing credit contracts**

15 (1) If a credit provider decides not to provide any further credit under a
16 continuing credit contract, the credit contract continues in force in
17 relation to any credit previously provided under the contract.
18 However, this subsection does not prevent the termination of the
19 contract if otherwise permitted by this Code or the contract.

20 (2) A credit provider must, unless the debtor is in default under the
21 contract, as soon as practicable after deciding not to provide any
22 further credit or to reduce the credit limit, give to the debtor a
23 written notice to that effect if such notice has not previously been
24 given.

25 Criminal penalty: 100 penalty units.

26 (3) Subsection (2) is an offence of strict liability.

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

28 (4) A credit provider may increase the credit limit under a continuing
29 credit contract only at the request of the debtor or with the written
30 consent of the debtor.

1 **68 Other unilateral changes by credit provider**

2 (1) A credit provider must not exercise a power under a credit contract,
3 mortgage or guarantee to unilaterally change its terms without
4 giving to the other party, not less than 20 days before the change
5 takes effect, written notice setting out:

- 6 (a) particulars of the change in the terms of the credit contract,
7 mortgage or guarantee; and
8 (b) any information required by the regulations.

9 Criminal penalty: 100 penalty units.

10 (2) Subsection (1) does not apply to a change that reduces the
11 obligations of the debtor, or extends the time for payment, under
12 the credit contract. The credit provider must, however, give
13 particulars of any such change before or when the next statement
14 of account is sent to the debtor after the change takes effect.

15 Criminal penalty: 100 penalty units.

16 (3) Subsections (1) and (2) are offences of strict liability.

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

18 (4) This section does not apply to a change of which notice is required
19 to be given under section 64, 65, 66 or 67 (or which would be
20 required to be so given but for an exception provided in any such
21 section) or which is referred to in subsection 67(4).

22 **69 Particulars of matters as changed only required to be given**
23 **under this Division in certain cases**

24 The credit provider may, under section 64, 65, 66 or 68, give a
25 person particulars only of a matter as changed instead of particulars
26 of the change, but only if the credit provider:

- 27 (a) makes it clear to the person that the matter has changed; or
28 (b) issues to the person a new set of terms and conditions relating
29 to the credit contract, mortgage or guarantee.

Schedule 1 National Credit Code

Part 4 Changes to obligations under credit contracts, mortgages and guarantees

Division 1 Unilateral changes by credit provider

Section 70

1 **70 Prohibited increases in liabilities**

- 2 (1) If the annual percentage rate under a credit contract is currently
3 fixed for a specified term (including the whole term) of the
4 contract, the contract cannot be changed unilaterally by a credit
5 provider so as to increase, or change the method of calculation of a
6 fee or charge so as to increase, a fee or charge:
7 (a) payable by the debtor on early termination of the credit
8 contract; or
9 (b) payable on prepayment of an amount under the credit
10 contract.
11 (2) The regulations may prescribe circumstances in which such a
12 change is permitted.

1

2 **Division 2—Changes by agreement of parties**

3 **71 Changes by agreement**

4 (1) If the parties under a credit contract, mortgage or guarantee agree
5 to change its terms, the credit provider must, not later than 30 days
6 after the date of the agreement, give to the other party under the
7 agreement a written notice setting out:

- 8 (a) particulars of the change in the terms of the credit contract,
9 mortgage or guarantee; and
10 (b) any information required by the regulations.

11 Criminal penalty: 100 penalty units.

12 (2) Subsection (1) does not apply to a change which defers or
13 otherwise reduces the obligations of the debtor for a period not
14 exceeding 90 days or to an agreement to increase the amount of
15 credit under a credit contract.

16 (3) If the parties under a credit contract (other than a continuing credit
17 contract) propose to increase the amount of credit under the
18 contract by agreement, the credit provider must also, before the
19 agreement is made, give to the debtor a written notice containing
20 the information required by the regulations.

21 Criminal penalty: 100 penalty units.

22 (4) This section does not apply to a change made under Division 3.

23 (5) The credit provider may, under subsection (1), give a person
24 particulars only of a matter as changed instead of particulars of the
25 change, but only if the credit provider:

- 26 (a) makes it clear to the person that the matter has changed; or
27 (b) issues to the person a new set of terms and conditions relating
28 to the credit contract, mortgage or guarantee.

29 (6) Subsections (1) and (3) are offences of strict liability.

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

Section 72

1

2 **Division 3—Changes on grounds of hardship and unjust**
3 **transactions**

4 **72 Changes on grounds of hardship**

5 *General principle*

- 6 (1) A debtor who is unable reasonably, because of illness,
7 unemployment or other reasonable cause, to meet the debtor's
8 obligations under a credit contract and who reasonably expects to
9 be able to discharge the debtor's obligations if the terms of the
10 contract were changed in a manner set out in subsection (2) may
11 apply to the credit provider for such a change.

12 *Changes*

- 13 (2) An application by a debtor must seek to change the terms of the
14 contract in one of the following ways:
- 15 (a) extending the period of the contract and reducing the amount
16 of each payment due under the contract accordingly (without
17 a change being made to the annual percentage rate or rates);
 - 18 (b) postponing during a specified period the dates on which
19 payments are due under the contract (without a change being
20 made to the annual percentage rate or rates);
 - 21 (c) extending the period of the contract and postponing during a
22 specified period the dates on which payments are due under
23 the contract (without a change being made to the annual
24 percentage rate or rates).

25 *Credit provider's notice about change*

- 26 (3) If the debtor makes an application, the credit provider must, within
27 21 days after the day of receiving the application, give the debtor a
28 written notice:
- 29 (a) that states whether or not the credit provider agrees to the
30 change; and

Section 73

- 1 (b) if the credit provider does not agree to the change—that
2 states:
3 (i) the name of the approved external resolution scheme of
4 which the credit provider is a member; and
5 (ii) the debtor’s rights under that scheme.

6 Criminal penalty: 30 penalty units.

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

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

9 *Application*

- 10 (5) This section and sections 73 to 75 do not apply to a credit contract
11 under which the maximum amount of credit that is or may be
12 provided is more than:

- 13 (a) \$500,000; or
14 (b) if the regulations prescribe a higher amount—that amount.

15 **73 Notice of change**

- 16 (1) A credit provider that enters into an agreement with the debtor on
17 any such application must, not later than 30 days after the date of
18 the agreement, give to the debtor, and any guarantor under a
19 guarantee related to the contract, a written notice setting out:

- 20 (a) particulars of the change in the terms of the credit contract;
21 and
22 (b) any information required by the regulations.

23 Criminal penalty: 50 penalty units.

- 24 (2) The credit provider may, under subsection (1), give a person
25 particulars only of a matter as changed instead of particulars of the
26 change, but only if the credit provider:

- 27 (a) makes it clear to the person that the matter has changed; or
28 (b) issues to the person a new set of terms and conditions relating
29 to the credit contract.

- 30 (3) Subsection (1) is an offence of strict liability.

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

Section 74

1 **74 Changes by court**

- 2 (1) If the credit provider does not change the credit contract in
3 accordance with the application, the debtor may apply to the court
4 to change the terms of the credit contract.
- 5 (2) The court may, after allowing the applicant, the credit provider and
6 any guarantor a reasonable opportunity to be heard, by order
7 change the credit contract in a manner set out in section 72, and
8 make such other orders as it thinks fit, or refuse to change the
9 credit contract.
- 10 (3) The court may, if it thinks it appropriate in the circumstances, stay
11 any enforcement proceedings under the credit contract, and make
12 such other orders as it thinks fit, until the application has been
13 determined.

14 **75 Credit provider may apply for variation of change**

- 15 (1) A credit provider under a credit contract that has been changed by
16 an order under subsection 74(2) may apply to the court for an order
17 varying or revoking the order.
- 18 (2) A credit provider subject to a stay of enforcement proceedings or
19 other order under subsection 74(3) may apply to the court for an
20 order varying or revoking the stay or order.
- 21 (3) On an application under this section, the court may vary or revoke
22 the order or stay to which the application relates as it thinks fit, or
23 may refuse the application.

24 **76 Court may reopen unjust transactions**

25 *Power to reopen unjust transactions*

- 26 (1) The court may, if satisfied on the application of a debtor,
27 mortgagor or guarantor that, in the circumstances relating to the
28 relevant credit contract, mortgage or guarantee at the time it was
29 entered into or changed (whether or not by agreement), the
30 contract, mortgage or guarantee or change was unjust, reopen the

1 transaction that gave rise to the contract, mortgage or guarantee or
2 change.

3 *Matters to be considered by court*

- 4 (2) In determining whether a term of a particular credit contract,
5 mortgage or guarantee is unjust in the circumstances relating to it
6 at the time it was entered into or changed, the court is to have
7 regard to the public interest and to all the circumstances of the case
8 and may have regard to the following:
- 9 (a) the consequences of compliance, or noncompliance, with all
10 or any of the provisions of the contract, mortgage or
11 guarantee;
 - 12 (b) the relative bargaining power of the parties;
 - 13 (c) whether or not, at the time the contract, mortgage or
14 guarantee was entered into or changed, its provisions were
15 the subject of negotiation;
 - 16 (d) whether or not it was reasonably practicable for the applicant
17 to negotiate for the alteration of, or to reject, any of the
18 provisions of the contract, mortgage or guarantee or the
19 change;
 - 20 (e) whether or not any of the provisions of the contract,
21 mortgage or guarantee impose conditions that are
22 unreasonably difficult to comply with, or not reasonably
23 necessary for the protection of the legitimate interests of a
24 party to the contract, mortgage or guarantee;
 - 25 (f) whether or not the debtor, mortgagor or guarantor, or a
26 person who represented the debtor, mortgagor or guarantor,
27 was reasonably able to protect the interests of the debtor,
28 mortgagor or guarantor because of his or her age or physical
29 or mental condition;
 - 30 (g) the form of the contract, mortgage or guarantee and the
31 intelligibility of the language in which it is expressed;
 - 32 (h) whether or not, and if so when, independent legal or other
33 expert advice was obtained by the debtor, mortgagor or
34 guarantor;
 - 35 (i) the extent to which the provisions of the contract, mortgage
36 or guarantee or change and their legal and practical effect
37 were accurately explained to the debtor, mortgagor or
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Schedule 1 National Credit Code

Part 4 Changes to obligations under credit contracts, mortgages and guarantees

Division 3 Changes on grounds of hardship and unjust transactions

Section 76

- 1 guarantor and whether or not the debtor, mortgagor or
2 guarantor understood those provisions and their effect;
- 3 (j) whether the credit provider or any other person exerted or
4 used unfair pressure, undue influence or unfair tactics on the
5 debtor, mortgagor or guarantor and, if so, the nature and
6 extent of that unfair pressure, undue influence or unfair
7 tactics;
- 8 (k) whether the credit provider took measures to ensure that the
9 debtor, mortgagor or guarantor understood the nature and
10 implications of the transaction and, if so, the adequacy of
11 those measures;
- 12 (l) whether at the time the contract, mortgage or guarantee was
13 entered into or changed, the credit provider knew, or could
14 have ascertained by reasonable inquiry at the time, that the
15 debtor could not pay in accordance with its terms or not
16 without substantial hardship;
- 17 (m) whether the terms of the transaction or the conduct of the
18 credit provider is justified in the light of the risks undertaken
19 by the credit provider;
- 20 (n) for a mortgage—any relevant purported provision of the
21 mortgage that is void under section 50;
- 22 (o) the terms of other comparable transactions involving other
23 credit providers and, if the injustice is alleged to result from
24 excessive interest charges, the annual percentage rate or rates
25 payable in comparable cases;
- 26 (p) any other relevant factor.

27 *Representing debtor, mortgagor or guarantor*

- 28 (3) For the purposes of paragraph (2)(f), a person is taken to have
29 represented a debtor, mortgagor or guarantor if the person
30 represented the debtor, mortgagor or guarantor, or assisted the
31 debtor, mortgagor or guarantor to a significant degree, in the
32 negotiations process prior to, or at, the time the credit contract,
33 mortgage or guarantee was entered into or changed.

1 *Unforeseen circumstances*

- 2 (4) In determining whether a credit contract, mortgage or guarantee is
3 unjust, the court is not to have regard to any injustice arising from
4 circumstances that were not reasonably foreseeable when the
5 contract, mortgage or guarantee was entered into or changed.

6 *Conduct*

- 7 (5) In determining whether to grant relief in respect of a credit
8 contract, mortgage or guarantee that it finds to be unjust, the court
9 may have regard to the conduct of the parties to the proceedings in
10 relation to the contract, mortgage or guarantee since it was entered
11 into or changed.

12 *Application*

- 13 (6) This section does not apply:
14 (a) to a matter or thing in relation to which an application may
15 be made under subsection 78(1); or
16 (b) to a change to a contract under this Division.
- 17 (7) This section does apply in relation to a mortgage, and a mortgagor
18 may make an application under this section, even though all or part
19 of the mortgage is void under subsection 50(3).

20 *Meaning of unjust*

- 21 (8) In this section:
22 *unjust* includes unconscionable, harsh or oppressive.

23 **77 Orders on reopening of transactions**

24 The court may, if it reopens a transaction under this Division, do
25 any one or more of the following, despite any settlement of
26 accounts or any agreement purporting to close previous dealings
27 and create a new obligation:

- 28 (a) reopen an account already taken between the parties to the
29 transaction;

Schedule 1 National Credit Code

Part 4 Changes to obligations under credit contracts, mortgages and guarantees

Division 3 Changes on grounds of hardship and unjust transactions

Section 78

- 1 (b) relieve the debtor and any guarantor from payment of any
2 amount in excess of such amount as the court, having regard
3 to the risk involved and all other circumstances, considers to
4 be reasonably payable;
- 5 (c) set aside either wholly or in part or revise or alter an
6 agreement made or mortgage given in connection with the
7 transaction;
- 8 (d) order that the mortgagee takes such steps as are necessary to
9 discharge the mortgage;
- 10 (e) give judgment for or make an order in favour of a party to the
11 transaction of such amount as, having regard to the relief (if
12 any) which the court thinks fit to grant, is justly due to that
13 party under the contract, mortgage or guarantee;
- 14 (f) give judgment or make an order against a person for delivery
15 of goods to which the contract, mortgage or guarantee relates
16 and which are in the possession of that person;
- 17 (g) make ancillary or consequential orders.

18 **78 Court may review unconscionable interest and other charges**

- 19 (1) The court may, if satisfied on the application of a debtor or
20 guarantor that:
- 21 (a) a change in the annual percentage rate or rates under a credit
22 contract to which subsection 64(1) or (4) applies; or
23 (b) an establishment fee or charge; or
24 (c) a fee or charge payable on early termination of a credit
25 contract; or
26 (d) a fee or charge for a prepayment of an amount under a credit
27 contract;
- 28 is unconscionable, annul or reduce the change or fee or charge and
29 may make ancillary or consequential orders.
- 30 (2) For the purposes of this section, a change to the annual percentage
31 rate or rates is unconscionable if and only if it appears to the court
32 that:
- 33 (a) it changes the annual percentage rate or rates in a manner that
34 is unreasonable, having regard to any advertised rate or other
35 representations made by the credit provider before or at the

- 1 time the contract was entered into, the period of time since
2 the contract was entered into and any other consideration the
3 court thinks relevant; or
4 (b) the change is a measure that discriminates unjustifiably
5 against the debtor when the debtor is compared to other
6 debtors of the credit provider under similar contracts.
- 7 (3) In determining whether an establishment fee or charge is
8 unconscionable, the court is to have regard to whether the amount
9 of the fee or charge is equal to the credit provider's reasonable
10 costs of determining an application for credit and the initial
11 administrative costs of providing the credit or is equal to the credit
12 provider's average reasonable costs of those things in respect of
13 that class of contract.
- 14 (4) For the purposes of this section, a fee or charge payable on early
15 termination of the contract or a prepayment of an amount under the
16 credit contract is unconscionable if and only if it appears to the
17 court that it exceeds a reasonable estimate of the credit provider's
18 loss arising from the early termination or prepayment, including
19 the credit provider's average reasonable administrative costs in
20 respect of such a termination or prepayment.

21 **79 Applications by ASIC**

- 22 (1) This section applies if ASIC considers that it is in the public
23 interest to make an application under this Division.
- 24 (2) ASIC may make an application under this Division and has
25 standing to represent the public interest.
- 26 (3) The application:
27 (a) may apply to any one or more credit contracts; and
28 (b) may apply to all or any class of credit contracts entered into
29 by a credit provider during a specified period (for example,
30 all credit contracts entered into during a specified period that
31 are affected by a specified matter for which relief is sought).

Section 80

1 **80 Time limit**

2 (1) An application (other than an application under section 78) may
3 not be brought under this Division more than 2 years after the
4 relevant credit contract is rescinded or discharged or otherwise
5 comes to an end.

6 (2) An application under section 78 may not be brought more than 2
7 years after the relevant change takes effect or fee or charge is
8 charged under the credit contract or the credit contract is rescinded
9 or discharged or otherwise comes to an end.

10 **81 Joinder of parties**

11 (1) If it appears to the court that a person other than a credit provider
12 or a mortgagee (a *third party*) has shared in the profits of, or has a
13 beneficial interest prospectively or otherwise in, a credit contract or
14 mortgage that the court holds to be unjust, the court may make an
15 order about the third party that the court considers appropriate.

16 (2) However, before making an order about the third party, the court
17 must:

- 18 (a) join the third party as a party to the proceedings; and
19 (b) give the third party an opportunity to appear and be heard in
20 the proceedings.

1

2 **Part 5—Ending and enforcing credit contracts,**
3 **mortgages and guarantees**

4 **Division 1—Ending of credit contract by debtor**

5 **82 Debtor’s or guarantor’s right to pay out contract**

6 (1) A debtor or guarantor is entitled to pay out the credit contract at
7 any time.

8 (2) The amount required to pay out a credit contract (other than a
9 continuing credit contract) is the total of the following amounts:

- 10 (a) the amount of credit;
11 (b) the interest charges and all other fees and charges payable by
12 the debtor to the credit provider up to the date of termination;
13 (c) reasonable enforcement expenses;
14 (d) early termination charges, if provided for in the contract;
15 less any payments made under the contract and any rebate of
16 premium under section 148.

17 **83 Statement of pay out figure**

18 (1) A credit provider must, at the written request of a debtor or
19 guarantor, provide a written statement of the amount required to
20 pay out a credit contract (other than a continuing credit contract) as
21 at such date as the debtor or guarantor specifies. If so requested,
22 the credit provider must also provide details of the items which
23 make up that amount.

24 Criminal penalty: 50 penalty units.

25 (2) The statement must also contain a statement to the effect that the
26 amount required to pay out the credit contract may change
27 according to the date on which it is paid.

