Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020

No. 3, 2020

An Act to amend the law in relation to ASIC, and financial sector regulation, and for related purposes

Note: An electronic version of this Act is available on the Federal Register of Legislation (https://www.legislation.gov.au/)

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Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020

No. 3, 2020

An Act to amend the law in relation to ASIC, and financial sector regulation, and for related purposes

[*Assented to 17 February 2020*]

The Parliament of Australia enacts:

1 Short title

This Act is the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020*.

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2 Commencement

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

Commencement information		
Column 1	**Column 2**	**Column 3**
Provisions	**Commencement**	**Date/Details**
1. The whole of this Act	The day after this Act receives the Royal Assent.	18 February 2020

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

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Schedule 1—ASIC search warrant provisions

Part 1—Main amendments to ASIC Act

Australian Securities and Investments Commission Act 2001

1 After Division 3 of Part 3

Insert:

Division 3A—Extra application of Crimes Act search warrant provisions

Subdivision A—Basic extra application

39D Extra application of Crimes Act search warrant provisions

(1) In addition to the application that the applied provisions have (disregarding this subsection) in relation to offences mentioned in subsection (3), the applied provisions also apply under this subsection in relation to those offences, with the modifications set out in Subdivision B.

(2) To avoid doubt, subsection (1) does not limit the application that the applied provisions have (disregarding that subsection).

(3) For the purposes of subsection (1), the offences are indictable offences under any of the following:
  (a) the corporations legislation;
  (b) a provision of a law of the Commonwealth, or of a State or Territory in this jurisdiction, a contravention of which:
    (i) concerns the management or affairs of a body corporate or managed investment scheme; or
    (ii) involves fraud or dishonesty and relates to a body corporate or managed investment scheme or to financial products;
  (c) the *Retirement Savings Accounts Act 1997*;
  (d) the *Superannuation Industry (Supervision) Act 1993*.

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(4) For the purposes of this Division, the ***applied provisions*** are as follows:
  (a) Divisions 1, 2, 4C and 5 of Part IAA of the *Crimes Act 1914*;
  (b) any other provisions of that Act, to the extent that those other provisions relate to the operation of the provisions mentioned in paragraph (a).

39E Interpretation of modifications

To avoid doubt, a term used in Subdivision B in a modification of an applied provision has the same meaning as in the *Crimes Act 1914* unless specified otherwise.

Subdivision B—Modifications

39F Major modifications—evidential material

For the purposes of subsection 39D(1), in the definition of ***evidential material*** in subsection 3C(1) of the *Crimes Act 1914*, omit the words "or a thing relevant to a summary offence".

39G Major modifications—who may apply for a warrant etc.

(1) For the purposes of subsection 39D(1), in subsection 3E(1) of the *Crimes Act 1914*, after the words "by information on oath or affirmation", insert "given by a constable, or by a member of ASIC or an ASIC staff member authorised in writing by ASIC for the purposes of this subsection".

(2) For the purposes of subsection 39D(1), in subsection 3E(2) of the *Crimes Act 1914*, after the words "by information on oath or affirmation", insert "given by a constable, or by a member of ASIC or an ASIC staff member authorised in writing by ASIC for the purposes of this subsection".

(3) For the purposes of subsection 39D(1), in subsection 3LA(1) of the *Crimes Act 1914*, after the words "A constable", insert ", or a member of ASIC or an ASIC staff member authorised in writing by ASIC for the purposes of this subsection,".

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(4) For the purposes of subsection 39D(1), in subsection 3R(1) of the *Crimes Act 1914*, after the words "A constable", insert ", or a member of ASIC or an ASIC staff member authorised in writing by ASIC for the purposes of this subsection,".

39H Major modifications—purposes for which things may be used and shared

For the purposes of subsection 39D(1), replace section 3ZQU of the *Crimes Act 1914* with the following 2 sections.

3ZQU Purposes for which things may be used and shared

(1) A constable or Commonwealth officer may use, or make available to a member of ASIC or an ASIC staff member to use, a thing seized under this Part for the purpose of the performance of ASIC's functions or duties or the exercise of its powers.