Schedule 1 National Credit Code

Part 5 Ending and enforcing credit contracts, mortgages and guarantees

Division 1 Ending of credit contract by debtor

Section 84

1 (3) A credit provider must give a statement, complying with this
2 section, within 7 days after the request is given to the credit
3 provider.

4 Criminal penalty: 50 penalty units.

5 (4) In the case of joint debtors or guarantors, the statement under this
6 section need only be given to a debtor or guarantor who requests
7 the statement and not, despite section 194, to each joint debtor or
8 guarantor.

9 (5) Subsections (1) and (3) are offences of strict liability.

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

11 **84 Court may determine pay out figure if credit provider does not**
12 **provide a pay out figure**

13 (1) If the credit provider does not provide a statement of the amount
14 required to pay out a credit contract (other than a continuing credit
15 contract) in accordance with this Part after a request is duly made
16 by a debtor or guarantor, the court may, on the application of the
17 debtor or guarantor, determine the amount payable on the date of
18 determination, the amount by which it increases daily and the
19 period for which the determination is applicable.

20 (2) The credit contract is discharged if an amount calculated in
21 accordance with the determination is tendered to the credit
22 provider within the applicable period.

23 **85 Surrender of mortgaged goods and goods subject to sale by**
24 **instalments**

25 *General principle*

26 (1) If:

27 (a) a credit contract takes the form of a sale of goods by
28 instalments and title in the goods does not pass until all
29 instalments are paid; or

30 (b) the credit provider has a mortgage over goods of the debtor
31 or guarantor;

1 the debtor or mortgagor may give written notice of an intention to
2 return the goods to the credit provider or, if the goods are in the
3 credit provider's possession, require the credit provider in writing
4 to sell the goods.

5 *Delivery of goods*

6 (2) A debtor or mortgagor may return the goods to the credit provider
7 at the credit provider's place of business during ordinary business
8 hours within 7 days of the date of the notice or within such other
9 period or at such other time or place as may be agreed with the
10 credit provider.

11 *Notice of value*

12 (3) The credit provider must, within 14 days after a debtor or
13 mortgagor returns the goods or requires the credit provider to sell
14 the goods, give the debtor or mortgagor a written notice containing
15 the estimated value of the goods and any other information
16 required by the regulations.

17 *Return or sale of goods*

18 (4) If the debtor or mortgagor, within 21 days after the notice under
19 subsection (3) is given, requests by written notice return of the
20 goods to the debtor or mortgagor or withdraws the requirement to
21 sell the goods (and the debtor is not in default under the terms of
22 the credit contract), the credit provider must return to the debtor or
23 mortgagor any goods returned by the debtor or mortgagor and must
24 not comply with the requirement.

25 *Nominated purchaser*

26 (5) The debtor or mortgagor may, within 21 days after the notice under
27 subsection (3) is given, nominate in writing a person who is
28 prepared to purchase the goods from the credit provider at the
29 estimated value or at any greater amount for which the credit
30 provider has obtained a written offer to buy the goods. The credit
31 provider must offer to sell the goods to that person for the
32 estimated value or, if there is a written offer to buy the goods for a
33 greater amount, that amount.

Schedule 1 National Credit Code

Part 5 Ending and enforcing credit contracts, mortgages and guarantees

Division 1 Ending of credit contract by debtor

Section 85

1 *Sale of goods by credit provider*

2 (6) The credit provider must, if the goods are not required to be
3 returned under subsection (4), as soon as reasonably practicable (or
4 at such other time as the credit provider and the debtor or
5 mortgagor agree) sell the goods in accordance with subsection (5)
6 or, if no buyer is nominated or the nominated buyer under that
7 subsection does not buy the goods, for the best price reasonably
8 obtainable.

9 *Amount to be credited to debtor or mortgagor*

10 (7) The credit provider must credit the debtor or mortgagor with a
11 payment equivalent to the proceeds of the sale less any amounts
12 which the credit provider is entitled to deduct from those proceeds.
13 On the sale of the goods, the amount required to pay out the
14 contract becomes due.

15 *Deductions from proceeds*

16 (8) A credit provider that sells mortgaged goods under this section is
17 entitled to deduct from the proceeds of that sale only the following
18 amounts:
19 (a) the amount currently secured by the mortgage in relation to
20 the credit contract or guarantee, not being more than the
21 amount required to discharge the contract or guarantee;
22 (b) the amount payable to discharge any prior mortgage to which
23 the goods were subject;
24 (c) the amounts payable in successive discharge of any
25 subsequent mortgages to which the goods were subject and of
26 which the credit provider had notice;
27 (d) the credit provider's reasonable enforcement expenses;
28 (e) the expenses reasonably incurred by the credit provider in
29 connection with the possession and sale of the mortgaged
30 goods.

31 *Notice of amount credited and other matters*

32 (9) The credit provider must give the debtor or mortgagor a written
33 notice stating the gross amount realised on the sale, the net

Section 86

1 proceeds of the sale, the amount credited to the debtor or
2 mortgagor and the amount required to pay out the credit contract or
3 the amount due under the guarantee.

4 *Offence—credit provider*

5 (10) A credit provider that contravenes a requirement of this section
6 commits an offence.

7 Criminal penalty: 50 penalty units.

8 *Strict liability offence*

9 (11) Subsection (10) is an offence of strict liability.

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

11 **86 Compensation to debtor or mortgagor**

12 (1) The court, on application by the debtor or mortgagor, may order a
13 credit provider to credit the debtor or mortgagor with a payment,
14 fixed by the court, exceeding the net proceeds of sale if it is not
15 satisfied that the credit provider sold the goods as soon as
16 reasonably practicable (or at such other time as the credit provider
17 and debtor or mortgagor agreed) for the best price reasonably
18 obtainable.

19 (2) On application by the debtor or mortgagor, the mortgagee under
20 any prior mortgage to which the goods are subject or the
21 mortgagee under any subsequent mortgage of which the credit
22 provider has notice, the court, if not satisfied that the credit
23 provider complied with section 85, may make an order requiring
24 the credit provider to compensate the debtor or mortgagor or the
25 relevant mortgagee for any loss suffered as a result.

26 (3) The onus of proving that section 85 was complied with is on the
27 credit provider.

28 **87 One-off notice to be given the first time a direct debit default**
29 **occurs**

30 (1) This section applies if:

Schedule 1 National Credit Code

Part 5 Ending and enforcing credit contracts, mortgages and guarantees

Division 1 Ending of credit contract by debtor

Section 87

- 1 (a) a debtor authorises payment of an amount for a credit
2 contract by direct debit; and
3 (b) default occurs; and
4 (c) it is the first occasion the default occurs.
- 5 (2) The credit provider must give the debtor, and any guarantor, a
6 direct debit default notice under this section within 10 business
7 days of the default occurring.
- 8 Criminal penalty: 50 penalty units.
- 9 (3) The direct debit default notice must contain the information
10 prescribed under the regulations.
- 11 (4) Subsection (2) is an offence of strict liability.
12 Note: For strict liability, see section 6.1 of the *Criminal Code*.
- 13 (5) This section does not affect any other requirement under this Code
14 to give a notice.
- 15 (6) In this section:
- 16 ***Bulk Electronic Clearing System*** means the system established by
17 the Australian Payments Clearing Association to manage the
18 conduct of the exchange and settlement of bulk electronic low
19 value transactions and includes any replacement system.
- 20 ***direct debit***, in relation to the payment by a debtor of an amount for
21 a credit contract, means the debiting of the amount against an
22 account with a financial institution, as specified and authorised in
23 writing by the debtor, that is processed through the Bulk Electronic
24 Clearing System.

1

2 **Division 2—Enforcement of credit contracts, mortgages**
3 **and guarantees**

4 **88 Requirements to be met before credit provider can enforce credit**
5 **contract or mortgage against defaulting debtor or**
6 **mortgagor**

7 *Enforcement of credit contract*

- 8 (1) A credit provider must not begin enforcement proceedings against
9 a debtor in relation to a credit contract unless the debtor is in
10 default under the credit contract and:
11 (a) the credit provider has given the debtor, and any guarantor, a
12 default notice, complying with this section, allowing the
13 debtor a period of at least 30 days from the date of the notice
14 to remedy the default; and
15 (b) the default has not been remedied within that period.

16 Criminal penalty: 50 penalty units.

17 *Enforcement of mortgage*

- 18 (2) A credit provider must not begin enforcement proceedings against
19 a mortgagor to recover payment of money due or take possession
20 of, sell, appoint a receiver for or foreclose in relation to property
21 subject to a mortgage, unless the mortgagor is in default under the
22 mortgage and:
23 (a) the credit provider has given the mortgagor a default notice,
24 complying with this section, allowing the mortgagor a period
25 of at least 30 days from the date of the notice to remedy the
26 default; and
27 (b) the default has not been remedied within that period.

28 Criminal penalty: 50 penalty units.

Schedule 1 National Credit Code

Part 5 Ending and enforcing credit contracts, mortgages and guarantees

Division 2 Enforcement of credit contracts, mortgages and guarantees

Section 88

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Default notice requirements

- (3) A default notice must contain a prominent heading at its top stating that it is a default notice and specify:
 - (a) the default; and
 - (b) the action necessary to remedy the default; and
 - (c) a period for remedying the default; and
 - (d) the date after which enforcement proceedings in relation to the default, and, if relevant, repossession of mortgaged property may begin if the default has not been remedied; and
 - (e) that repossession and sale of mortgaged property may not extinguish the debtor's liability; and
 - (f) the information prescribed by the regulations about the debtor's right to:
 - (i) make an application to the credit provider under section 72; or
 - (ii) negotiate with the credit provider under section 94; or
 - (iii) make an application to the court under sections 74 and 96; and
 - (g) the information prescribed by the regulations about:
 - (i) the approved external dispute resolution scheme of which the credit provider is a member; or
 - (ii) the debtor's rights under that scheme; and
 - (h) that a subsequent default of the same kind that occurs during the period specified for remedying the original default may be the subject of enforcement proceedings without further notice if it is not remedied within the period; and
 - (i) that, under the *Privacy Act 1988*, the debt may be included in a credit reporting agency's credit information file about the debtor if:
 - (i) the debt remains overdue for 60 days or more; and
 - (ii) the credit provider has taken steps to recover all or part of the debt; and
 - (j) any other information prescribed by the regulations.

1 *Combined notices*

- 2 (4) Default notices that may be given under subsections (1) and (2)
3 may be combined in one document if given to a person who is both
4 a debtor and a mortgagor.

5 *When default notice not required*

- 6 (5) A credit provider is not required to give a default notice or to wait
7 until the period specified in the default notice has elapsed, before
8 beginning enforcement proceedings, if:
9 (a) the credit provider believes on reasonable grounds that it was
10 induced by fraud on the part of the debtor or mortgagor to
11 enter into the credit contract or mortgage; or
12 (b) the credit provider has made reasonable attempts to locate the
13 debtor or mortgagor but without success; or
14 (c) the court authorises the credit provider to begin the
15 enforcement proceedings; or
16 (d) the credit provider believes on reasonable grounds that the
17 debtor or mortgagor has removed or disposed of mortgaged
18 goods under a mortgage related to the credit contract or under
19 the mortgage concerned, or intends to remove or dispose of
20 mortgaged goods, without the credit provider's permission or
21 that urgent action is necessary to protect the mortgaged
22 property.

23 *Non-remedial default*

- 24 (6) If the credit provider believes on reasonable grounds that a default
25 is not capable of being remedied:
26 (a) the default notice need only specify the default; and
27 (b) the credit provider may begin the enforcement proceedings
28 after the period of 30 days from the date of the notice.
- 29 (7) Subsections (1) and (2) are offences of strict liability.

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

Schedule 1 National Credit Code

Part 5 Ending and enforcing credit contracts, mortgages and guarantees

Division 2 Enforcement of credit contracts, mortgages and guarantees

Section 89

1 *Other law about mortgages not affected*

2 (8) This section is in addition to any provision of any other law
3 relating to the enforcement of real property or other mortgages and
4 does not prevent the issue of notices to defaulting mortgagors
5 under other legislation. Nothing in this section prevents a notice to
6 a defaulting mortgagor under other legislation being issued at the
7 same time, or in the same document, as the default notice under
8 this section.

9 Note: By virtue of subsection 183(2), a notice may contain information
10 required to be given under other legislation or be included in a notice
11 given under other legislation.

12 **89 Defaults may be remedied**

13 (1) If a default notice states that the credit provider intends to take
14 action because the debtor or mortgagor is in default under the
15 credit contract or mortgage, the debtor, mortgagor or guarantor
16 may remedy the default within the period specified in the notice,
17 and the contract or mortgage is then reinstated and any acceleration
18 clause cannot operate.

19 (2) A debtor, mortgagor or guarantor does not remedy the default if, at
20 the end of the period, the debtor or mortgagor is in default under
21 the credit contract or mortgage because of the breach specified in
22 the notice or because of a subsequent breach of the same type.

23 **90 Requirements to be met before credit provider can enforce**
24 **guarantee against guarantor**

25 (1) A credit provider must not, under a guarantee, enforce a judgment
26 against a guarantor unless:
27 (a) the credit provider has obtained a judgment against the debtor
28 for payment of the guaranteed liability and the judgment
29 remains unsatisfied for 30 days after the credit provider has
30 made a written demand for payment of the judgment debt; or
31 (b) the court has relieved the credit provider from the obligation
32 to obtain a judgment against the debtor on the ground that
33 recovery from the debtor is unlikely; or

Section 91

1 (c) the credit provider has made reasonable attempts to locate the
2 debtor but without success; or

3 (d) the debtor is insolvent.

4 Criminal penalty: 50 penalty units.

5 (2) Subsection (1) is an offence of strict liability.

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

7 **91 Requirements to be met before credit provider can repossess**
8 **mortgaged goods**

9 (1) A credit provider must not, without the consent of the court, take
10 possession of mortgaged goods if the amount currently owing
11 under the credit contract related to the relevant mortgage is less
12 than 25% of the amount of credit provided under the contract or
13 \$10,000, whichever is the lesser.

14 Criminal penalty: 100 penalty units.

15 (2) However, the restriction does not apply:

16 (a) to a continuing credit contract; or

17 (b) if the credit provider believes on reasonable grounds that the
18 debtor has removed or disposed of the mortgaged goods, or
19 intends to remove or dispose of them, without the credit
20 provider's permission or that urgent action is necessary to
21 protect the goods.

22 (3) Subsection (1) is an offence of strict liability.

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

24 (4) In any proceedings in which it is established that a credit provider
25 has taken possession of mortgaged goods contrary to
26 subsection (1), the burden of establishing that the possession of the
27 goods was lawfully taken by virtue of subsection (2) lies on the
28 credit provider.

29 (5) Nothing in this section prevents a credit provider from accepting
30 the return of goods under section 85.

Section 92

1 **92 Acceleration clauses**

2 (1) For the purposes of this Part, an *acceleration clause* is a term of a
3 credit contract or mortgage providing that:

4 (a) on the occurrence or non-occurrence of a particular event, the
5 credit provider becomes entitled to immediate payment of all,
6 or a part, of an amount under the contract that would not
7 otherwise have been immediately payable; or

8 (b) whether or not on the occurrence or non-occurrence of a
9 particular event, the credit provider has a discretion to require
10 repayment of the amount of credit otherwise than by
11 repayments fixed, or determined on a basis stated, in the
12 contract;

13 but does not include any such term in a credit contract or mortgage
14 that is an on demand facility.

15 (2) An *on demand facility* is a credit contract or mortgage under
16 which:

17 (a) the total amount outstanding under the contract or mortgage
18 is repayable at any time on demand by the credit provider;
19 and

20 (b) there is no agreement, arrangement or understanding between
21 the credit provider and the debtor or mortgagor that
22 repayment will only be demanded on the occurrence or
23 non-occurrence of a particular event.

24 **93 Requirements to be met before credit provider can enforce an**
25 **acceleration clause**

26 (1) An acceleration clause is to operate only if the debtor or mortgagor
27 is in default under the credit contract or mortgage and:

28 (a) the credit provider has given to the debtor and any guarantor,
29 or to the mortgagor, a default notice under section 88; and

30 (b) the default notice contains an additional statement of the
31 manner in which the liabilities of the debtor or mortgagor
32 under the contract or mortgage would be affected by the
33 operation of the acceleration clause and also of the amount
34 required to pay out the contract (as accelerated); and

- 1 (c) the default has not been remedied within the period specified
2 in the default notice (unless the credit provider believes on
3 reasonable grounds that the default is not capable of being
4 remedied).
- 5 (2) However, a credit provider is not required to give a default notice
6 under section 88 or to wait until the period specified in the default
7 notice has elapsed before bringing an acceleration clause into
8 operation, if:
- 9 (a) the credit provider believes on reasonable grounds that it was
10 induced by fraud on the part of the debtor or mortgagor to
11 enter into the contract or mortgage; or
- 12 (b) the credit provider has made reasonable attempts to locate the
13 debtor or mortgagor but without success; or
- 14 (c) the court authorises the credit provider not to do so; or
- 15 (d) the credit provider believes on reasonable grounds that the
16 debtor or mortgagor has removed or disposed of mortgaged
17 goods under a mortgage related to the credit contract or the
18 mortgage concerned, or intends to remove or dispose of
19 mortgaged goods, without the credit provider's permission or
20 that urgent action is necessary to protect the goods.
- 21 (3) This section is in addition to any provision of any other law
22 relating to the enforcement of real property mortgages and does not
23 prevent the issue of notices to defaulting mortgagors under other
24 legislation.

Section 94

1

2 **Division 3—Postponement of enforcement proceedings**

3 **94 Postponement of exercise of rights**

4 (1) A debtor, mortgagor or guarantor who has been given a default
5 notice under Division 2 or a demand for payment under section 90
6 may, at any time before the end of the period specified in the notice
7 or demand, request the credit provider to negotiate a postponement
8 of the enforcement proceedings or any action taken under such
9 proceedings or of the operation of any applicable acceleration
10 clause.

11 *Credit provider's notice about postponement*

12 (2) If the debtor, mortgagor or guarantor makes the request, the credit
13 provider must, within 21 days after the day of receiving the
14 request, give the person a written notice:
15 (a) that states whether or not the credit provider agrees to
16 negotiate a postponement; and
17 (b) if the credit provider does not agree to negotiate—that states:
18 (i) the name of the approved external resolution scheme of
19 which the credit provider is a member; and
20 (ii) the person's rights under that scheme.

21 Criminal penalty: 30 penalty units.

22 (3) Subsection (2) is an offence of strict liability.

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

24 (4) This Division does not apply to a credit contract in respect of
25 which the maximum amount of credit that is or may be provided is
26 more than:

- 27 (a) \$500,000; or
28 (b) if the regulations prescribe a higher amount—that amount.