(2) Without limiting the scope of subsection (1), a constable or Commonwealth officer may use, or make available to a person covered under subsection (3) to use, a thing seized under this Part for the purpose of any or all of the following if it is necessary to do so for that purpose:

(a) preventing or investigating any of the following:

(i) a breach of an offence provision;

(ii) a breach of a civil penalty provision;

(iii) a breach of an obligation (whether under statute or otherwise), other than an obligation of a private nature (such as an obligation under a contract, deed, trust or similar arrangement);

(b) prosecuting a breach of an offence provision;

(c) prosecuting a breach of a civil penalty provision;

(d) taking administrative action, or seeking an order of a court or tribunal (within the meaning of the *Australian Securities and Investments Commission Act 2001*), in response to a breach of an obligation (whether under statute or otherwise), other than an obligation of a private nature (such as an obligation under a contract, deed, trust or similar arrangement).

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(3) A person is covered under this subsection if the person is any of the following:
  (a) a constable;
  (b) a Commonwealth officer.

(4) Without limiting the scope of subsections (1) and (2), a constable or Commonwealth officer may use, or make available to a person covered under subsection (3) to use, a thing seized under this Part for the purpose of any or all of the following if it is necessary to do so for that purpose:
  (a) proceedings under the *Proceeds of Crime Act 1987* or the *Proceeds of Crime Act 2002*;
  (b) proceedings under a corresponding law (within the meaning of either of the Acts mentioned in paragraph (a)) that relate to a State offence that has a federal aspect;
  (c) proceedings for the forfeiture of the thing under a law of the Commonwealth, a State or a Territory;
  (d) the performance of a function or duty, or the exercise of a power, by a person, court or other body under, or in relation to a matter arising under, Division 104, 105 or 105A of the *Criminal Code*;
  (e) investigating or resolving a complaint or an allegation of misconduct relating to an exercise of a power or the performance of a function or duty under this Part;
  (f) investigating or resolving an AFP conduct or practices issue (within the meaning of the *Australian Federal Police Act 1979*) under Part V of that Act;
  (g) investigating or resolving a complaint under the *Ombudsman Act 1976* or the *Privacy Act 1988*;
  (h) investigating or inquiring into a corruption issue under the *Law Enforcement Integrity Commissioner Act 2006*;
  (i) proceedings in relation to a complaint, allegation or issue mentioned in paragraph (e), (f), (g) or (h);
  (j) deciding whether to institute proceedings, to make an application or request, or to take any other action, mentioned in:
    (i) any of the preceding paragraphs of this subsection; or
    (ii) subsection (1) or (2);

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(k) the performance of the functions of the Australian Federal Police under section 8 of the *Australian Federal Police Act 1979*.

(5) A constable or Commonwealth officer may use a thing seized under this Part for any other use that is required or authorised by or under a law of a State or a Territory.

(6) A constable or Commonwealth officer may make available to another constable or Commonwealth officer to use a thing seized under this Part for any purpose for which the making available of the thing is required or authorised by a law of a State or Territory.

(7) To avoid doubt, this section does not limit any other law of the Commonwealth that:
   (a) requires or authorises the use of a document or other thing; or
   (b) requires or authorises the making available (however described) of a document or other thing.

(8) A constable or Commonwealth officer may make available to an agency that has responsibility for:
   (a) law enforcement in a foreign country; or
   (b) intelligence gathering for a foreign country; or
   (c) the security of a foreign country;

   a thing seized under this Part to be used by that agency for:
   (d) a purpose mentioned in subsection (1), (2), (4), (5) or (6); or
   (e) the purpose of performing a function, or exercising a power, conferred by a law in force in that foreign country.

Ministerial arrangements for sharing

(9) This Division does not prevent the Minister from making an arrangement with a Minister of a State or Territory for:
   (a) the making available to a State or Territory law enforcement agency of that State or Territory, for purposes mentioned in subsections (1), (2), (4), (6) and (8), of things seized under this Part; and
   (b) the disposal by the agency of such things, originals and copies when they are no longer of use to that agency for those purposes.

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Note: This subsection does not empower the Minister to make such an arrangement.

Definition

(10) In this section:

State or Territory law enforcement agency means:

(a) the police force or police service of a State or Territory; or

(b) the New South Wales Crime Commission; or

(c) the Independent Commission Against Corruption of New South Wales; or

(d) the Law Enforcement Conduct Commission of New South Wales; or

(e) the Independent Broad-based Anti-corruption Commission of Victoria; or

(f) the Crime and Corruption Commission of Queensland; or

(g) the Corruption and Crime Commission of Western Australia; or

(h) the Independent Commissioner Against Corruption of South Australia.