1 **95 Effect of negotiated postponement**

2 (1) The default notice or demand for payment is taken, for the
3 purposes of this Code, not to have been given or made if a
4 postponement is negotiated with the credit provider and the debtor,
5 mortgagor or guarantor complies with the conditions of
6 postponement.

7 (2) It is a condition of any postponement negotiated with a credit
8 provider after the credit provider has taken possession of property
9 subject to a mortgage that the mortgagor pay the reasonable costs
10 of the credit provider in taking possession of the property.

11 (3) A credit provider must give written notice of the conditions of a
12 postponement referred to in subsection (1) not later than 30 days
13 after agreement is reached on the postponement. The notice must
14 set out the consequences under subsection (5) if the conditions of
15 the postponement are not complied with.

16 Criminal penalty: 100 penalty units.

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

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

19 (5) A credit provider that is required to give notice under section 71 in
20 relation to a postponement is not required to comply with
21 subsection (3).

22 (6) If any of the conditions of a postponement are not complied with, a
23 credit provider is not required to give a further default notice under
24 this Code to the debtor, mortgagor or guarantor with whom the
25 postponement was negotiated before proceeding with enforcement
26 proceedings.

27 **96 Postponement by court**

28 (1) If the debtor, mortgagor or guarantor is unable to negotiate a
29 postponement, the debtor, mortgagor or guarantor may apply to the
30 court for a postponement.

31 (2) The court may, after allowing the applicant, the credit provider and
32 any debtor, mortgagor or guarantor concerned a reasonable

Schedule 1 National Credit Code

Part 5 Ending and enforcing credit contracts, mortgages and guarantees

Division 3 Postponement of enforcement proceedings

Section 97

1 opportunity to be heard, order or refuse to order the postponement
2 to which the application relates and may make such other orders as
3 it thinks fit.

4 (3) The court may, if it thinks it appropriate in the circumstances, stay
5 any enforcement proceedings under the credit contract or mortgage
6 until the application has been determined.

7 **97 Credit provider may apply for variation of postponement order**

8 (1) A credit provider that is subject to an order under this Division
9 may apply to the court for variation of the order.

10 (2) On such an application, the court may vary the order to which the
11 application relates as it thinks fit or may refuse to vary the order or
12 may revoke the order.

1

2 **Division 4—Enforcement procedures for goods mortgaged**

3 **98 Information as to location of mortgaged goods**

4 (1) A credit provider may, by written notice to a mortgagor under a
5 goods mortgage, require the mortgagor to inform the credit
6 provider within 7 days where the mortgaged goods are and, if the
7 mortgaged goods are not in the mortgagor's possession, to give the
8 credit provider all information in the mortgagor's possession that
9 might assist the credit provider to trace the goods.

10 (2) A mortgagor who contravenes a notice under this section commits
11 an offence.

12 Criminal penalty: 50 penalty units.

13 (3) Subsection (2) is an offence of strict liability.

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

15 **99 Entry to residential property to take possession of goods**

16 (1) A credit provider, or an agent of a credit provider, must not enter
17 any part of premises used for residential purposes for the purpose
18 of taking possession of mortgaged goods under a goods mortgage
19 unless:

20 (a) the court has authorised the entry; or

21 (b) the occupier of the premises has, after being informed in
22 writing of the provisions of this section, consented in writing
23 to the entry.

24 (2) The regulations may provide for procedures for the obtaining and
25 giving of consent for the purposes of this section and may set out
26 the circumstances in which consent is or is not taken to have been
27 given.

28 (3) If premises are entered in contravention of this section by a credit
29 provider or an agent of a credit provider, the credit provider
30 commits an offence.

Schedule 1 National Credit Code

Part 5 Ending and enforcing credit contracts, mortgages and guarantees

Division 4 Enforcement procedures for goods mortgaged

Section 100

1 Criminal penalty: 50 penalty units.

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

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

4 **100 Court may order entry**

5 The court may, on the application of a credit provider that is
6 entitled to take possession of mortgaged goods, authorise the credit
7 provider to enter residential premises for the purpose of taking
8 possession of mortgaged goods.

9 **101 Order for possession**

10 (1) The court may, on the application of a credit provider that is
11 entitled to take possession of mortgaged goods, order a person who
12 has possession of the goods to deliver them to the credit provider at
13 a specified time or place or within a specified period.

14 (2) The court may, on the application of a credit provider or other
15 person required to deliver goods to a credit provider, by order vary
16 the place at which or time or period within which goods must be
17 delivered to the credit provider.

18 (3) A person who contravenes an order under this section commits an
19 offence.

20 Criminal penalty: 30 penalty units.

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

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

23 **102 Procedures to be followed by credit provider after taking**
24 **possession of goods**

25 *Notice to be given*

26 (1) A credit provider that has taken possession of goods under a
27 mortgage must, within 14 days after doing so, give the mortgagor a
28 written notice containing the following matters:

29 (a) the estimated value of the goods;

Section 102

- 1 (b) the enforcement expenses incurred up to the date on which
2 the goods were taken into the credit provider's possession
3 and, if enforcement expenses are accruing while the goods
4 remain in the credit provider's possession, the rate of accrual;
5 (c) a statement of the mortgagor's rights and obligations in the
6 form set out in the regulations.

7 *Goods not to be sold immediately*

- 8 (2) A credit provider must not dispose of goods taken under the
9 mortgage within 21 days after the date of the notice, unless the
10 court authorises the credit provider to do so.

11 *Effect of proceedings*

- 12 (3) If at the end of that 21 day period a stay of enforcement
13 proceedings is in force under this Code or an application under
14 section 76 has not been determined, the credit provider must not
15 dispose of the goods until those proceedings have been determined
16 and any period allowed for appeal has elapsed.

17 *Payment during notice period*

- 18 (4) The credit provider must return the goods if:
19 (a) the amount in arrears (less any accelerated amount) and the
20 credit provider's reasonable enforcement expenses are paid
21 within that 21 day period and the debtor has not committed a
22 further default of the same kind under the credit contract; or
23 (b) the credit contract is paid out.

24 *Offence*

- 25 (5) A credit provider that contravenes this section commits an offence.

26 Criminal penalty: 50 penalty units.

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

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

Section 103

1 **103 Mortgagor may nominate purchaser of goods taken by credit**
2 **provider**

3 (1) The mortgagor may, within 21 days after the date of the notice
4 given under section 102, nominate in writing a person who is
5 prepared to purchase the goods from the credit provider at the
6 estimated value or at any greater amount for which the credit
7 provider has obtained a written offer to buy the goods.

8 (2) The credit provider must offer to sell the goods to that person for
9 the estimated value or, if there is a written offer to buy the goods
10 for a greater amount, that amount.

11 Criminal penalty: 50 penalty units.

12 (3) Subsection (2) is an offence of strict liability.

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

14 **104 Sale of goods by credit provider**

15 (1) The credit provider must, if payment is not made within 21 days
16 after the date of the notice given under section 102 and that section
17 does not prevent the sale, as soon as reasonably practicable (or at
18 such time as the credit provider and mortgagor agree) sell the
19 goods in accordance with section 103 or, if there is no nominated
20 buyer or the nominated buyer under that section does not buy the
21 goods, for the best price reasonably obtainable.

22 (2) The credit provider must credit the mortgagor with a payment
23 equivalent to the proceeds of the sale less any amounts which the
24 credit provider is entitled to deduct from those proceeds. On the
25 sale of the goods, the amount required to pay out the contract
26 becomes due.

27 (3) A credit provider that sells mortgaged goods must give the
28 mortgagor a written notice stating the gross amount realised on the
29 sale, the net proceeds of the sale, the amount required to pay out
30 the credit contract or the amount due under the guarantee, any
31 further recovery action proposed to be taken by the credit provider
32 against the debtor and any other information required by the
33 regulations.

Section 105

1 (4) A credit provider that contravenes a requirement of this section
2 commits an offence.

3 Criminal penalty: 50 penalty units.

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

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

6 **105 Matters for which account can be debited after mortgagee sale**
7 **of goods**

8 A credit provider that sells mortgaged goods under section 104 is
9 entitled to deduct from the proceeds of that sale only the following
10 amounts:

- 11 (a) the amount currently secured by the mortgage in relation to
12 the credit contract, not being more than the amount required
13 to discharge the contract;
- 14 (b) the amount payable to discharge any prior mortgage to which
15 the goods were subject;
- 16 (c) the amounts payable in successive discharge of any
17 subsequent mortgages to which the goods were subject and of
18 which the credit provider had notice;
- 19 (d) the credit provider's reasonable enforcement expenses.

20 **106 Compensation to mortgagor**

21 (1) The court, on application by a mortgagor, may order a credit
22 provider to credit the mortgagor with a payment, fixed by the
23 court, exceeding the net proceeds of sale if it is not satisfied that
24 the credit provider sold the goods as soon as reasonably
25 practicable, or at a time agreed between the credit provider and the
26 mortgagor, for the best price reasonably obtainable.

27 (2) On application by a mortgagor, the mortgagee under any prior
28 mortgage to which the goods are subject or the mortgagee under
29 any subsequent mortgage of which the credit provider has notice,
30 the court, if not satisfied that the credit provider exercised its
31 power of sale in accordance with this Division, may make an order
32 requiring the credit provider to compensate the mortgagor or the
33 relevant mortgagee for any loss suffered as a result.

Schedule 1 National Credit Code

Part 5 Ending and enforcing credit contracts, mortgages and guarantees

Division 4 Enforcement procedures for goods mortgaged

Section 106

- 1 (3) The onus of proving that a power of sale was exercised in
2 accordance with this Division is on the credit provider that
3 exercised it.

1

2 **Division 5—Enforcement expenses**

3 **107 Recovery of enforcement expenses**

4 (1) A credit provider must not recover or seek to recover enforcement
5 expenses from a debtor, mortgagor or guarantor in excess of those
6 reasonably incurred by the credit provider. Enforcement expenses
7 of a credit provider extend to those reasonably incurred by the use
8 of the staff and facilities of the credit provider.

9 *Civil effect*

10 (2) Any provision of the credit contract, mortgage or guarantee that
11 appears to confer a greater right is void. If enforcement expenses
12 are in fact recovered in excess of this limitation, they may be
13 recovered back.

14 (3) If there is a dispute between the credit provider and the debtor,
15 mortgagor or guarantor about the amount of enforcement expenses
16 that may be recovered by the credit provider, the court may, on
17 application by any of the parties to the dispute, determine the
18 amount of that liability.

Section 108

1

2 **Division 6—Mortgagor's remedies**

3 **108 Mortgagor may apply to regain possession of mortgaged goods**

4 (1) If a credit provider takes possession of mortgaged goods in
5 contravention of Division 2 or Division 4, the court may, on the
6 application of the mortgagor, order the credit provider, at the credit
7 provider's expense, to return possession of the goods to the
8 mortgagor.

9 (2) An order may be made under subsection (1) even though the
10 relevant default has not been remedied.

11 (3) A person who contravenes an order under subsection (1) commits
12 an offence.

13 Criminal penalty: 30 penalty units.

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

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

16 **109 Order for possession for mortgagor**

17 (1) The court may, when making an order under subsection 108(1),
18 order a person who has possession of the goods to deliver them to
19 the mortgagor at a specified time or place or within a specified
20 period.

21 (2) If the person is not the credit provider, the court may also order the
22 credit provider to pay the person's costs of delivering the goods to
23 the mortgagor.

24 (3) The court may, on the application of a mortgagor or other person
25 required to deliver goods to a mortgagor, by order vary the place at
26 which or time or period within which goods must be delivered to
27 the mortgagor.

28 (4) A person who contravenes an order under this section commits an
29 offence.

Section 110

1 Criminal penalty: 30 penalty units.

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

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

4 **110 Ancillary or consequential orders**

5 (1) This section applies if the court makes an order under this
6 Division.

7 (2) The court may make ancillary or consequential orders it considers
8 appropriate, including, for example, orders to restore the parties to
9 the position they were in before the taking of possession in
10 contravention of Division 2 or Division 4.

11 (3) Without limiting subsection (2), the court may order that the
12 mortgagor be paid compensation for any damage to the goods
13 because of the taking of possession.

Schedule 1 National Credit Code

Part 6 Civil penalties for defaults of credit providers

Division 1 Civil penalties for breach of key disclosure and other requirements

Section 111

1

2 **Part 6—Civil penalties for defaults of credit**
3 **providers**

4 **Division 1—Civil penalties for breach of key disclosure and**
5 **other requirements**

6 **111 Key requirements**

7 (1) For the purposes of this Division, a *key requirement* in connection
8 with a credit contract (other than a continuing credit contract) is
9 any one of the requirements of this Code contained in the
10 following provisions:

- 11 (a) subsection 17(3);
- 12 (b) subsection 17(4);
- 13 (c) subsection 17(5);
- 14 (d) subsection 17(6);
- 15 (e) paragraphs 17(8)(a) and (b)—but only in respect of retained
16 credit fees and charges;
- 17 (f) subsection 17(9);
- 18 (g) subsection 17(11);
- 19 (h) paragraphs 17(15)(a) and (b);
- 20 (i) subsection 23(1)—but only at the time the credit contract is
21 entered into.

22 (2) For the purposes of this Division, a *key requirement* in connection
23 with a continuing credit contract is any one of the requirements of
24 this Code contained in the following provisions:

- 25 (a) paragraph 17(3)(b);
- 26 (b) subsection 17(4);
- 27 (c) subsection 17(5);
- 28 (d) paragraphs 17(8)(a) and (b)—but only in respect of retained
29 credit fees and charges;
- 30 (e) subsection 17(9);
- 31 (f) subsection 23(1);

- 1 (g) subsection 34(6);
2 (h) section 35.

- 3 (3) A key requirement relating to a disclosure or a statement of
4 account extends to the requirements set out in Part 2 as to the
5 manner in which the disclosure or statement is to be made, but
6 does not extend to any requirements set out in the regulations.

7 **112 Application for order relating to key requirements**

- 8 (1) A party to a credit contract or a guarantor or ASIC may apply to
9 the court for an order under this Division.
- 10 (2) A debtor or guarantor may not make an application for an order
11 under this Division in respect of a contravention under a contract if
12 the contravention under that contract is or has been subject to an
13 application for an order made by the credit provider or ASIC
14 anywhere in Australia under this Code.
- 15 (3) Subsection (2) does not prevent an application from being made for
16 an order for the payment of compensation under section 118.

17 **113 Civil penalty may be imposed for contravention of key**
18 **requirement**

19 *Declaration as to key requirement*

- 20 (1) The court must, on an application being made, by order declare
21 whether or not the credit provider has contravened a key
22 requirement in connection with the credit contract or contracts
23 concerned.

24 *Penalty orders*

- 25 (2) The court may make an order, in accordance with this Division,
26 requiring the credit provider to pay an amount as a penalty, if it is
27 of the opinion that the credit provider has contravened a key
28 requirement.

Schedule 1 National Credit Code

Part 6 Civil penalties for defaults of credit providers

Division 1 Civil penalties for breach of key disclosure and other requirements

Section 113

1

Prudential standing

2

- (3) The court, in considering the imposition of a penalty, must have regard primarily to the prudential standing of any credit provider concerned, or of any subsidiary of the credit provider (within the meaning of the *Corporations Act 2001*), if the credit provider or subsidiary takes deposits or is a borrowing corporation (within the meaning of that Act). However, the court is to have regard to that prudential standing only if the credit provider requests the court to do so.

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Other matters to be considered

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- (4) The court, in considering the imposition of a penalty, must have regard to the following:

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- (a) the conduct of the credit provider and debtor before and after the credit contract was entered into;
- (b) whether the contravention was deliberate or otherwise;
- (c) the loss or other detriment (if any) suffered by the debtor as a result of the contravention;
- (d) when the credit provider first became aware, or ought reasonably to have become aware, of the contravention;
- (e) any systems or procedures of the credit provider to prevent or identify contraventions;
- (f) whether the contravention could have been prevented by the credit provider;
- (g) any action taken by the credit provider to remedy the contravention or compensate the debtor or to prevent further contraventions;
- (h) the time taken to make the application and the nature of the application;
- (i) any other matter the court considers relevant.

30

Related contraventions

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- (5) The court must, for the purposes of determining an application for an order under this Division or the amount of a penalty, treat a contravention of a key requirement that occurs merely because of another contravention of a key requirement as being a

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Section 114

1 contravention of the same kind. If a provision referred to in
2 section 111 contains several requirements, the court must treat
3 contraventions of more than one of those requirements as a single
4 contravention of the one key requirement for the purposes of
5 determining the amount of a penalty.

6 *Suppression of publication of application*

7 (6) The court may, if it thinks it appropriate in the circumstances,
8 order that particulars of or any matters relating to an application for
9 an order under this Division not be published.

10 **114 Penalty if application made by debtor or guarantor**

11 (1) On application being made by a debtor or a guarantor for an order,
12 the maximum penalty that may be imposed by the court for a
13 contravention of a key requirement is an amount not exceeding the
14 amount of:

- 15 (a) except as provided by paragraphs (b) and (c)—all interest
16 charges payable under the contract from the date it was
17 made; or
18 (b) in the case of a contravention of a key requirement relating to
19 a statement of account of a continuing credit contract—all
20 interest charges payable under the contract for the period to
21 which the statement of account relates; or
22 (c) in the case of a contravention of a key requirement relating to
23 prohibited monetary obligations—all interest charges
24 accruing under the contract from the date the contravention
25 occurred.

26 (2) The court may, however, impose a greater penalty if the debtor or
27 guarantor satisfies the court that the debtor has suffered a loss. The
28 amount of the penalty is to be not less than the amount of the loss.

29 (3) For the purposes of paragraph (1)(a), the amount of future interest
30 charges payable under a credit contract is to be calculated on the
31 assumptions in sections 180 and 182.

Section 115

1 **115 Payment of penalty to debtor or guarantor**

2 (1) An amount of penalty ordered by the court to be paid on an
3 application for an order made by a debtor or a guarantor may be set
4 off by the debtor or guarantor against any amount that is due or
5 becomes due to the credit provider under the credit contract. If
6 there is no such amount, the amount of the penalty is a debt due by
7 the credit provider to the debtor or guarantor.

8 (2) The Consolidated Revenue Fund is appropriated for the purposes
9 of:
10 (a) a set-off; or
11 (b) a debt due;
12 in relation to a penalty ordered under subsection (1). The *Financial*
13 *Management and Accountability Act 1997* does not apply in
14 relation to those amounts.

15 (3) An order made on application by a debtor or a guarantor may
16 include such directions as the court considers appropriate relating
17 to the payment of the amount owed by the debtor or the credit
18 provider as a result of the order.