3ZQUA Commonwealth law permitting access to things seized under this Part does not apply

(1) This section applies if, disregarding this section, a law of the Commonwealth (other than this Part) requires or permits any of the following to be made available to a person covered under subsection (3):

(a) a thing seized under this Part;

(b) if a thing contains data that ASIC or the Australian Federal Police came into possession of as a result of exercising powers under this Part—the thing.

(2) Subject to subsection (4), that law does not require or permit the thing to be made available to the person.

(3) A person is covered under this subsection if the person is not, and is not representing, the Commonwealth, a State or a Territory.

(4) This section does not affect any of the following:

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(a) the power of a court, or of a tribunal (within the meaning of the *Australian Securities and Investments Commission Act 2001*), to make an order;
(b) the effect of an order of a court, or of a tribunal (within the meaning of that Act).

(5) This section does not affect the operation of the *Freedom of Information Act 1982*.

39I Minor modifications

(1) For the purposes of subsection 39D(1), the applied provisions apply with the modifications set out in this section.

(2) To avoid doubt, those modifications have no effect other than for the purposes mentioned in subsection (1).

(3) In subsection 3C(1) of the *Crimes Act 1914*, insert the following definitions:

ASIC means the Australian Securities and Investments Commission.

ASIC senior staff member means a senior staff member (within the meaning of the *Australian Securities and Investments Commission Act 2001*).

ASIC staff member means a staff member (within the meaning of the *Australian Securities and Investments Commission Act 2001*).

responsible agency, in relation to data or a thing, means:
(a) if the data, or a device containing the data, or the thing, is in the control of the Australian Federal Police—the Australian Federal Police; or
(b) if the data, or a device containing the data, or the thing, is in the control of ASIC—ASIC.

responsible Commissioner, in relation to data or a thing, means:
(a) if the data, or a device containing the data, or the thing, is in the control of the Australian Federal Police—the Commissioner of the Australian Federal Police; or

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(b) if the data, or a device containing the data, or the thing, is in the control of ASIC—the Chairperson of ASIC.

(4) In section 3E of the *Crimes Act 1914*:

(a) omit the note to subsection (1) of that section; and

(b) omit the words "is a member or special member of the Australian Federal Police and" in subsection (4) of that section.

(5) In subsections 3L(1B) and 3LAA(3) and sections 3ZQX and 3ZQZB of the *Crimes Act 1914*:

(a) treat the references to the Commissioner as being references to the responsible Commissioner; and

(b) treat the references to the Australian Federal Police as being references to the responsible agency.

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Part 2—Main amendments to NCCP Act

National Consumer Credit Protection Act 2009

2 After Part 6-3

Insert:

Part 6-3A—Search warrants

Division 1—Introduction

272A Guide to this Part

This Part allows the grant of search warrants in respect of indictable offences under the credit legislation, etc.

Division 2—Extra application of Crimes Act search warrant provisions

Subdivision A—Basic extra application

272B Extra application of Crimes Act search warrant provisions

(1) In addition to the application that the applied provisions have (disregarding this subsection) in relation to offences mentioned in subsection (3), the applied provisions also apply under this subsection in relation to those offences, with the modifications set out in Subdivision B.

(2) To avoid doubt, subsection (1) does not limit the application that the applied provisions have (disregarding that subsection).

(3) For the purposes of subsection (1), the offences are indictable offences under any of the following:

(a) the credit legislation;

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(b) a provision of a law of the Commonwealth, or of a law of a referring State or a Territory, a contravention of which:
  (i) concerns the management, conduct or affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity; or
  (ii) involves fraud or dishonesty and relates to a credit activity engaged in by a person, or a credit contract, mortgage, guarantee or consumer lease.

(4) For the purposes of this Division, the ***applied provisions*** are as follows:
  (a) Divisions 1, 2, 4C and 5 of Part IAA of the *Crimes Act 1914*;
  (b) any other provisions of that Act, to the extent that those other provisions relate to the operation of the provisions mentioned in paragraph (a).

272C Interpretation of modifications

To avoid doubt, a term used in Subdivision B in a modification of an applied provision has the same meaning as in the *Crimes Act 1914* unless specified otherwise.

Subdivision B—Modifications

272D Major modifications—evidential material

For the purposes of subsection 272B(1), in the definition of ***evidential material*** in subsection 3C(1) of the *Crimes Act 1914*, omit the words "or a thing relevant to a summary offence".

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

(1) For the purposes of subsection 272B(1), in subsection 3E(1) of the *Crimes Act 1914*, after the words "by information on oath or affirmation", insert "given by a constable, or by a member of ASIC or an ASIC staff member authorised in writing by ASIC for the purposes of this subsection".