19 **116 Penalty if application made by a credit provider or ASIC**

20 On application being made by a credit provider or ASIC for an
21 order, the maximum penalty that may be imposed by the court for a
22 contravention of a key requirement relating to a contract affected
23 by the application is an amount calculated so that the total penalty
24 for all contraventions of the requirement in Australia (as disclosed
25 by the credit provider) does not exceed \$500,000.

26 **117 Payment of penalty**

27 An amount of penalty ordered by the court to be paid on a
28 application for an order made by a credit provider or ASIC must be
29 paid by the credit provider to ASIC on behalf of the
30 Commonwealth.

1 **118 Compensation for debtor or guarantor**

- 2 (1) The court may, on application by a debtor or a guarantor, order that
3 the credit provider pay to the debtor or guarantor an amount by
4 way of compensation for loss arising from the contravention of a
5 key requirement.
- 6 (2) The court may only order an amount to be paid by way of
7 compensation if the debtor or guarantor satisfies the court that the
8 debtor or guarantor has suffered a loss arising from the
9 contravention. The amount of compensation is not to exceed the
10 amount of the loss.
- 11 (3) The court may not make an order under this section if the debtor or
12 guarantor has previously obtained or been refused a penalty
13 referred to in section 115 relating to the same contravention.
- 14 (4) An amount payable under this section does not affect the amount
15 of penalty for the purposes of section 116.

16 **119 General provisions relating to applications by credit providers**
17 **or ASIC**

- 18 (1) An application for an order by a credit provider or ASIC:
19 (a) may apply to any one or more credit contracts; and
20 (b) may apply to all or any class of credit contracts entered into
21 by the credit provider during a specified period (for example,
22 all credit contracts entered into during a specified period
23 which are affected by a specified contravention).
- 24 (2) The court may require notice of any such application to be
25 published by notice, in a form approved by the court, in a
26 newspaper circulating throughout one or more States or Territories,
27 as the court determines.
- 28 (3) Notice of an application by a credit provider must be given by the
29 credit provider to ASIC.

Section 120

1 **120 ASIC may represent interests of debtors**

2 ASIC may apply to the court to become a party to an application
3 under this Division and, if joined as a party, has standing to
4 represent the public interest and the interests of debtors.

5 **121 Directions pending court's decision**

- 6 (1) The court may, before disposing of an application by a debtor or
7 guarantor for an order under this Division, make such directions as
8 it considers appropriate to protect the interests of the debtor or
9 guarantor concerned.
- 10 (2) Subject to any such directions of the court, the application does not
11 prevent:
- 12 (a) any proceedings for the enforcement of the debtor's
13 obligations (or the obligations of a guarantor) from being
14 taken; or
- 15 (b) any rights over property the subject of a mortgage from being
16 exercised.
- 17 (3) For the purposes of this section, a reference to the disposal of an
18 application includes a reference to its withdrawal by the applicant.
- 19 (4) A credit provider affected by a direction of the court may apply to
20 the court for variation of the direction. The court may, on such an
21 application being made, vary or revoke the direction or refuse to
22 vary or revoke the direction.

23 **122 Offences**

24 Nothing in this Division affects the liability of a person for an
25 offence against this Code or the regulations.

26 **123 Time limit for application for orders under this Division**

- 27 (1) Proceedings under this Division for a declaration of contravention
28 and the imposition of a penalty for a contravention may not be
29 brought after 6 years from the day the contravention happened.

Section 123

- 1 (2) Subsection (1) applies despite any Act relating to the limitation of
2 time for commencing actions.
- 3 (3) In this section:
- 4 ***contravention*** means contravention of a key requirement.

Section 124

1

2 **Division 2—Other civil penalties**

3 **124 Civil effect of other contraventions**

- 4 (1) If a credit provider contravenes a requirement of or made under
5 this Code (other than one for which a civil effect is specifically
6 provided by Division 1 or by any other provision of this Code), the
7 court may order the credit provider to make restitution or pay
8 compensation to any person affected by the contravention and, in
9 that event, may make any consequential order it considers
10 appropriate in the circumstances.
- 11 (2) An application for the exercise of the court's powers under this
12 section may be made by ASIC or by any person affected by the
13 contravention.

1

2 **Part 7—Related sale contracts**

3 **Division 1—Interpretation and application**

4 **125 Meaning of *sale contract***

5 For the purposes of this Code, a *sale contract* is a contract for any
6 one or more of the following:

- 7 (a) a contract for the sale of goods;
8 (b) a contract for the supply of services.

9 **126 Sale contracts to which this Part applies**

10 This Part applies to or in respect of a sale contract or proposed sale
11 contract only if the sale of the goods or supply of services
12 concerned is financed, or is proposed to be financed, wholly or
13 partly by the provision of credit to which this Code applies.

14 **127 Linked credit providers and tied credit contracts**

15 (1) For the purposes of this Code, a *linked credit provider* of a
16 supplier means a credit provider:

- 17 (a) with whom the supplier has a contract, arrangement or
18 understanding relating to the supply to the supplier of goods
19 in which the supplier deals, relating to the business carried on
20 by the supplier of supplying goods or services or relating to
21 the provision to persons to whom goods or services are
22 supplied by the supplier of credit in respect of payment for
23 those goods or services; or
24 (b) to whom the supplier, by arrangement with the credit
25 provider, regularly refers persons for the purpose of obtaining
26 credit; or
27 (c) whose forms of contract or forms of application or offers for
28 credit are, by arrangement with the credit provider, made
29 available to persons by the supplier; or

Section 127

- 1 (d) with whom the supplier has a contract, arrangement or
2 understanding under which contracts or applications or offers
3 for credit from the credit provider may be signed by persons
4 at the premises of the supplier.
- 5 (2) For the purposes of this Code, a *tied continuing credit* contract is a
6 continuing credit contract under which a credit provider provides
7 credit in respect of the payment by a debtor for goods or services
8 supplied by a supplier in relation to whom the credit provider is a
9 linked credit provider.
- 10 (3) For the purposes of this Code, a *tied loan contract* is a credit
11 contract (other than a continuing credit contract) entered into
12 between a credit provider and a debtor where:
- 13 (a) the credit provider knows or ought reasonably to know that
14 the debtor enters into the credit contract wholly or partly for
15 the purposes of payment for the goods or services supplied
16 by a supplier; and
- 17 (b) at the time the credit contract is entered into the credit
18 provider is a linked credit provider of the supplier.

1

2 **Division 2—Liability of credit providers for suppliers'**
3 **misrepresentations**

4 **128 Credit provider liable with respect to supplier's**
5 **misrepresentations etc. about tied credit contract**

- 6 (1) If there is a tied loan contract or a tied continuing credit contract in
7 respect of a sale contract, any representation, warranty or statement
8 made (whether orally or in writing) by the supplier, or any person
9 acting on behalf of the supplier, to the debtor in relation to the tied
10 loan contract or tied continuing credit contract gives the debtor the
11 same rights against the credit provider as the debtor would have
12 had if it had been made by the credit provider.
- 13 (2) Without prejudice to any other rights or remedies to which a credit
14 provider may be entitled, a credit provider is entitled to be
15 indemnified by the person who made the representation, warranty
16 or statement, and any person on whose behalf it was made, against
17 any damage suffered by the credit provider through the operation
18 of this section.

Section 129

1

2 **Division 3—Liability of credit providers in relation to**
3 **goods**

4 **129 Right to damages under sale contract against both supplier and**
5 **linked credit provider (cf. section 73 of the *Trade***
6 ***Practices Act 1974*)**

7 *General right to damages*

8 (1) If:

- 9 (a) a supplier supplies goods, or causes goods to be supplied, to a
10 linked credit provider of the supplier and a debtor enters into
11 a contract with the linked credit provider for the provision of
12 credit in respect of the supply by way of sale of the goods to
13 the debtor; or
14 (b) a debtor enters into a contract with a linked credit provider of
15 a supplier for the provision of credit in respect of the supply
16 by the supplier of goods or services, or goods and services, to
17 the debtor;

18 and the debtor suffers loss or damage as a result of
19 misrepresentation, breach of contract, or failure of consideration in
20 relation to the sale contract, the supplier and the linked credit
21 provider are, subject to this Division, jointly and severally liable to
22 the debtor for the amount of the loss or damage, and the debtor
23 may recover that amount by action in accordance with this section
24 in a court of competent jurisdiction.

25 *Credit provider's defences*

- 26 (2) A linked credit provider of a particular supplier is not liable to a
27 debtor by virtue of subsection (1) in proceedings arising under that
28 subsection if the credit provider establishes:
29 (a) that the credit provided by the credit provider to the debtor
30 was the result of an approach made to the credit provider by
31 the debtor that was not induced by the supplier; or
32 (b) if the proceedings relate to a contract of sale with respect to
33 which a tied loan contract applies, that:

- 1 (i) after due inquiry before becoming a linked credit
2 provider of the supplier, the credit provider was
3 satisfied that the reputation of the supplier in respect of
4 the supplier's financial standing and business conduct
5 was good; and
- 6 (ii) after becoming a linked credit provider of the supplier,
7 but before the tied loan contract was entered into, the
8 linked credit provider had not had cause to suspect that
9 the debtor might, if the contract was entered into, be
10 entitled to recover an amount of loss or damage suffered
11 as a result of misrepresentation, breach of contract or
12 failure of consideration in relation to the contract as
13 referred to in subsection (1); and
- 14 (iii) after becoming a linked credit provider of the supplier,
15 but before the tied loan contract was entered into, the
16 credit provider had not had cause to suspect that the
17 supplier might be unable to meet the supplier's
18 liabilities as and when they fell due; or
- 19 (c) if the proceedings relate to a contract of sale with respect to
20 which a tied continuing credit contract entered into by the
21 linked credit provider applies, that, having regard to:
- 22 (i) the nature and volume of business carried on by the
23 linked credit provider; and
- 24 (ii) such other matters as appear to be relevant in the
25 circumstances of the case;
- 26 the linked credit provider, before becoming aware of the
27 contract of sale, or of proposals for the making of the
28 contract of sale (whichever the linked credit provider first
29 became aware of), had not had cause to suspect that a person
30 entering into such a contract with the supplier might be
31 entitled to claim damages against, or recover a sum of money
32 from, the supplier for misrepresentation, breach of contract or
33 failure of consideration as referred to in subsection (1).

Section 130

1 **130 Limits on debtor's right of action against linked credit provider**
2 **(cf. section 73 of the *Trade Practices Act 1974*)**

3 *Debtor may raise credit provider's liability*

- 4 (1) Subject to subsection (2), in relation to a contract referred to in
5 paragraph 129(1)(a) or (b), in which a credit provider claims
6 damages or an amount of money from a debtor, the debtor may set
7 up the liability of the credit provider under section 129 in
8 diminution or extinction of the debtor's liability.

9 *Proceedings to be brought against both supplier and linked credit*
10 *provider*

- 11 (2) Subject to subsection (3), a debtor may not, in respect of a liability
12 for which, by reason of section 129, a supplier and a linked credit
13 provider are jointly and severally liable:
14 (a) bring proceedings to recover an amount of loss or damage
15 from the credit provider; or
16 (b) where proceedings are brought against the debtor by the
17 linked credit provider, make a counterclaim or exercise the
18 right conferred by subsection (1) against the credit provider;
19 unless the debtor brings the action against the supplier and the
20 credit provider jointly or, in the case of a counterclaim or right
21 conferred by subsection (1), claims in the proceedings against the
22 supplier in respect of the liability by third-party proceedings or
23 otherwise.

24 *When joint proceedings not required*

- 25 (3) Subsection (2) and paragraphs (5)(a) and (6)(a) do not apply in
26 relation to proceedings where:
27 (a) the supplier is insolvent, cannot be located after reasonable
28 inquiry, or has died or been dissolved; or
29 (b) in the opinion of the court in which the proceedings are
30 taken, it is not reasonably likely that a judgment obtained
31 against the supplier would be satisfied and the court has, on
32 the application of the debtor, declared that subsection (2) and
33 paragraphs (5)(a) and (6)(a) do not apply in relation to the
34 proceedings.

Section 130

1 *Limit of credit provider's liability*

- 2 (4) The liability of a linked credit provider to a debtor for damages or
3 a sum of money in respect of a contract referred to in subsection
4 129(1) is not to exceed the sum of:
- 5 (a) the amount of credit under the tied loan contract or tied
6 continuing credit contract; and
 - 7 (b) the amount of interest (if any) or damages in the nature of
8 interest allowed or awarded against the linked credit provider
9 by the court; and
 - 10 (c) the amount of costs (if any) awarded by the court against the
11 linked credit provider or supplier or both.

12 *Enforcement of judgment against linked credit provider*

- 13 (5) Where in proceedings arising under section 129, judgment is given
14 against a supplier and a linked credit provider, the judgment:
- 15 (a) must not be enforced against the linked credit provider unless
16 a written demand made on the supplier for satisfaction of the
17 judgment has remained unsatisfied for not less than 30 days;
18 and
 - 19 (b) may be enforced against the linked credit provider only to the
20 extent of the amount calculated in accordance with this
21 section, or so much of the judgment debt as has not been
22 satisfied by the supplier, whichever is the lesser.

23 *Enforcement of right against linked credit provider*

- 24 (6) Where in proceedings in respect of the liability arising under
25 section 129, a right conferred by subsection (1) is established
26 against a linked credit provider, the debtor:
- 27 (a) may not receive the benefit of the right unless judgment has
28 been given against the supplier and linked credit provider, a
29 written demand has been made on the supplier for
30 satisfaction of the judgment and the demand has remained
31 unsatisfied for not less than 30 days; and
 - 32 (b) may receive the benefit only to the extent of the amount
33 calculated in accordance with this section or so much of the
34 judgment debt as has not been satisfied by the supplier,
35 whichever is the lesser.

Section 131

1 **131 Liability of supplier to linked credit provider (cf. section 73 of**
2 **the *Trade Practices Act 1974*)**

3 Unless the linked credit provider and supplier otherwise agree, the
4 supplier is liable to the linked credit provider for the amount of a
5 loss suffered by the linked credit provider, being an amount not
6 exceeding the maximum amount of the linked credit provider's
7 liability under subsection 130(4) and, unless the court otherwise
8 determines, the amount of costs (if any) reasonably incurred by the
9 linked credit provider in defending the proceedings by reason of
10 which the liability was incurred.

11 **132 Interest may be awarded (cf. section 73 of the *Trade Practices***
12 ***Act 1974*)**

- 13 (1) Despite any other law, where, in proceedings arising under
14 section 129, judgment is given against a supplier and a linked
15 credit provider or against a linked credit provider for an amount of
16 loss or damage, the court in which the proceedings are taken must,
17 on the application of the debtor, unless good cause is shown to the
18 contrary, award interest to the debtor against the supplier and credit
19 provider or against the credit provider, as the case may be, on the
20 whole or a part of the amount from the time when the debtor
21 became entitled to recover the amount until the date on which the
22 judgment is given, at a rate prescribed by the regulations.
- 23 (2) In determining whether good cause is shown against awarding
24 interest under this section on the whole or part of an amount of loss
25 or damage, the court is to take into account any payment made into
26 court by the supplier or credit provider.

27 **133 Subrogation of credit provider (cf. section 73 of the *Trade***
28 ***Practices Act 1974*)**

29 If a judgment given in proceedings arising under section 129 is
30 enforced against a linked credit provider of a particular supplier,
31 the credit provider is subrogated to the extent of the judgment so
32 enforced to any rights that the debtor would have had but for the
33 judgment against the supplier or any other person in respect of the
34 loss or damage suffered by the debtor as a result of the

Section 133

1 misrepresentation, breach of contract or failure of consideration in
2 relation to the contract from which the liability arose.

Section 134

1

2 **Division 4—Termination of related transactions**

3 **134 Termination of sale contract which is conditional on obtaining**
4 **credit**

5 (1) If a purchaser of goods or services makes it known to a supplier
6 that credit is required in order to pay for the goods or services and
7 the purchaser, after making reasonable endeavours to do so, fails to
8 obtain credit on reasonable terms, the purchaser is entitled to
9 terminate the sale contract.

10 (2) A purchaser may terminate a sale contract under this section even
11 though goods or services have already been supplied under the
12 contract but, if practicable, goods supplied under the sale contract
13 must be returned to the supplier.

14 (3) If a sale contract is terminated under this section:

15 (a) the supplier is entitled to:

16 (i) reasonable compensation for damage to, or deterioration of,
17 goods supplied under the sale contract (other than
18 fair wear and tear) up to the date of their return to the
19 supplier or, if they are not returned, the cash price of the
20 goods; and

21 (ii) the reasonable value of the services supplied under the
22 sale contract up to the date of termination; and

23 (b) the purchaser is entitled (subject to the supplier's entitlement
24 referred to above) to the return of money paid under the sale
25 contract.

26 (4) This section does not apply to a sale contract for the supply of
27 rights in relation to, and interests in, real property unless the
28 supplier was aware that the purchaser intended to obtain the credit
29 from the supplier or from a linked credit provider of the supplier.

1 **135 Termination of (or recredit under) tied credit contract if sale**
2 **contract terminated**

- 3 (1) If a sale contract is rescinded or discharged (whether under this
4 Code or any other law) and there is a tied loan contract or a tied
5 continuing credit contract made with the purchaser by a linked
6 credit provider of the supplier under the sale contract, the debtor is
7 entitled:
8 (a) in the case of a tied loan contract—to terminate the credit
9 contract; or
10 (b) in the case of a tied continuing credit contract—to be credited
11 with the amount of credit in relation to the sale contract and
12 the interest charges attributable to that amount.
- 13 (2) If a tied loan contract is terminated under this section, any related
14 guarantee or mortgage is terminated to the extent to which it
15 secures obligations under the contract or any related guarantee.
- 16 (3) If a tied loan contract is terminated under this section, the credit
17 provider is entitled to recover from the debtor any part of the
18 amount of credit that has not been paid to the supplier and the
19 debtor is entitled to recover from the credit provider any interest
20 charges or other amounts paid by the debtor under the credit
21 contract.
- 22 (4) If a mortgage or guarantee is terminated under this section, the
23 credit provider is entitled to recover from the mortgagor or
24 guarantor any part of the amount of credit that has not been paid to
25 the supplier and that is secured by the mortgage or guarantee, and
26 the mortgagor or guarantor is entitled to recover from the credit
27 provider any other amounts paid by the mortgagor or guarantor.
- 28 (5) If a tied loan contract is terminated under this section, the credit
29 provider is entitled to recover from the supplier (subject to any
30 agreement between them) the amount of any loss suffered by the
31 credit provider as a result of the operation of this section.
- 32 (6) A supplier who knows that a sale contract referred to in
33 subsection (1) has been rescinded or discharged must forthwith
34 give the credit provider under any tied loan contract or tied
35 continuing credit contract notice of the termination.

Section 136

- 1 Criminal penalty: 50 penalty units.
- 2 (7) This section does not apply if the credit is provided as a result of an
3 approach by the debtor that was not induced by the supplier or
4 credit provider.
- 5 (8) This section applies:
- 6 (a) to the exercise by a purchaser of a right under this Code or
7 any other law to rescind or discharge a sale contract; and
- 8 (b) to a tied loan contract or a tied continuing credit contract, but
9 only if the sale contract was the principal purpose for which
10 the credit was provided.

11 **136 Termination of linked maintenance services contract if credit**
12 **contract terminated**

- 13 (1) If:
- 14 (a) there is a tied loan contract or a tied continuing credit
15 contract made with the debtor by a linked credit provider of
16 the supplier under a sale contract to supply maintenance
17 services; and
- 18 (b) the tied loan contract or tied continuing credit contract is
19 terminated (whether under this Code or any other law) before
20 the end of the term of the sale contract;
- 21 the debtor is entitled to terminate the sale contract to supply
22 maintenance services and recover from the supplier a proportionate
23 rebate of consideration paid under the sale contract.
- 24 (2) In any such case, the credit provider must inform the debtor in
25 accordance with the regulations of the debtor's rights under this
26 section.
- 27 Criminal penalty: 50 penalty units.
- 28 (3) Subsection (2) is an offence of strict liability.
- 29 Note: For strict liability, see section 6.1 of the *Criminal Code*.
- 30 (4) The regulations may prescribe the manner of calculating the
31 proportionate rebate of consideration for the purposes of this
32 section.

Section 137

1 (5) This section does not apply if the credit is provided as a result of an
2 approach by the debtor that was not induced by the supplier or
3 credit provider.

4 **137 Termination of contract under this Part to be in writing**

5 An entitlement to terminate a sale contract or credit contract that is
6 conferred by a provision of this Part may be exercised only by
7 notice in writing to the other party to the contract.

8 **138 Powers of court with respect to termination of contract under**
9 **this Part**

10 The court may, on the application of any interested party, make
11 orders:

- 12 (a) declaring whether a purported termination of a contract under
13 this Part is valid; and
14 (b) for the adjustment of rights following termination of a
15 contract under this Part.

16 **139 Part 5 not to apply to termination of contract under this Part**

17 Part 5 does not apply to the termination of a contract under this
18 Part.

Section 140

1

2 **Division 5—Other provisions**

3 **140 Requirement as to source of credit for goods or services**

4 (1) A supplier must not require a purchaser of goods or services to
5 apply for, or obtain, credit from a particular credit provider.

6 Criminal penalty: 100 penalty units.

7 (2) Subsection (1) is an offence of strict liability.

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

9 **141 Prohibition on payment for goods or services by postdated bills**
10 **of exchange or notes which exceed cash price of goods or**
11 **services**

12 (1) A supplier must not demand or accept payment from the purchaser
13 for goods or services supplied under a sale contract in the form of a
14 postdated bill of exchange or promissory note given by the
15 purchaser if the face value of the bill or note exceeds the cash price
16 of the goods or services.

17 Criminal penalty: 100 penalty units.

18 (2) Subsection (1) does not apply unless the postponement of the debt
19 to the supplier constitutes a provision of credit to which this Code
20 applies.

21 (3) Subsection (1) is an offence of strict liability.

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

1

2 **Part 8—Related insurance contracts**
3

4 **142 Interpretation and application**

5 (1) For the purposes of this Code, a *credit-related insurance contract*
6 is a contract for insurance of any of the following kinds in
7 connection with a credit contract:

- 8 (a) insurance over mortgaged property;
9 (b) consumer credit insurance;
10 (c) insurance of a nature prescribed for the purposes of this
11 section by the regulations.

12 (2) This Code does not apply to insurance over mortgaged property
13 that:

- 14 (a) is insurance for an extended period of warranty for goods; or
15 (b) is insurance over property that is not mortgaged to secure
16 obligations under the credit contract.

17 (3) This Code does not apply to consumer credit insurance in
18 connection with a credit contract unless the contract for consumer
19 credit insurance insures the obligations of the debtor under the
20 credit contract.

21 **143 Requirement to take out insurance or to insure with particular**
22 **insurer or on particular terms**

23 (1) A credit provider or a supplier must not:

- 24 (a) require a debtor or guarantor to take out insurance or to pay
25 the cost of insurance taken out or arranged by the credit
26 provider or supplier; or
27 (b) represent to a debtor or guarantor that the debtor or guarantor
28 is required to pay the cost of any such insurance;

29 unless the insurance is compulsory insurance, mortgage indemnity
30 insurance, insurance over mortgaged property or insurance of a
31 nature and extent approved for the purposes of this section by the
32 regulations.

Section 144

- 1 Criminal penalty: 100 penalty units.
- 2 (2) A credit provider or a supplier must not, in connection with a credit
3 contract or a sale contract in relation to which there is a tied loan
4 contract or a tied continuing credit contract:
- 5 (a) require a debtor or guarantor to take out insurance with a
6 particular insurer (unless the insurer is the only insurer
7 providing insurance of the relevant kind or the requirement is
8 exempted from the operation of this section by the
9 regulations); or
- 10 (b) make any unreasonable requirement as to the terms on which
11 the debtor or guarantor is to take out insurance.

12 Criminal penalty: 100 penalty units.

- 13 (3) Subsections (1) and (2) are offences of strict liability.

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

15 *Civil effect*

- 16 (4) If the credit provider or supplier contravenes this section, the
17 insured is entitled to recover the whole of the premium paid under
18 the contract from the credit provider or supplier, as the case
19 requires.

20 **144 Financing of insurance premiums over mortgaged property**

- 21 (1) A credit provider must not knowingly provide credit to the debtor
22 to pay the premium or finance the premium on insurance taken out
23 by the debtor over mortgaged property for a period of insurance
24 exceeding 1 year, but may provide credit for or finance successive
25 premiums for periods of 1 year or less.

26 Criminal penalty: 100 penalty units.

- 27 (2) The credit provider must not knowingly debit the premium to the
28 debtor's account more than 30 days before the beginning of the
29 period of insurance to which it relates.

30 Criminal penalty: 100 penalty units.

Section 145

1 *Civil effect*

- 2 (3) If a credit provider contravenes subsection (1), the insured is
3 entitled to recover the whole of the premium paid under the
4 contract from the credit provider. If a credit provider contravenes
5 subsection (2), the insured is entitled to recover the amount of
6 premium debited in contravention of the subsection.

7 **145 Commission for consumer credit insurance**

- 8 (1) This section applies to commission paid by an insurer in
9 connection with consumer credit insurance taken out by the debtor,
10 or for which an amount is paid by the debtor.
- 11 (2) The total of any such commission accepted by all or any of the
12 following:
13 (a) the credit provider;
14 (b) the supplier under a sale contract in relation to which there is
15 a tied loan contract or a tied continuing credit contract;
16 (c) the agent of the credit provider or supplier;
17 must not exceed, in amount or value, 20% of the premium
18 (excluding government charges).
- 19 (3) A credit provider or any such supplier or agent must not accept,
20 and an insurer must not pay, a commission exceeding, in amount or
21 value, the maximum allowed under this section.

22 Criminal penalty: 100 penalty units.

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

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

25 *Civil effect*

- 26 (5) If a credit provider or supplier contravenes this section, the insured
27 is entitled to recover the whole amount or value of the commission
28 from the credit provider or the supplier, as the case requires.

Section 146

1 **146 Supply of copy of credit-related insurance contract by insurer**

- 2 (1) If the premium under a credit-related insurance contract is financed
3 under the credit contract, the insurer must ensure that a copy of the
4 policy of insurance is given to the debtor within 14 days after
5 acceptance of the insurance proposal by the insurer.

6 Criminal penalty: 100 penalty units.

- 7 (2) In the case of any such contract of insurance entered into by the
8 credit provider in which the debtor has a beneficial interest, the
9 credit provider must ensure that a written notice containing
10 particulars of the insurance prescribed by the regulations is given
11 to the debtor within 14 days after the beneficial interest is acquired
12 by the debtor.

13 Criminal penalty: 100 penalty units.

- 14 (3) Subsections (1) and (2) do not apply to compulsory insurance.

- 15 (4) Subsections (1) and (2) are offences of strict liability.

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

17 **147 Rejection of debtor's proposal for insurance**

- 18 (1) If a credit provider proposes to finance the amount payable by the
19 debtor under or in connection with a credit-related insurance
20 contract and the proposal for insurance is rejected by an insurer,
21 the insurer must inform the debtor and the credit provider of its
22 rejection.

- 23 (2) Unless the insurance is to be arranged with another insurer, the
24 credit provider must ensure that any amount paid by the debtor is
25 refunded or credited in full.

26 Criminal penalty: 100 penalty units.

- 27 (3) Subsection (2) is an offence of strict liability.

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

- 29 (4) The credit provider may, in turn, recover the amount paid to the
30 debtor from the insurer, if an amount has been paid to the insurer

Section 148

1 by the debtor under or in connection with the proposed insurance
2 contract.

3 **148 Termination of consumer credit insurance contract if credit**
4 **contract terminated**

5 (1) On termination of a credit contract, any relevant credit-related
6 insurance contract financed under the credit contract for consumer
7 credit insurance in force is also terminated.

8 (2) If a credit contract is terminated, the credit provider is required to
9 pay the debtor or credit the debtor with a proportionate rebate of
10 premium paid under any relevant credit-related insurance contract
11 for consumer credit insurance in force immediately before the
12 credit contract is terminated.

13 (3) The credit provider may, in turn, recover the amount paid to the
14 debtor from the insurer.

15 (4) The regulations may prescribe the manner of calculating the
16 proportionate rebate of premium for the purposes of this section,
17 including the rebate payable where this section does not apply to
18 the whole of a credit-related insurance contract.

19 (5) This section has effect despite any provision of the credit-related
20 insurance contract.

21 (6) This section does not apply to a credit-related insurance contract,
22 to the extent that it provides a benefit in the event of the death of
23 the debtor, if a credit contract is terminated on the death of a
24 debtor. However, it does apply to the credit-related insurance
25 contract to the extent that it provides other benefits.

26 **149 Termination of insurance contract over mortgaged property if**
27 **credit contract terminated**

28 (1) If a credit contract is terminated before the end of the term of a
29 credit-related insurance contract over mortgaged property financed
30 under the credit contract or before any such insurance contract is
31 otherwise terminated, the debtor is entitled to terminate the

Section 149

- 1 insurance contract and recover from the insurer a proportionate
2 rebate of premium paid under the insurance contract.
- 3 (2) On the termination of the credit contract, the credit provider must
4 inform the debtor in accordance with the regulations of the debtor's
5 rights under this section.
- 6 Criminal penalty: 50 penalty units.
- 7 (3) Subsection (2) is an offence of strict liability.
- 8 Note: For strict liability, see section 6.1 of the *Criminal Code*.
- 9 (4) The regulations may prescribe the manner of calculating the
10 proportionate rebate of premium for the purposes of this section.
- 11 (5) An entitlement under this section to terminate an insurance
12 contract may be exercised only by notice in writing to the insurer.
- 13 (6) This section has effect despite any provision of the credit-related
14 insurance contract.

1

2 **Part 9—Advertising and related conduct**

3

4 **150 Advertising**

5 *General principle*

- 6 (1) A person must not publish, or cause to be published, an
7 advertisement that states or implies that credit is available unless
8 the advertisement complies with:
- 9 (a) this section; and
 - 10 (b) if, under Part 10, the comparison rate is included—Division 2
11 of that Part.

12 Criminal penalty: 100 penalty units.

13 *Regulations*

- 14 (2) The advertisement must not contain a statement of a kind
15 prohibited by the regulations. It must contain any statement
16 required by the regulations.

17 *Annual percentage rate*

- 18 (3) The advertisement need not contain an annual percentage rate, but
19 must do so if the advertisement states the amount of any
20 repayment. If the advertisement contains an annual percentage rate
21 and credit fees and charges are payable, the advertisement must:
- 22 (a) state that fees and charges are payable; or
 - 23 (b) specify the amount of the fees and charges payable; or
 - 24 (c) specify the amount of some of the fees and charges payable
25 and state that other fees and charges are payable.

26 *Civil effect*

- 27 (4) A person who suffers loss as a result of a contravention by another
28 person of this section may recover the amount of the loss against
29 that other person or any other person involved in the contravention.

Section 151

1 **151 Persons liable for advertisements**

- 2 (1) A person is, in the absence of proof to the contrary, taken to have
3 caused an advertisement to be published if:
- 4 (a) the person provides credit, owns or has an interest in any
5 goods, or supplies or has an interest in the supply of any
6 goods or services, which the advertisement promotes; and
7 (b) the advertisement specifies the name, business name,
8 address, telephone number, facsimile number or post office
9 box number of the person or the person's agent.
- 10 (2) It is a defence to a charge under section 150 of causing an
11 advertisement that does not comply with that section to be
12 published if the person charged proves that he or she could not, by
13 the exercise of reasonable care, have prevented the noncompliance
14 to which the offence relates.

15 **152 Defence**

16 A printer, publisher or proprietor of a newspaper, a licensee of a
17 commercial broadcasting or television station, an exhibitor of a
18 film, or a person acting with the authority of any of them, does not
19 commit an offence under section 150 unless he or she suspected, or
20 had reason to suspect, that publishing the advertisement would
21 constitute an offence.

22 **153 Interest rates which may be disclosed**

- 23 (1) A person must not disclose an interest rate:
- 24 (a) in an advertisement that states or implies that credit is
25 available; or
26 (b) to a debtor before the debtor enters into a credit contract;
27 unless the interest rate is expressed as a nominal percentage rate
28 per annum or is the comparison rate calculated as prescribed by the
29 regulations and accompanied by the warnings set out in the
30 regulations.

31 Criminal penalty: 100 penalty units.

- 32 (2) Subsection (1) is an offence of strict liability.

Section 154

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

2 **154 False or misleading representations**

3 (1) A person must not make a false or misleading representation in
4 relation to a matter that is material to entry into a credit contract or
5 a related transaction or in attempting to induce another person to
6 enter into a credit contract or related transaction.

7 Criminal penalty: 50 penalty units.

8 (2) It is a defence to prosecution for an offence against this section if a
9 person charged proves that he or she reasonably believed that the
10 representation was not false or misleading.

11 *Civil effect*

12 (3) A person who suffers loss as a result of a contravention by another
13 person of this section may recover the amount of the loss from that
14 other person or any other person involved in the contravention.

15 **155 Harassment**

16 A credit provider or supplier must not harass a person in
17 attempting to get that person to apply for credit or to enter into a
18 credit contract or a related transaction.

19 Criminal penalty: 100 penalty units.

20 **156 Canvassing of credit at home**

21 (1) A credit provider must not visit (personally or in the person of an
22 employee or agent) a place of residence for the purpose of inducing
23 a person who resides there to apply for or obtain credit, except by
24 prior arrangement by the credit provider with a person who resides
25 there.

26 Criminal penalty: 100 penalty units.

27 (2) A person who visits another's residence for the purpose of offering
28 goods or services for sale and who offers to provide or arrange for
29 the provision of credit to finance the sale will not be taken to have

Schedule 1 National Credit Code
Part 9 Advertising and related conduct

Section 156

1 called for the purpose of inducing a person to apply for or obtain
2 credit.

1

2 **Part 10—Comparison rates**

2

3 **Division 1—Preliminary**

3

4 **157 Object of Part**

4

- 5 (1) The object of this Part is to assist consumers to identify the true
6 cost of credit offered by credit providers.
- 7 (2) In order to achieve that object, this Part makes it mandatory for
8 credit providers to include the comparison rate in advertisements
9 for consumer credit (other than under continuing credit contracts)
10 if an interest rate is advertised.
- 11 (3) The comparison rate will reflect the total cost of credit arising from
12 interest charges and other prescribed credit fees and charges.

11

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13 **158 Part not to apply to continuing credit contracts**

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- 14 (1) This Part does not apply to advertising or other matters about the
15 provision of credit under continuing credit contracts.
- 16 (2) Accordingly, a reference in this Part to the provision of credit (or
17 to a credit contract or related matters) does not include a reference
18 to the provision of credit under a continuing credit contract (or to a
19 continuing credit contract or matters related to such a contract).

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20 **159 Definitions**

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21 In this Part:

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22 ***consumer credit product*** means any form of facility for the
23 provision of credit (other than under a continuing credit contract)
24 provided to debtors by a credit provider.

22

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25 ***credit advertisement*** means an advertisement in any form or
26 medium that states or implies that credit is available, but (for the
27 avoidance of doubt) does not include:

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27

Schedule 1 National Credit Code

Part 10 Comparison rates

Division 1 Preliminary

Section 159

- 1 (a) notices or other documents required or authorised to be given
2 under this Code; or
3 (b) a publication that only lists reference rates.
- 4 ***name***, of a consumer credit product, means the usual name or
5 description by which the credit provider describes or advertises the
6 product.

1

2 **Division 2—Comparison rate in credit advertising**

3 **160 Comparison rate mandatory in advertisements containing**
4 **annual percentage rate**

5 (1) A credit advertisement must contain the relevant comparison rate
6 in accordance with this Part if it contains an annual percentage rate.

7 (2) A credit advertisement may contain the relevant comparison rate in
8 accordance with this Part even if it does not contain an annual
9 percentage rate.

10 Note: Section 150(1) makes it an offence (penalty—100 penalty units) if a
11 person publishes a credit advertisement that does not comply with this
12 Division.

13 **161 The relevant comparison rate**

14 (1) The relevant comparison rate for the purposes of section 160 is the
15 comparison rate calculated for whichever of the designated
16 amounts and terms most closely represents the typical amount of
17 credit and term initially provided by the credit provider for the
18 consumer credit product being advertised.

19 (2) The designated amounts and terms are the amounts and terms
20 prescribed by a regulation for the purposes of this section.

21 (3) The credit advertisement may contain more than one relevant
22 comparison rate.

23 **162 Information about comparison rate**

24 (1) The credit advertisement must clearly state the name of the
25 consumer credit product, the amount of credit and the term to
26 which each comparison rate applies.

27 (2) If the comparison rate is calculated for an amount of credit
28 prescribed by a regulation for the purposes of this subsection, the
29 credit advertisement must clearly state:

Schedule 1 National Credit Code

Part 10 Comparison rates

Division 2 Comparison rate in credit advertising

Section 163

- 1 (a) that the comparison rate is for a secured loan if it has been
2 calculated on the basis that a mortgage or guarantee is taken
3 by the credit provider; or
4 (b) that the comparison rate is for an unsecured loan if it has not
5 been so calculated.
6 The word “secured” or “unsecured” in connection with the amount
7 of credit for which the comparison rate is calculated is a sufficient
8 description for the purposes of this subsection.