(2) For the purposes of subsection 272B(1), in subsection 3E(2) of the *Crimes Act 1914*, after the words "by information on oath or affirmation", insert "given by a constable, or by a member of ASIC

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or an ASIC staff member authorised in writing by ASIC for the purposes of this subsection".

(3) For the purposes of subsection 272B(1), in subsection 3LA(1) of the *Crimes Act 1914*, after the words "A constable", insert ", or a member of ASIC or an ASIC staff member authorised in writing by ASIC for the purposes of this subsection,".

(4) For the purposes of subsection 272B(1), in subsection 3R(1) of the *Crimes Act 1914*, after the words "A constable", insert ", or a member of ASIC or an ASIC staff member authorised in writing by ASIC for the purposes of this subsection,".

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

For the purposes of subsection 272B(1), replace section 3ZQU of the *Crimes Act 1914* with the following 2 sections.

3ZQU Purposes for which things may be used and shared

(1) A constable or Commonwealth officer may use, or make available to a member of ASIC or an ASIC staff member to use, a thing seized under this Part for the purpose of the performance of ASIC's functions or duties or the exercise of its powers.

(2) Without limiting the scope of subsection (1), a constable or Commonwealth officer may use, or make available to a person covered under subsection (3) to use, a thing seized under this Part for the purpose of any or all of the following if it is necessary to do so for that purpose:

(a) preventing or investigating any of the following:

(i) a breach of an offence provision;

(ii) a breach of a civil penalty provision;

(iii) a breach of an obligation (whether under statute or otherwise), other than an obligation of a private nature (such as an obligation under a contract, deed, trust or similar arrangement);

(b) prosecuting a breach of an offence provision;

(c) prosecuting a breach of a civil penalty provision;

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(d) taking administrative action, or seeking an order of a court or tribunal (within the meaning of the *Australian Securities and Investments Commission Act 2001*), in response to a breach of an obligation (whether under statute or otherwise), other than an obligation of a private nature (such as an obligation under a contract, deed, trust or similar arrangement).

(3) A person is covered under this subsection if the person is any of the following:

(a) a constable;

(b) a Commonwealth officer.

(4) Without limiting the scope of subsections (1) and (2), a constable or Commonwealth officer may use, or make available to a person covered under subsection (3) to use, a thing seized under this Part for the purpose of any or all of the following if it is necessary to do so for that purpose:

(a) proceedings under the *Proceeds of Crime Act 1987* or the *Proceeds of Crime Act 2002*;

(b) proceedings under a corresponding law (within the meaning of either of the Acts mentioned in paragraph (a)) that relate to a State offence that has a federal aspect;

(c) proceedings for the forfeiture of the thing under a law of the Commonwealth, a State or a Territory;

(d) the performance of a function or duty, or the exercise of a power, by a person, court or other body under, or in relation to a matter arising under, Division 104, 105 or 105A of the *Criminal Code*;

(e) investigating or resolving a complaint or an allegation of misconduct relating to an exercise of a power or the performance of a function or duty under this Part;

(f) investigating or resolving an AFP conduct or practices issue (within the meaning of the *Australian Federal Police Act 1979*) under Part V of that Act;

(g) investigating or resolving a complaint under the *Ombudsman Act 1976* or the *Privacy Act 1988*;

(h) investigating or inquiring into a corruption issue under the *Law Enforcement Integrity Commissioner Act 2006*;

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(i) proceedings in relation to a complaint, allegation or issue mentioned in paragraph (e), (f), (g) or (h);

(j) deciding whether to institute proceedings, to make an application or request, or to take any other action, mentioned in:

(i) any of the preceding paragraphs of this subsection; or

(ii) subsection (1) or (2);

(k) the performance of the functions of the Australian Federal Police under section 8 of the *Australian Federal Police Act 1979*.

(5) A constable or Commonwealth officer may use a thing seized under this Part for any other use that is required or authorised by or under a law of a State or a Territory.

(6) A constable or Commonwealth officer may make available to another constable or Commonwealth officer to use a thing seized under this Part for any purpose for which the making available of the thing is required or authorised by a law of a State or Territory.

(7) To avoid doubt, this section does not limit any other law of the Commonwealth that:

(a) requires or authorises the use of a document or other thing; or

(b) requires or authorises the making available (however described) of a document or other thing.

(8) A constable or Commonwealth officer may make available to an agency that has responsibility for:

(a) law enforcement in a foreign country; or

(b) intelligence gathering for a foreign country; or

(c) the security of a foreign country;

a thing seized under this Part to be used by that agency for:

(d) a purpose mentioned in subsection (1), (2), (4), (5) or (6); or

(e) the purpose of performing a function, or exercising a power, conferred by a law in force in that foreign country.

Ministerial arrangements for sharing

(9) This Division does not prevent the Minister from making an arrangement with a Minister of a State or Territory for:

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(a) the making available to a State or Territory law enforcement agency of that State or Territory, for purposes mentioned in subsections (1), (2), (4), (6) and (8), of things seized under this Part; and

(b) the disposal by the agency of such things, originals and copies when they are no longer of use to that agency for those purposes.

Note: This subsection does not empower the Minister to make such an arrangement.

Definition

(10) In this section:

State or Territory law enforcement agency means:

(a) the police force or police service of a State or Territory; or

(b) the New South Wales Crime Commission; or

(c) the Independent Commission Against Corruption of New South Wales; or

(d) the Law Enforcement Conduct Commission of New South Wales; or

(e) the Independent Broad-based Anti-corruption Commission of Victoria; or

(f) the Crime and Corruption Commission of Queensland; or

(g) the Corruption and Crime Commission of Western Australia; or

(h) the Independent Commissioner Against Corruption of South Australia.

3ZQUA Commonwealth law permitting access to things seized under this Part does not apply

(1) This section applies if, disregarding this section, a law of the Commonwealth (other than this Part) requires or permits any of the following to be made available to a person covered under subsection (3):

(a) a thing seized under this Part;

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(b) if a thing contains data that ASIC or the Australian Federal Police came into possession of as a result of exercising powers under this Part—the thing.

(2) Subject to subsection (4), that law does not require or permit the thing to be made available to the person.

(3) A person is covered under this subsection if the person is not, and is not representing, the Commonwealth, a State or a Territory.

(4) This section does not affect any of the following:

(a) the power of a court, or of a tribunal (within the meaning of the *Australian Securities and Investments Commission Act 2001*), to make an order;

(b) the effect of an order of a court, or of a tribunal (within the meaning of that Act).

(5) This section does not affect the operation of the *Freedom of Information Act 1982*.

272G Minor modifications

(1) For the purposes of subsection 272B(1), the applied provisions apply with the modifications set out in this section.

(2) To avoid doubt, those modifications have no effect other than for the purposes mentioned in subsection (1).

(3) In subsection 3C(1) of the *Crimes Act 1914*, insert the following definitions:

ASIC means the Australian Securities and Investments Commission.

ASIC senior staff member means a senior staff member (within the meaning of the *Australian Securities and Investments Commission Act 2001*).

ASIC staff member means a staff member (within the meaning of the *Australian Securities and Investments Commission Act 2001*).

responsible agency, in relation to data or a thing, means:

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(a) if the data, or a device containing the data, or the thing, is in the control of the Australian Federal Police—the Australian Federal Police; or

(b) if the data, or a device containing the data, or the thing, is in the control of ASIC—ASIC.

responsible Commissioner, in relation to data or a thing, means:

(a) if the data, or a device containing the data, or the thing, is in the control of the Australian Federal Police—the Commissioner of the Australian Federal Police; or

(b) if the data, or a device containing the data, or the thing, is in the control of ASIC—the Chairperson of ASIC.

(4) In section 3E of the *Crimes Act 1914*:

(a) omit the note to subsection (1) of that section; and

(b) omit the words "is a member or special member of the Australian Federal Police and" in subsection (4) of that section.

(5) In subsections 3L(1B) and 3LAA(3) and sections 3ZQX and 3ZQZB of the *Crimes Act 1914*:

(a) treat the references to the Commissioner as being references to the responsible Commissioner; and

(b) treat the references to the Australian Federal Police as being references to the responsible agency.

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Part 3—Consequential amendments

Australian Securities and Investments Commission Act 2001

3 Section 28

Omit “, 35, 36”.

4 Sections 35 to 36A

Repeal the sections.

5 Paragraph 37(1)(b)

Omit “section 36”, substitute “Division 2 of Part IAA of the *Crimes Act 1914*, as applied under section 39D of this Act”.

6 After subsection 37(1)

Insert:

(1A) However, if paragraph (1)(b) applies, subsections (4), (5), (6), (7) and (8) do not apply.

7 Subsection 37(8)

Omit “Unless subparagraph (1)(b)(ii) applies, the person”, substitute “The person”.