9 **163 Warning about comparison rate**

- 10 (1) A comparison rate in a credit advertisement must be accompanied
11 by a warning about the accuracy of the comparison rate that is
12 prescribed by a regulation.
13 (2) The warning may be given in conjunction with the basis on which
14 the comparison rate is calculated, that is, that the comparison rate
15 is accurate only for the specified amount of credit and specified
16 term.

17 **164 Other requirements for comparison rate**

- 18 (1) A comparison rate in any credit advertisement must be identified as
19 a comparison rate.
20 (2) A comparison rate in any credit advertisement must not be less
21 prominent than:
22 (a) any annual percentage rate stated in the advertisement; and
23 (b) the amount of any repayment stated in the advertisement.
24 (3) The following applies to credit advertisements on television, the
25 internet or other electronic display medium:
26 (a) if the annual percentage rate is in spoken form and not
27 displayed on the screen in text, the comparison rate must also
28 be in spoken form;
29 (b) if the annual percentage rate is displayed on the screen in
30 text, the comparison rate must also be displayed on the screen
31 in text and may be in spoken form;

Section 164

- 1 (c) if the comparison rate is in spoken form, the warning and
2 other information may be either in spoken form or displayed
3 on the screen in text;
4 (d) if the comparison rate is displayed on the screen in text, the
5 warning and other information must also be displayed on the
6 screen in text.

Section 165

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2 **Division 3—Comparison rate in other documents**

3 **165 Comparison rates in documents other than credit advertising**

4 If a document, other than a credit advertisement, contains a
5 comparison rate, Division 2 applies (with necessary changes) in
6 relation to the comparison rate as if it were in a credit
7 advertisement.

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2 **Division 4—Miscellaneous**

3 **166 Calculation of comparison rates**

4 (1) A regulation may make provision about the way in which
5 comparison rates are to be calculated for the purposes of this Part.

6 (2) For the purposes of calculating the relevant comparison rate, credit
7 fees or charges are not ascertainable and need not be included in
8 the calculation if their imposition or amount is dependent on events
9 that may or may not happen (unless a regulation under this section
10 otherwise provides).

11 **167 Compliance grace period following changes in interest or fees**

12 A credit advertisement does not cease to comply with this Part
13 merely because of a change in the annual percentage rate or in any
14 credit fees or charges during the period of 7 days after the change
15 takes effect.

16 **168 Regulations—exemptions and other matters**

17 A regulation may make provision about the following:

- 18 (a) exempting any class of persons or matters from the operation
19 of any provision of this Part;
20 (b) requirements with which a credit advertisement containing a
21 comparison rate must comply.

Section 169

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2 **Part 11—Consumer leases**

2

3 **Division 1—Interpretation and application**

3

4 **169 Meaning of *consumer lease***

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5 For the purposes of this Code, a *consumer lease* is a contract for
6 the hire of goods by a natural person or strata corporation under
7 which that person or corporation does not have a right or obligation
8 to purchase the goods.

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9 **170 Consumer leases to which this Part applies**

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10 (1) This Part applies to a consumer lease if, when the lease is entered
11 into:

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(a) the goods are hired wholly or predominantly for personal,
domestic or household purposes; and

(b) a charge is or may be made for hiring the goods and the
charge together with any other amount payable under the
consumer lease exceeds the cash price of the goods; and

(c) the lessor hires the goods in the course of a business of hiring
goods carried on in this jurisdiction or as part of or
incidentally to any other business of the lessor carried on in
this jurisdiction.

21 (2) If this Part applies to a consumer lease:

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(a) this Part applies to all transactions or acts under the lease
whether or not they take place in this jurisdiction; and

(b) this Part continues to apply even though the lessee ceases to
carry on a business in this jurisdiction.

26 (3) For the purposes of this section, the amount payable under a
27 consumer lease includes any agreed or residual value of the goods
28 at the end of the lease or on termination of the lease by the lessor
29 or lessee, but does not include:

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(a) any amount payable for services that are incidental to the hire
of the goods under the lease; or

Section 171

- 1 (b) any amount that ceases to be payable on the termination of
2 the contract following the exercise of a right of cancellation
3 by the lessee at the earliest opportunity.
- 4 (4) For the purposes of this section, the predominant purpose for
5 which goods are hired is:
- 6 (a) the purpose for which more than one half of the goods are
7 intended to be used; or
- 8 (b) if the same goods are intended to be used for different
9 purposes, the purpose for which the goods are intended to be
10 most used.

11 **171 Consumer leases to which this Part does not apply**

12 *Short term or indefinite leases*

- 13 (1) This Part does not apply to a consumer lease for a fixed period of 4
14 months or less or for an indefinite period.

15 *Employment-related leases*

- 16 (2) This Part does not apply to a consumer lease under which goods
17 are hired by an employee in connection with the employee's
18 remuneration or other employment benefits.

19 *Regulations may exclude leases*

- 20 (3) The regulations may exclude from the application of all or any
21 provisions of this Part consumer leases of a class specified in the
22 regulations.

23 *ASIC may exclude leases*

- 24 (4) ASIC may exclude, from the application of all or any provisions of
25 this Part, a consumer lease specified by ASIC.
- 26 (5) An exemption under subsection (4) is not a legislative instrument.
- 27 (6) ASIC may, by legislative instrument, exclude from the application
28 of all or any provisions of this Part, consumer leases of a class
29 specified in the instrument.

Section 172

1 **172 Presumptions relating to application of this Part**

- 2 (1) In any proceedings (whether brought under this Code or not) in
3 which a party claims that a lease is a consumer lease to which this
4 Part applies, it is presumed to be such unless the contrary is
5 established.
- 6 (2) It is presumed for the purposes of this Code that goods hired under
7 a lease are not hired wholly or predominantly for personal,
8 domestic or household purposes if the lessee declares, before
9 entering the lease, that the goods are hired wholly or
10 predominantly for business purposes, unless the contrary is
11 established.
- 12 (3) However, the declaration is ineffective if, when the declaration was
13 made, the lessor or a person (the *prescribed person*) of a kind
14 prescribed by the regulations:
15 (a) knew, or had reason to believe; or
16 (b) would have known, or had reason to believe, if the lessor or
17 prescribed person had made reasonable inquiries about the
18 purpose for which the goods were hired;
19 that the goods were in fact hired wholly or predominantly for
20 personal, domestic or household purposes.
- 21 (4) If the declaration is ineffective under subsection (3), paragraph
22 170(1)(a) is taken to be satisfied in relation to the lease.
- 23 (5) A declaration under this section is to be substantially in the form (if
24 any) required by the regulations and is ineffective for the purposes
25 of this section if it is not.
- 26 (6) A person commits an offence if:
27 (a) the person engages in conduct; and
28 (b) the conduct induces a debtor to make a declaration under this
29 section that is false or misleading in a material particular; and
30 (c) the declaration is false or misleading in a material particular.
- 31 Criminal penalty: 100 penalty units, or 2 years imprisonment, or
32 both.
- 33 (7) Strict liability applies to paragraph (6)(c).

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

Section 173

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2 **Division 2—Form of and information to be included in**
3 **consumer leases**

4 **173 Form of consumer lease**

5 (1) A consumer lease must be in the form of a written lease document
6 signed by the lessee and containing the information required by
7 this Division.

8 (2) The regulations may make provision for or with respect to the form
9 of consumer leases and the way they are expressed.

10 (3) A lessor must not enter into a consumer lease that contravenes a
11 requirement of this section or regulations made under this section.

12 Criminal penalty: 100 penalty units.

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

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

15 **174 Disclosures in consumer leases**

16 (1) A consumer lease must contain the following matters, if
17 ascertainable:

18 (a) a description or identification of the goods hired under the
19 lease;

20 (b) the amount or value of any consideration to be paid or
21 provided by the lessee before the delivery of those goods;

22 (c) the amount of any stamp duty or other government charge
23 (other than on receipts or withdrawals) payable by the lessee
24 in respect of the lease;

25 (d) the amount of any other charges not included in the rental
26 payable under the lease, and a description of those charges;

27 (e) the amount of each rental payment to be made by the lessee
28 under the lease, the date on which the first rental payment is
29 due and either the dates on which subsequent rental payments
30 are due or the interval between rental payments;

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- 1 (f) the number of rental payments to be made by the lessee, and
2 the total amount of rental payable under the lease;
3 (g) a statement of the conditions on which the lessee may
4 terminate the lease;
5 (h) a statement of the liabilities (if any) of the lessee on
6 termination of the lease.

7 (2) A consumer lease is taken to comply with this section despite any
8 omission or other error if the court is satisfied that the omission or
9 error is not of such a nature as to mislead the lessee to his or her
10 disadvantage.

11 (3) A lessor must not enter into a consumer lease that contravenes a
12 requirement of this section.

13 Criminal penalty: 100 penalty units.

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

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

16 **175 Copy of lease etc. for lessee**

17 (1) A lessor must, within 14 days after entering into a consumer lease,
18 give to the lessee a copy of the consumer lease, together with a
19 statement in the form prescribed by the regulations explaining the
20 rights and obligations of a lessee.

21 Criminal penalty: 50 penalty units.

22 (2) Subsection (1) does not apply if the lessor has previously given the
23 lessee a copy of the consumer lease to keep.

24 (3) Subsection (1) is an offence of strict liability.

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

26 (4) Section 194 applies to this section as if references in that section to
27 the credit provider were references to the lessor or a lease broker
28 and as if references in that section to the debtor were references to
29 the lessee.

Schedule 1 National Credit Code

Part 11 Consumer leases

Division 2 Form of and information to be included in consumer leases

Section 176

1 **176 Further goods and deferrals or waivers under consumer leases**

2 The provision of further goods under a consumer lease or a change
3 in a consumer lease as a result of a deferral or waiver of payment
4 of an amount payable under a consumer lease is not to be treated as
5 creating a new consumer lease for the purposes of this Part or as
6 creating a credit contract, if the provision of the further goods or
7 the deferral or waiver is permitted by this Code or the consumer
8 lease.

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2 **Division 3—Other provisions applicable to consumer leases**

3 **177 Application of certain Code provisions to consumer leases**

4 (1) The following provisions of this Code apply in relation to a
5 consumer lease in the same way as they apply in relation to credit
6 contracts:

7 (a) Division 3 of Part 4 (relating to changes to contracts on the
8 grounds of hardship and unjust transactions), other than
9 section 78;

10 (b) sections 98 to 101 (relating to information as to mortgaged
11 goods, entry to residential property to take possession of
12 goods and orders by the court for entry and possession);

13 (c) Part 12 (relating to miscellaneous matters).

14 (2) For the purposes of the application of those provisions:

15 (a) references to a credit provider are to be read as references to
16 a lessor; and

17 (b) references to a debtor are to be read as references to a lessee;
18 and

19 (c) references to a credit contract or contract are to be read as
20 references to a consumer lease; and

21 (d) references to mortgaged goods are to be read as references to
22 goods hired under a consumer lease.

23 (3) For the purposes of the application of Division 3 of Part 4, the
24 words “(without a change being made to the annual percentage rate
25 or rates)” are taken to be omitted from section 72 wherever
26 occurring.

27 **178 Notice of repossession**

28 (1) A lessor must not exercise any right under a consumer lease to take
29 possession of goods subject to the lease unless the lessor has given
30 the lessee 30 days’ written notice of the lessor’s intention to do so.

31 Criminal penalty: 50 penalty units.

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Part 11 Consumer leases

Division 3 Other provisions applicable to consumer leases

Section 179

- 1 (2) However, the lessor is not required to give the notice in accordance
2 with this section if:
3 (a) the right arises under a lease granted for a fixed term at the
4 end of that term; or
5 (b) the lessor believes on reasonable grounds that the lessee has
6 disposed of goods hired under the lease, or intends to dispose
7 of such goods, contrary to the terms of the lease; or
8 (c) the lessor has made reasonable attempts to locate the lessee
9 but without success; or
10 (d) the lessee is insolvent; or
11 (e) the court authorises the lessor to do so.

- 12 (3) Subsection (1) is an offence of strict liability.

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

14 **179 Termination of lease**

- 15 (1) A lessee may, at any time before the end of a consumer lease, end
16 the lease by returning the goods hired under the lease to the lessor
17 during ordinary business hours or at such other time as may be
18 agreed with the lessor or fixed by the court on the application of
19 the lessee.
- 20 (2) The amount payable by a lessee on the termination of a consumer
21 lease under this section before the end of its fixed term is:
22 (a) the amount payable under the lease on such a termination; or
23 (b) the amount determined in accordance with the principles (if
24 any) set out in the regulations for the purposes of this section;
25 whichever is the lesser.

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2 **Part 12—Miscellaneous**

2

3 **Division 1—Tolerances and assumptions**

3

4 **180 Tolerances and assumptions relating to information**

4

5 *Disclosures generally*

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- 6 (1) Information disclosed in a precontractual statement, contract
7 document, mortgage document or guarantee, statement, notice or
8 consumer lease, or otherwise disclosed for the purposes of this
9 Code, is taken to be correctly disclosed if:

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- (a) it is within tolerances allowed by the regulations; and
11 (b) the disclosure is made as at a date stated in it.

11

12 *Disclosure of interest charges*

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- 13 (2) Disclosures for the purposes of this Code relating to interest
14 charges may be made on the following assumptions (and such
15 other assumptions under this section as are applicable):

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- (a) that, in the case of an annual percentage rate or default rate,
there will be no variation in the rate as disclosed over the
whole term of the contract or any shorter term for which it
applies;
(b) if a change to a variable rate is provided for by the contract,
that the variable rate applicable over the term for which it
applies is the same as the equivalent variable rate as at the
date disclosure is made;
(c) that the debtor will make the repayments required by the
contract at the times required by the contract.

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Disclosure of repayments

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- (3) Disclosures for the purposes of this Code relating to repayments
may be made on the assumption that the debtor will pay the
repayments required by the contract at the times required by the

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1 contract and on such other assumptions under this section as are
2 applicable.

3 *Disclosures of credit fees and charges*

4 (4) Disclosures relating to credit fees and charges for the purposes of
5 this Code may be made on the following assumptions (and on such
6 other assumptions under this section as are applicable):

7 (a) that there will be no change in the credit fees and charges as
8 so disclosed and no new fees or charges imposed;

9 (b) that the debtor will pay the fees and charges required by the
10 contract at the times required by the contract.

11 *Disclosures in consumer leases*

12 (5) Disclosures for the purposes of this Code relating to consideration,
13 charges and payments in a consumer lease may be made on the
14 assumptions that there will be no change in the matters disclosed
15 and no new charges imposed.

16 *When information is ascertainable*

17 (6) Information required to be disclosed for the purposes of this Code,
18 which is not otherwise ascertainable, is taken to be ascertainable if
19 it is ascertainable, as at the date the disclosure is made, on the basis
20 of assumptions set out in this section or in the regulations.

21 *Disclosure of names*

22 (7) Information disclosed for the purposes of this Code as to a name is
23 taken to be correctly disclosed if the information is sufficient to
24 identify the person concerned.

25 **181 Tolerances relating to contracts and other documents**

26 An amount of interest, a fee or charge or any other amount
27 charged, payable or calculated under or in connection with a credit
28 contract, mortgage, guarantee or consumer lease is, for the
29 purposes of this Code, taken to comply with this Code if the
30 amount is within tolerances allowed by the regulations.

1 **182 Regulations**

2 The regulations may vary an assumption set out in this Division
3 and may provide for additional assumptions.

Section 183

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2 **Division 2—Documentary provisions**

3 **183 Form of notices**

- 4 (1) The regulations may prescribe the form of any notices required or
5 authorised to be given under this Code and may require such
6 notices to contain specified information.
- 7 (2) A notice required to be given by a mortgagee under this Code may
8 include information required to be given in the same situation
9 under an Act, and the notice may be included in any notice given
10 under that Act.
- 11 (3) A notice required or authorised to be given under this Code is to be
12 in writing unless this Code or the regulations otherwise provide.

13 **184 Legibility and language**

- 14 (1) A credit contract, mortgage or guarantee or a notice given by a
15 credit provider under this Code, other than a document transmitted
16 by electronic communication:
17 (a) must be easily legible; and
18 (b) to the extent that it is printed or typed must conform with the
19 provisions of the regulations as to print or type; and
20 (c) must be clearly expressed.
- 21 (2) A credit contract, mortgage or guarantee or a notice given by a
22 credit provider under this Code, if transmitted by electronic
23 communication:
24 (a) must be easily legible; and
25 (b) must conform with the provisions of the regulations, if any,
26 as to content, legibility and accompanying information; and
27 (c) must be clearly expressed.
- 28 (3) If the court is satisfied, on application by ASIC, that a provision of
29 a credit contract, mortgage or guarantee or a notice given by a
30 credit provider under this Code does not comply with the
31 requirements of this section, it may prohibit the credit provider

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1 from using a provision in the same or similar terms in future credit
2 contracts, mortgages or guarantees or notices.

3 (4) A credit provider that contravenes a prohibition imposed under
4 subsection (3) commits an offence.

5 Criminal penalty (subsection (4)): 100 penalty units.

6 **185 Copies of contracts and other documents**

7 (1) A credit provider must in accordance with this section, at the
8 written request of a debtor, mortgagor or guarantor, provide to the
9 debtor, mortgagor or guarantor a copy of:

- 10 (a) the credit contract, mortgage or guarantee; or
11 (b) any credit-related insurance contract in the credit provider's
12 possession; or
13 (c) a notice previously given to the debtor, mortgagor or
14 guarantor under this Code.

15 Criminal penalty: 30 penalty units.

16 (2) The copy must be provided:

- 17 (a) within 14 days, if the original came into existence one year or
18 less before the request is given; or
19 (b) within 30 days, if the original came into existence more than
20 one year before the request is given.

21 Note: Section 196 provides for the date on which notice is taken to be given.

22 (3) A credit provider must provide a copy of a notice which requires a
23 debtor, mortgagor or guarantor to take action if requested in
24 accordance with subsection (1) even though the contract has been
25 discharged or terminated but only if the request is made within 2
26 years of the discharge or termination.

27 Criminal penalty: 30 penalty units.

28 (4) Subsections (1) and (3) are offences of strict liability.

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

Section 186

1 **186 Signing of documents**

- 2 (1) It is sufficient compliance with a requirement under this Code that
3 a document be signed by a person if the person's signature is
4 written on the document by another person by or under the
5 authority of the person required to sign.
- 6 (2) This section has effect subject to section 199 (Conduct of agents
7 and related matters).

8 **187 Electronic transactions and documents**

- 9 (1) Without limiting the provisions of this Code, it is declared that any
10 contract, mortgage or guarantee referred to in this Code may be
11 made in accordance with the *Electronic Transactions Act 1999*.
- 12 (2) Without limiting the provisions of this Code, it is declared that any
13 requirement or permission by or under this Code, however
14 expressed:
- 15 (a) to give information in writing; or
16 (b) to provide a signature; or
17 (c) to produce a document; or
18 (d) to record information in writing; or
19 (e) to retain a document;
- 20 may be met in accordance with the *Electronic Transactions Act*
21 *1999*.

22 Example: Giving information would include the requirement under subsection
23 36(1) to provide a statement of amount owing.

- 24 Note 1: Subsection 9(5) of the *Electronic Transactions Act 1999* has a
25 definition relating to the giving of information. That definition
26 provides, generally, that giving information includes, but is not limited
27 to, the following:
- 28 (a) making an application;
29 (b) making or lodging a claim;
30 (c) giving, sending or serving a notification;
31 (d) lodging a return;
32 (e) making a request;
33 (f) making a declaration;
34 (g) lodging or issuing a certificate;
35 (h) making, varying or cancelling an election;
36 (i) lodging an objection;

Section 187

1 (j) giving a statement of reasons.

2 Note 2: See regulations made under the *Electronic Transactions Act 1999* for
3 exemptions relating to electronic transactions.

Section 188

1

2 **Division 3—General provisions**

3 **188 Assignment by credit provider**

4 (1) If the rights of a credit provider under a credit contract, mortgage
5 or guarantee are assigned or pass by law to another person, this
6 Code from then on applies to that other person and does not impose
7 any further obligation on the credit provider.

8 (2) The debtor, mortgagor or guarantor has and may exercise the same
9 rights in respect of the credit contract, mortgage or guarantee
10 against the assignee as the debtor, mortgagor or guarantor has
11 against the credit provider.

12 (3) Subsection (1) does not apply while the credit provider continues
13 to receive payments from the debtor, or would continue to do so if
14 the debtor complied with the credit contract.

15 **189 Assignment by debtor, mortgagor or guarantor**

16 (1) If the rights of a debtor, mortgagor or guarantor under a credit
17 contract, mortgage or guarantee are assigned or pass by law to
18 another person, this Code from then on applies to that other person
19 and does not confer any further rights on the debtor, mortgagor or
20 guarantor.

21 (2) Subsection (1) does not apply if the rights are assigned or pass by
22 law to a corporation which is neither a trustee for the debtor,
23 mortgagor or guarantor nor an executor of the debtor's,
24 mortgagor's or guarantor's estate.

25 (3) Subsection (1) does not affect a requirement which is made of a
26 debtor or mortgagor under section 52.

27 **190 Appropriation of payments**

28 (1) A debtor who is liable to a credit provider under 2 or more credit
29 contracts may require the credit provider by written notice to apply

Section 191

- 1 a payment to a particular one of those contracts or to divide the
2 payment between them in a specified manner.
- 3 (2) A credit provider that contravenes a requirement under this section
4 commits an offence.
- 5 Criminal penalty: 30 penalty units.
- 6 (3) Subsection (2) is an offence of strict liability.
7 Note: For strict liability, see section 6.1 of the *Criminal Code*.
- 8 (4) A debtor may not make a requirement under this section if the
9 debtor and the credit provider have previously agreed as to the
10 application of the payment concerned in relation to the credit
11 contracts under which the debtor is liable to the credit provider.

12 **191 Contracting out**

- 13 (1) A provision of a contract or other instrument by which a person
14 seeks to avoid or modify the effect of this Code is void.
- 15 (2) A provision of a contract or other instrument by which a person
16 seeks to have the debtor, mortgagor or guarantor indemnify the
17 credit provider for any loss or liability arising under this Code is
18 void.
- 19 (3) A credit provider that is a party to any such contract or other
20 instrument commits an offence.
- 21 Criminal penalty: 100 penalty units.
- 22 (4) Subsection (3) is an offence of strict liability.
23 Note: For strict liability, see section 6.1 of the *Criminal Code*.
- 24 (5) Subsection (2) does not affect the operation of subsection 60(2).

25 **192 Indemnities**

- 26 (1) An indemnity for any liability under this Code is not void, and
27 cannot be declared void, on the grounds of public policy, despite
28 any rule of law to the contrary.

Section 193

- 1 (2) The liabilities to which this section applies include the following:
- 2 (a) a liability for any criminal or civil penalty incurred by any
- 3 person under this Code;
- 4 (b) a payment in settlement of a liability or alleged liability
- 5 under this Code;
- 6 (c) a liability under another indemnity for any liability under this
- 7 Code.
- 8 (3) This section is subject to subsection 191(2).
- 9 (4) This section does not derogate from any other rights and remedies
- 10 that exist apart from this section.

11 **193 Effect of noncompliance**

- 12 (1) A credit contract, mortgage or guarantee or any other contract is
- 13 not illegal, void or unenforceable because of a contravention of this
- 14 Code unless this Code contains an express provision to that effect.
- 15 (2) Except as provided by this section, this Code does not derogate
- 16 from rights and remedies that exist apart from this Code.

17 **194 Giving notice or other document**

18 *Application*

- 19 (1) This section applies as follows:
- 20 (a) this section applies (subject to this subsection) to notices or
- 21 other documents that are required to be given for the
- 22 purposes of this Code;
- 23 (b) this subsection and subsections (3) and (7) apply, but the
- 24 remainder of this section does not apply, to precontractual
- 25 statements and notices given under section 16;
- 26 (c) subsections (4), (5) and (6) do not apply to default notices;
- 27 (d) this section applies despite the provisions of any other section
- 28 of this Code (except subsections 36(4) and 83(4)) to the
- 29 contrary.

30 Note: Examples of notices or other documents to which this section applies

31 are those required to be given under sections 20, 33, 36, 43, 56, 57 and

32 83.

Section 194

1 *Unsuccessful attempts by credit provider*

- 2 (2) A credit provider is relieved from the obligation to give a notice or
3 other document to a person if:
4 (a) the credit provider has previously made a reasonable (but
5 unsuccessful) attempt to give a notice or other document in
6 accordance with this Code by leaving it at, or by sending it
7 by post or electronic communication to the appropriate
8 address of the person under section 195; and
9 (b) the credit provider has reasonable grounds for believing that
10 the person can no longer be contacted at that address.

11 *Joint debtors etc—general obligation*

- 12 (3) In the case of joint debtors, mortgagors or guarantors, a notice or
13 other document must be given to each debtor, mortgagor or
14 guarantor, except as provided by this section.

15 *Joint debtors etc—nomination of one of them*

- 16 (4) A notice or other document may be given to any 2 or more joint
17 debtors, mortgagors or guarantors by being given to one of the
18 joint debtors, mortgagors or guarantors nominated by them to
19 receive the notice or other document on their behalf. The notice or
20 other document need not be addressed to all of them.

21 *Joint debtors etc—same address*

- 22 (5) A single copy of a notice or other document may be given to any 2
23 or more joint debtors, mortgagors or guarantors at the same address
24 if each of them has consented to a single copy being given and the
25 notice or other document is addressed jointly to them. The
26 procedure prescribed by this subsection is an alternative to the
27 procedure prescribed by subsection (4).

28 *Nominated persons generally*

- 29 (6) A notice or other document may be given to a person by being
30 given to any other person nominated by the person to receive the
31 notice or other document on his or her behalf. However—

Schedule 1 National Credit Code

Part 12 Miscellaneous

Division 3 General provisions

Section 195

- 1 (a) a debtor, mortgagor or guarantor cannot nominate the credit
2 provider or a person associated with the credit provider; and
3 (b) a mortgagor cannot nominate the debtor if the mortgage is
4 given by a guarantor; and
5 (c) a guarantor cannot nominate the debtor.

6 *Lawyers*

- 7 (7) A notice or other document may be given to a person by being
8 given to a lawyer acting for the person in the matter concerned.

9 *Withdrawal of nomination or consent*

- 10 (8) A nomination or consent under this section ceases to have effect if
11 it is withdrawn by the person who made or gave it.

12 *Form of nomination or consent*

- 13 (9) A nomination or consent under this section (or the withdrawal of
14 any such nomination or consent) must be in the form required by
15 the regulations.

16 **195 Manner of giving notice or other document**

- 17 (1) If this Code requires or permits a notice or other document to be
18 given to a person who is a debtor, mortgagor or guarantor, the
19 appropriate address of the person is:
20 (a) an address nominated in writing by that person to the person
21 giving the notice or other document; or
22 (b) if there is no such nomination, the address of the place of
23 residence of that person last known to the person giving the
24 notice or other document.

25 Note: A nominated address may be an electronic address.

- 26 (2) An appropriate address of any other person is:
27 (a) an address nominated in writing by that person to the person
28 giving the notice or other document; or
29 (b) the address of the place of residence or business of that
30 person last known to the person giving the notice or other
31 document.

Section 196

1 Note: A nominated address may be an electronic address.

2 (3) If a person nominates an address under paragraph (1)(a) or (2)(a),
3 the person may, by notice in writing to the person giving the notice
4 or other document referred to in subsection (1), change the
5 nominated address or cancel the nomination.

6 (4) A nomination under this section ceases to have effect if it
7 cancelled by the person who made it.

8 **196 Date of notice or other document**

9 (1) For the purposes of this Code a notice or other document is taken
10 to be given:

11 (a) in the case of a notice or other document given personally—
12 on the date it bears or the date it is received by the addressee,
13 whichever is the later; or

14 (b) in the case of a notice or other document sent by post—on
15 the date it bears or the date when it would have been
16 delivered in the ordinary course of post, whichever is the
17 later; or

18 (c) in the case of a notice or other document given by electronic
19 communication—at the time that subsection 14(3) of the
20 *Electronic Transactions Act 1999* provides is the time of
21 receipt of the electronic communication.

22 (2) For the purposes of this Code, the date of a notice or other
23 document is the date it is taken to be given in accordance with this
24 section.

25 **197 Extensions of time**

26 The court may extend a period if authorised by this Code to do so
27 even though the period has elapsed.

28 **198 Orders of court**

29 An order of the court in force under this Code, including such an
30 order as varied from time to time, has effect according to its tenor.

Section 199

1 **199 Conduct of agents and related matters**

2 (1) The conduct of an officer, agent or employee of a credit provider
3 acting within his or her actual or ostensible authority will be
4 imputed to the credit provider and taken to be conduct of the credit
5 provider.

6 (2) A person cannot authorise a credit provider, or a person associated
7 with a credit provider, to enter into a credit contract, mortgage or
8 guarantee on the person's behalf. This subsection does not prevent
9 a credit provider from authorising a person associated with the
10 credit provider to enter into a credit contract on behalf of the credit
11 provider.

12 (3) A credit provider or person associated with a credit provider that
13 purports to act as agent of a debtor, mortgagor or a guarantor in
14 entering into a credit contract or a mortgage or guarantee commits
15 an offence.

16 Criminal penalty: 50 penalty units.

17 (4) A credit provider is not, for the purposes of this Code, taken to
18 know or have reason to believe something because an officer,
19 agent or employee of the credit provider does so, unless the
20 knowledge or reason to believe that thing is acquired by the officer,
21 agent or employee acting in that capacity and in connection with
22 the transaction concerned.

1

2 **Division 4—Provisions relating to offences**

3 **200 Offences by officers, agents or employees**

4 An officer, agent or employee of a credit provider or other person
5 may be prosecuted for an offence against this Code or the
6 regulations (if liable for the offence) whether or not proceedings
7 have been taken against the credit provider or other person.

8 **201 Offences by corporations**

- 9 (1) If a corporation contravenes a provision of this Code or the
10 regulations, each officer of the corporation is taken to have
11 contravened the provision if the officer knowingly authorised or
12 permitted the contravention.
- 13 (2) An officer of a corporation may be proceeded against and
14 convicted under a provision pursuant to this section whether or not
15 the corporation has been proceeded against or convicted under the
16 provision.
- 17 (3) Nothing in this section affects the liability imposed on a
18 corporation for an offence committed by the corporation against
19 this Code or the regulations.
- 20 (4) In this section:
- 21 *officer* means a director of the corporation or a person who is
22 otherwise concerned in its management.

23 **202 Limitations**

24 Despite anything in any Act, proceedings for an offence against
25 this Code or the regulations may be brought within the period of 3
26 years that next succeeds the commission of the offence or, with the
27 consent of the Attorney-General, at any later time.

Schedule 1 National Credit Code

Part 12 Miscellaneous

Division 4 Provisions relating to offences

Section 203

1 **203 Application of section 4K of the *Crimes Act 1914***

2 Section 4K of the *Crimes Act 1914* does not apply in relation to an
3 offence against this Code or the regulations.

1

2 **Part 13—Principal definitions**

3

4 **204 Principal definitions**

5 (1) In this Code:

6 *acceleration clause*: see section 92.

7 *ADI* has the same meaning as in the *Banking Act 1959*.

8 *amend* includes:

9 (a) omit or omit and substitute; or

10 (b) alter or vary; or

11 (c) amend by implication.

12 *amount of credit*: see subsection 3(2).

13 *annual percentage rate*: see section 27.

14 *approved external dispute resolution scheme* has same meaning as
15 in section 11 of the National Credit Act.

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

18 *associated*: see subsection (2).

19 *Australia* means the Commonwealth of Australia but, when used in
20 a geographical sense, does not include an external Territory.

21 *business day* means a day that is not:

22 (a) a Saturday or Sunday; or

23 (b) a public holiday, special holiday or bank holiday in the place
24 in which any relevant act is to be or may be done.

25 *carried on in this jurisdiction* has a meaning affected by
26 section 12 of the National Credit Act.

Section 204

1 **cash price** of goods or services to which a credit contract relates
2 means:

- 3 (a) the lowest price that a cash purchaser might reasonably be
4 expected to pay for them from the supplier; or
5 (b) if the goods or services are not available for cash from the
6 supplier or are only available for cash at the same, or a
7 reasonably similar, price to the price that would be payable
8 for them if they were sold with credit provided—the market
9 value of the goods or services.

10 **commission** includes any form of monetary consideration or any
11 form of non-monetary consideration to which a monetary value can
12 be assigned.

13 **Commonwealth** means the Commonwealth of Australia but, when
14 used in a geographical sense, does not include an external
15 Territory.

16 **compulsory insurance** means:

- 17 (a) compulsory third-party personal injury insurance; or
18 (b) insurance of a nature declared by the regulations to be
19 compulsory insurance for the purposes of this Code.

20 **consumer credit insurance** means insurance that insures the
21 capacity of the debtor to make repayments under the credit
22 contract, including insurance against sickness of, injury to, or
23 disability or death of, the debtor or against unemployment of the
24 debtor, and also including life insurance (including insurance under
25 a group policy) to cover any outstanding amount on the debtor's
26 death.

27 **consumer lease**: see section 169.

28 **continuing credit contract** means a credit contract under which:

- 29 (a) multiple advances of credit are contemplated; and
30 (b) the amount of available credit ordinarily increases as the
31 amount of credit is reduced.

32 **contract** includes a series or combination of contracts, or contracts
33 and arrangements.

Section 204

1 **contract document** means the document or documents setting out
2 the terms of a contract.

3 **credit**: see subsection 3(1).

4 **credit contract**: see section 4.

5 **credit fees and charges** means fees and charges payable in
6 connection with a credit contract or mortgage, but does not
7 include:

8 (a) interest charges (including default charges); or

9 (b) any fees or charges that are payable to or by a credit provider
10 in connection with a credit contract in connection with which
11 both credit and debit facilities are available if the fees or
12 charges would be payable even if credit facilities were not
13 available (not being annual fees or charges in connection
14 with continuing credit contracts under which credit is
15 ordinarily obtained only by the use of a card); or

16 (c) government charges, or duties, on receipts or withdrawals; or

17 (d) enforcement expenses.

18 **credit provider** means a person that provides credit, and includes a
19 prospective credit provider.

20 **credit-related insurance contract**: see section 142.

21 **credit service** has the same meaning as in section 7 of the National
22 Credit Act.

23 **daily percentage rate**: see section 27.

24 **date** of a notice: see section 196.

25 **debtor** means a person (other than a guarantor) who is liable to pay
26 for (or to repay) credit, and includes a prospective debtor.

27 **default notice**: see Part 5.

28 **default rate**: see section 27.

29 **definition** means a provision of this Code (however expressed)
30 that:

31 (a) gives a meaning to a word or expression; or

Section 204

1 (b) limits or extends the meaning of a word or expression.

2 **dispose** of property includes:

- 3 (a) sell the property; or
4 (b) part with possession of the property to the prejudice of the
5 owner or a mortgagee of the property; or
6 (c) destroy the property.

7 **electronic communication** has the same meaning as in the
8 *Electronic Transactions Act 1999*.

9 **enforcement expenses**, in relation to a mortgage, includes
10 expenses incurred by the mortgagee in preserving or maintaining
11 property subject to the mortgage (including insurance, rates and
12 taxes payable for the property) but only if the expenses are
13 incurred after a breach occurs and are authorised by the mortgage.

14 **enforcement proceedings**, in relation to a credit contract or a
15 guarantee or mortgage, means:

- 16 (a) proceedings in a court to recover a payment due under the
17 contract or a guarantee; or
18 (b) taking possession of property under a mortgage or taking any
19 other action to enforce a mortgage.

20 **fail** includes refuse.

21 **goods** includes:

- 22 (a) ships, aircraft or other vehicles; or
23 (b) animals, including fish; or
24 (c) minerals, trees or crops, whether on, under or attached to land
25 or not;

26 but does not include anything declared by the regulations not to be
27 goods for the purposes of this Code.

28 **goods mortgage** means a mortgage over goods.

29 **guarantee** includes an indemnity (other than one arising under a
30 contract of insurance).

31 **guarantee document** means the document or documents setting out
32 the terms of a guarantee.

Section 204

1 **guarantor** includes a prospective guarantor.

2 **insolvent** means:

3 (a) in the case of a natural person—a person who is an insolvent
4 under administration within the meaning of the *Corporations*
5 *Act 2001*; or

6 (b) in the case of a corporation—a corporation that is an
7 externally-administered corporation within the meaning of
8 the *Corporations Act 2001*.

9 **instrument** includes a statutory instrument.

10 **interest**, in relation to land or other property, means:

11 (a) a legal or equitable estate in the land or other property; or

12 (b) a right, power or privilege over, or in relation to, the land or
13 other property.

14 **key requirement**: see Part 6.

15 **land** includes any interest in land.

16 **linked credit provider**: see subsection 127(1).

17 **lowest price**, in relation to the cash price of goods or services to
18 which a credit contract relates, means the lowest price including
19 any goods and services tax but unaffected by any discount between
20 the credit provider and the supplier.

21 **market value**, of goods or services to which a credit contract
22 relates, means fair market value including any goods and services
23 tax.

24 **merchant service agreement** means an agreement between a credit
25 provider and a supplier of goods and services under which the
26 credit provider agrees to pay to the supplier amounts for goods or
27 services supplied by the supplier and paid by means of credit cards,
28 whether or not the credit cards are issued by the credit provider.

29 **modification** includes addition, omission or substitution.

30 **mortgage** includes:

Section 204

- 1 (a) any interest in, or power over, property securing obligations
2 of a debtor or guarantor; or
3 (b) a credit provider's title to land or goods subject to a sale by
4 instalments; or
5 (c) a mortgage taken to have been entered into under subsection
6 9(3);
7 but does not include a consumer lease to which Part 11 applies.

8 ***mortgage document*** means the document or documents setting out
9 the terms of a mortgage by reference to which the mortgage is
10 created.

11 ***mortgagor*** includes a prospective mortgagor.

12 ***National Credit Act*** means the *National Consumer Credit*
13 *Protection Act 2009* and includes regulations made under
14 section 329 of that Act, but does not include this Code.

15 ***number*** means:

- 16 (a) a number expressed in figures or words; or
17 (b) a letter; or
18 (c) a combination of a number so expressed and a letter.

19 ***omit***, in relation to a provision of this Code or an Act, includes
20 repeal.

21 ***penalty*** includes forfeiture or punishment.

22 ***power*** includes authority.

23 ***printed*** includes typewritten, lithographed or reproduced by any
24 mechanical means.

25 ***proceedings*** means a legal or other action or proceedings.

26 ***property*** means any legal or equitable estate or interest (whether
27 present or future, vested or contingent, or tangible or intangible) in
28 real or personal property of any description (including money), and
29 includes things in action.

Section 204

1 **provision**, in relation to this Code or an Act, means words or other
2 matter that form or forms part of this Code or the Act, and
3 includes:

- 4 (a) a Chapter, Part, Division, Subdivision, section, subsection,
5 paragraph, subparagraph, subsubparagraph or Schedule of or
6 to this Code or the Act; or
7 (b) a section, clause, subclause, item, column, table or form of or
8 in a Schedule to this Code or the Act; or
9 (c) the long title and any preamble to the Act.

10 **purchaser** means:

- 11 (a) in relation to goods—a person who purchases, or proposes to
12 purchase, the goods; or
13 (b) in relation to services—a person who contracts, or proposes
14 to contract, to obtain services.

15 **reference rate** means a benchmark, index or other reference rate.

16 **referring State** has the same meaning as in section 19 of the
17 National Credit Act.

18 **regulation** means a regulation made or in force for the purposes of
19 this Code.

20 **repeal** includes:

- 21 (a) revoke or rescind; or
22 (b) repeal by implication; or
23 (c) abrogate or limit the effect of this Code or instrument
24 concerned; or
25 (d) exclude from, or include in, the application of this Code or
26 instrument concerned any person, subject matter or
27 circumstance.

28 **residential property** means:

- 29 (a) land on which a dwelling is or will be affixed for residential
30 purposes; or
31 (b) a lease of land on which a dwelling is or will be affixed for
32 residential purposes, being a lease that:
33 (i) is a Crown lease (within the meaning of the *Income Tax*
34 *Assessment Act 1997*); and

Section 204

- 1 (ii) gives the lessee reasonable security of tenure; or
2 (c) a licence in relation to land on which a dwelling is or will be
3 affixed for residential purposes, being a licence that:
4 (i) is granted by the Commonwealth, a State or a Territory;
5 and
6 (ii) gives the licensee reasonable security of tenure; or
7 (d) a share that:
8 (i) is in a company that is the legal owner of the land on
9 which a dwelling is or will be affixed for residential
10 purposes; and
11 (ii) gives the person who legally owns the share a right to
12 occupy the dwelling; or
13 (e) a right to occupy a dwelling in an aged care facility or
14 retirement village;
15 (f) an equity of redemption in relation to land on which a
16 dwelling is or will be affixed for residential purposes.

17 ***retained credit fees and charges*** means credit fees and charges
18 retained by the credit provider, other than credit fees and charges
19 passed on to (or retained in reimbursement of an amount paid to):

- 20 (a) a third party that is not a related body corporate (for the
21 purposes of the *Corporations Act 2001*) of the credit
22 provider; or
23 (b) a financial institution that is such a related body corporate in
24 respect of the provision of banking services that are provided
25 to the credit provider by the financial institution on the same
26 terms as those services are ordinarily provided to customers
27 who are not related to or associated with the financial
28 institution.

29 ***sale contract***: see section 125.

30 ***services*** includes:

- 31 (a) rights in relation to, and interests in, real property; or
32 (b) insurance; or
33 (c) professional services; or
34 (d) a right to services;

Section 204

1 but does not include the provision of credit or a right to credit or
2 services provided under a consumer lease.

3 **sign** includes the affixing of a seal or the making of a mark.

4 Note: See section 186.

5 **statutory instrument** means an instrument (including a regulation)
6 made or in force under or for the purposes of this Code, and
7 includes an instrument made or in force under any such instrument.

8 **strata corporation** means:

- 9 (a) a body corporate incorporated in relation to land subdivided
10 wholly or mainly for residential purposes under a law of the
11 Commonwealth, a State or a Territory providing for strata,
12 cluster, precinct or other subdivision of land; or
13 (b) a body corporate whose issued shares confer a right to
14 occupy land for residential purposes.

15 **supplier** means a supplier of goods or services.

16 **supply** includes agree to supply.

17 **termination** of a contract includes the discharge or rescission of the
18 contract.

19 **this Code** means this Schedule and includes regulations made for
20 the purposes of this Schedule.

21 **this jurisdiction** has the same meaning as in section 21 of the
22 National Credit Act.

23 **tied continuing credit contract**: see subsection 127(2).

24 **tied loan contract**: see subsection 127(3).

25 **unpaid balance**: see section 27.

26 **unpaid daily balance**: see section 27.

27 **word** includes any symbol, figure or drawing.

28 **writing** includes any mode of representing or reproducing words in
29 a visible form.

Schedule 1 National Credit Code
Part 13 Principal definitions

Section 204

- 1 Note: See section 187.
- 2 (2) For the purposes of this Code, a person is *associated* with a credit
- 3 provider if:
- 4 (a) the person and the credit provider are related bodies
- 5 corporate for the purposes of the *Corporations Act 2001*; or
- 6 (b) the person is a supplier in respect of whom the credit
- 7 provider is a linked credit provider; or
- 8 (c) the person is an officer, agent or employee of the credit
- 9 provider, or of any such related body corporate or supplier,
- 10 acting in that capacity.

1

2 **Part 14—Miscellaneous provisions relating to**
3 **interpretation**

4 **Division 1—Preliminary**

5 **205 Displacement of Part by contrary intention**

6 The application of this Part may be displaced, wholly or partly, by
7 a contrary intention appearing in this Code.

Section 206

1

2 **Division 2—General**

3 **206 Material that is, and is not, part of this Code**

- 4 (1) The heading to a Part, Division or Subdivision into which this
5 Code is divided is part of this Code.
- 6 (2) Punctuation in this Code is part of this Code.
- 7 (3) A heading to a section or subsection of this Code does not form
8 part of this Code.
- 9 (4) Notes included in this Code (including footnotes and endnotes) do
10 not form part of this Code.

11 **207 References to particular Acts and to enactments**

- 12 In this Code:
- 13 (a) an Act of the Commonwealth may be cited by its short title;
14 and
- 15 (b) an Act of a State or Territory may be cited:
- 16 (i) by its short title; or
17 (ii) in another way sufficient in an Act of the State or
18 Territory for the citation of such an Act;
19 together with a reference to the State or Territory.

20 **208 Compliance with forms**

- 21 (1) If a form is prescribed or approved by or for the purpose of this
22 Code, strict compliance with the form is not necessary and
23 substantial compliance is sufficient.
- 24 (2) If a form prescribed or approved by or for the purpose of this Code
25 requires:
- 26 (a) the form to be completed in a specified way; or
27 (b) specified information or documents to be included in,
28 attached to or given with the form; or

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- 1 (c) the form, or information or documents included in, attached
2 to or given with the form, to be verified in a specified way;
3 the form is not properly completed unless the requirement is
4 complied with.

Section 209

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2 **Division 3—Terms and references**

3 **209 Provisions relating to defined terms and gender and number**

- 4 (1) If this Code defines a word or expression, other parts of speech and
5 grammatical forms of the word or expression have corresponding
6 meanings.
- 7 (2) Definitions in or applicable to this Code apply except so far as the
8 context or subject matter otherwise indicates or requires.
- 9 (3) In this Code, words indicating a gender include each other gender.
- 10 (4) In this Code:
- 11 (a) words in the singular include the plural; and
12 (b) words in the plural include the singular.

13 **210 Meaning of *may* and *must* etc.**

- 14 (1) In this Code, the word *may*, or a similar word or expression, used
15 in relation to a power indicates that the power may be exercised or
16 not exercised, at discretion.
- 17 (2) In this Code, the word *must*, or a similar word or expression, used
18 in relation to a power indicates that the power is required to be
19 exercised.
- 20 (3) This section has effect despite any rule of construction to the
21 contrary.

22 **211 Effect of express references to bodies corporate and individuals**

- 23 In this Code, a reference to a person generally (whether the
24 expression “person”, “party”, “someone”, “anyone”, “no-one”,
25 “one”, “another” or “whoever” or another expression is used):
- 26 (a) does not exclude a reference to a body corporate or an
27 individual merely because elsewhere in this Code there is
28 particular reference to a body corporate (however expressed);
29 and

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- 1 (b) does not exclude a reference to an individual or a body
2 corporate merely because elsewhere in this Code there is
3 particular reference to an individual (however expressed).

4 **212 Reference to certain provisions of Code**

5 If a provision of this Code refers:

- 6 (a) to a Part or section by a number and without reference to this
7 Code—the reference is a reference to the Part or section,
8 designated by the number, of this Code; or
9 (b) to a Division, Subdivision, subsection, paragraph,
10 subparagraph or subsubparagraph by a number and without
11 reference to this Code—the reference is a reference to:
12 (i) the Division, designated by the number, of the Part in
13 which the reference occurs; and
14 (ii) the Subdivision, designated by the number, of the
15 Division in which the reference occurs; and
16 (iii) the subsection, designated by the number, of the section
17 in which the reference occurs; and
18 (iv) the paragraph, designated by the number, of the section,
19 subsection, or other provision in which the reference
20 occurs; and
21 (v) the subparagraph, designated by the number, of the
22 paragraph in which the reference occurs; and
23 (vi) the subsubparagraph, designated by the number, of the
24 subparagraph in which the reference occurs;
25 as the case requires.

26 **213 Reference to provisions of this Code or an Act is inclusive**

27 In this Code, a reference to a portion of this Code or an Act
28 includes:

- 29 (a) a reference to the Chapter, Part, Division, Subdivision,
30 section, subsection or other provision of this Code or the Act
31 referred to that forms the beginning of the portion; and
32 (b) a reference to the Chapter, Part, Division, Subdivision,
33 section, subsection or other provision of this Code or the Act
34 referred to that forms the end of the portion.

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Division 3 Terms and references

Section 213

- 1 Example: A reference to “sections 5 to 9” includes both section 5 and section 9.
2 It is not necessary to refer to “sections 5 to 9 (both inclusive)” to
3 ensure that the reference is given an inclusive interpretation.

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2 **Division 4—Functions and powers**

3 **214 Power to make instrument or decision includes power to amend**
4 **or repeal**

5 If this Code authorises or requires the making of an instrument or
6 decision:

- 7 (a) the power includes power to amend or repeal the instrument
8 or decision; and
9 (b) the power to amend or repeal the instrument or decision is
10 exercisable in the same way, and subject to the same
11 conditions, as the power to make the instrument or decision.

12 **215 Matters for which statutory instruments may make provision**

- 13 (1) If this Code authorises or requires the making of a statutory
14 instrument in relation to a matter, a statutory instrument made
15 under this Code may make provision for the matter by applying,
16 adopting or incorporating (with or without modification) the
17 provisions of:
18 (a) an Act or statutory instrument; or
19 (b) another document (whether of the same or a different kind);
20 as in force at a particular time or as in force from time to time.
- 21 (2) If a statutory instrument applies, adopts or incorporates the
22 provisions of a document, the statutory instrument applies, adopts
23 or incorporates the provisions as in force from time to time, unless
24 the statutory instrument otherwise expressly provides.
- 25 (3) A statutory instrument may:
26 (a) apply generally to all persons, matters or things or be limited
27 in its application to:
28 (i) particular persons, matters or things; or
29 (ii) particular classes of persons, matters or things; or
30 (b) otherwise apply generally or be limited in its application by
31 reference to specified exceptions or factors.

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- 1 (4) A statutory instrument may:
2 (a) apply differently according to different specified factors; or
3 (b) otherwise make different provision in relation to:
4 (i) different persons, matters or things; or
5 (ii) different classes of persons, matters or things.
- 6 (5) A statutory instrument may authorise a matter or thing to be from
7 time to time determined, applied or regulated by a specified person
8 or body.
- 9 (6) If this Code authorises or requires a matter to be regulated by
10 statutory instrument, the power may be exercised by prohibiting by
11 statutory instrument the matter or any aspect of the matter.
- 12 (7) If this Code authorises or requires provision to be made with
13 respect to a matter by statutory instrument, a statutory instrument
14 made under this Code may make provision with respect to a
15 particular aspect of the matter despite the fact that provision is
16 made by this Code in relation to another aspect of the matter or in
17 relation to another matter.
- 18 (8) A statutory instrument may provide for the review of, or a right of
19 appeal against, a decision made under the statutory instrument, or
20 this Code, and may, for that purpose, confer jurisdiction on any
21 court, tribunal, person or body.
- 22 (9) A statutory instrument may require a form prescribed by or under
23 the statutory instrument, or information or documents included in,
24 attached to or given with the form, to be verified by statutory
25 declaration.

26 **216 Presumption of validity and power to make**

- 27 (1) All conditions and preliminary steps required for the making of a
28 statutory instrument are presumed to have been satisfied and
29 performed in the absence of evidence to the contrary.
- 30 (2) A statutory instrument is taken to be made under all powers under
31 which it may be made, even though it purports to be made under
32 this Code or a particular provision of this Code.

1 **217 Exercise of powers between enactment and commencement**

2 (1) If a provision of this Code (the *empowering provision*) that does
3 not commence on its enactment would, had it commenced, confer a
4 power:

- 5 (a) to make an appointment; or
6 (b) to make a statutory instrument of a legislative or
7 administrative character; or
8 (c) to do another thing;

9 then:

- 10 (d) the power may be exercised; and
11 (e) anything may be done for the purpose of enabling the
12 exercise of the power or of bringing the appointment,
13 instrument or other thing into effect;

14 before the empowering provision commences.

15 (2) If a provision of an Act (the *empowering provision*) that does not
16 commence on its enactment would, had it commenced, amend a
17 provision of this Code so that it would confer a power:

- 18 (a) to make an appointment; or
19 (b) to make a statutory instrument of a legislative or
20 administrative character; or
21 (c) to do another thing;

22 then:

- 23 (d) the power may be exercised; and
24 (e) anything may be done for the purpose of enabling the
25 exercise of the power or of bringing the appointment,
26 instrument or other thing into effect;

27 before the empowering provision commences.

28 (3) If:

- 29 (a) this Code has commenced and confers a power to make a
30 statutory instrument (the *basic instrument-making power*);
31 and
32 (b) a provision of an Act that does not commence on its
33 enactment would, had it commenced, amend this Code so as
34 to confer additional power to make a statutory instrument
35 (the *additional instrument-making power*);
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Division 4 Functions and powers

Section 217

- 1 then:
2 (c) the basic instrument-making power and the additional
3 instrument-making power may be exercised by making a
4 single instrument; and
5 (d) any provision of the instrument that required an exercise of
6 the additional instrument-making power is to be treated as
7 made under subsection (2).
- 8 (4) If an instrument, or a provision of an instrument, is made under
9 subsection (1) or (2) that is necessary for the purpose of:
10 (a) enabling the exercise of a power mentioned in the subsection;
11 or
12 (b) bringing an appointment, instrument or other thing made or
13 done under such a power into effect;
14 the instrument or provision takes effect:
15 (c) on the making of the instrument; or
16 (d) on such later day (if any) on which, or at such later time (if
17 any) at which, the instrument or provision is expressed to
18 take effect.
- 19 (5) If:
20 (a) an appointment is made under subsection (1) or (2); or
21 (b) an instrument, or a provision of an instrument, made under
22 subsection (1) or (2) is not necessary for a purpose mentioned
23 in subsection (4);
24 the appointment, instrument or provision takes effect:
25 (c) on the commencement of the relevant empowering provision;
26 or
27 (d) on such later day (if any) on which, or at such later time (if
28 any) at which, the appointment, instrument or provision is
29 expressed to take effect.
- 30 (6) Anything done under subsection (1) or (2) does not confer a right,
31 or impose a liability, on a person before the relevant empowering
32 provision commences.
- 33 (7) After the enactment of a provision mentioned in subsection (2) but
34 before the provision's commencement, this section applies as if the
35 references in subsections (2) and (5) to the commencement of the

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- 1 empowering provision were references to the commencement of
2 the provision mentioned in subsection (2) as amended by the
3 empowering provision.
- 4 (8) In the application of this section to a statutory instrument, a
5 reference to the enactment of the instrument is a reference to the
6 making of the instrument.

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2 **Division 5—Distance, time and age**

3 **218 Matters relating to distance, time and age**

4 (1) In the measurement of distance for the purposes of this Code, the
5 distance is to be measured along the shortest road ordinarily used
6 for travelling.

7 (2) If a period beginning on a given day, act or event is provided or
8 allowed for a purpose by this Code, the period is to be calculated
9 by excluding the day, or the day of the act or event, and:

10 (a) if the period is expressed to be a specified number of clear
11 days or at least a specified number of days—by excluding the
12 day on which the purpose is to be fulfilled; and

13 (b) in any other case—by including the day on which the
14 purpose is to be fulfilled.

15 (3) If the last day of a period provided or allowed by this Code for
16 doing anything is not a business day in the place in which the thing
17 is to be or may be done, the thing may be done on the next business
18 day in the place.

19 (4) If the last day of a period provided or allowed by this Code for the
20 filing or registration of a document is a day on which the office is
21 closed where the filing or registration is to be or may be done, the
22 document may be filed or registered at the office on the next day
23 that the office is open.

24 (5) If no time is provided or allowed for doing anything, the thing is to
25 be done as soon as possible, and as often as the prescribed occasion
26 happens.

27 (6) If, in this Code, there is a reference to time, the reference is, in
28 relation to the doing of anything in a State or Territory, a reference
29 to the legal time in the State or Territory.

30 (7) For the purposes of this Code, a person attains an age in years at
31 the beginning of the person's birthday for the age.