8 Subsection 37(9)

Omit “or a person”, substitute “or if paragraph (1)(a) applies a person”.

9 Paragraph 39B(1)(b)

Omit “section 36”, substitute “Division 2 of Part IAA of the *Crimes Act 1914*, as applied under section 39D of this Act”.

10 Paragraph 39B(1)(d)

Omit “section 36”, substitute “Division 2 of Part IAA of the *Crimes Act 1914*, as applied under section 39D of this Act”.

11 Subsection 65(1)

Repeal the subsection, substitute:

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(1) A person must not engage in conduct that results in the obstruction or hindering of a person in the exercise of the power under this Part.

Penalty: 2 years imprisonment.

12 Subsection 65(2)

Repeal the subsection.

National Consumer Credit Protection Act 2009

13 Section 262

Omit:

> 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.

14 Section 263

Omit "265, 269 and 270", substitute "and 265".

15 Sections 269 and 270

Repeal the sections.

16 Paragraph 271(1)(b)

Omit "section 270", substitute "Division 2 of Part IAA of the *Crimes Act 1914*, as applied under section 272B of this Act".

17 After subsection 271(1)

Insert:

(1A) However, if paragraph (1)(b) applies, subsections (4), (5), (6), (7) and (8) do not apply.

18 Subsection 271(8)

Omit "Unless subparagraph (1)(b)(ii) applies, the person", substitute "The person".

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19 Subsection 271(9)

Omit "or a person", substitute "or if paragraph (1)(a) applies a person".

20 Section 292

Repeal the section.

Retirement Savings Accounts Act 1997

21 At the end of section 102

Add:

(3) The reference in subsection (1) to an inspector does not include:
  (a) an inspector that is appointed by ASIC; or
  (b) ASIC, where ASIC is exercising the powers of an inspector under section 98.

22 Paragraph 104(1)(b)

After "section 103,", insert "or Division 2 of Part IAA of the *Crimes Act 1914*, as applied under section 39D of the *Australian Securities and Investments Commission Act 2001*,".

23 After subsection 104(1)

Insert:

(1A) However, if paragraph (1)(b) applies because of the operation of section 39D of the *Australian Securities and Investments Commission Act 2001*, subsections (4), (5), (6), (7) and (8) do not apply.

Superannuation Industry (Supervision) Act 1993

24 At the end of section 271

Add:

(3) The reference in subsection (1) to an inspector does not include:
  (a) an inspector that is appointed by ASIC; or
  (b) ASIC, where ASIC is exercising the powers of an inspector under section 267.

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25 Paragraph 273(1)(b)

After "section 272,", insert "or Division 2 of Part IAA of the *Crimes Act 1914*, as applied under section 39D of the *Australian Securities and Investments Commission Act 2001*,".

26 After subsection 273(1)

Insert:

(1A) However, if paragraph (1)(b) applies because of the operation of section 39D of the *Australian Securities and Investments Commission Act 2001*, subsections (4), (5), (6), (7) and (8) do not apply.

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Part 4—Application provisions

27 Application—SIS Act and RSA Act

The amendments made by Part 3 of this Schedule to the *Retirement Savings Accounts Act 1997* and the *Superannuation Industry (Supervision) Act 1993* apply to warrants applied for on or after the commencement of that Part (whether or not a matter to which the warrant relates arose before, on, or after that commencement).

Australian Securities and Investments Commission Act 2001

28 In the appropriate position

Insert:

Part 28—Transitional provisions relating to the Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020

324 Application of amendments—search warrant provisions

The amendments of this Act made by Parts 1 and 3 of Schedule 1 to the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020* apply to warrants applied for on or after the commencement of those Parts (whether or not a matter to which the warrant relates arose before, on, or after that commencement).

National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009

29 In the appropriate position

Insert:

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Schedule 12—Application provisions for Schedule 1 to the Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020

1 Definitions

In this Schedule:

amending Act means the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020*.

2 Application—search warrant provisions

The amendments of the National Credit Act made by Parts 2 and 3 of Schedule 1 to the amending Act apply to warrants applied for on or after the commencement of those Parts (whether or not a matter to which the warrant relates arose before, on, or after that commencement).

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Schedule 2—Access to telecommunications interception information

Telecommunications (Interception and Access) Act 1979

1 Subsection 5(1)

Insert:

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

2 Subsection 5(1) (definition of *permitted purpose*)

Omit "or an eligible authority of a State,", substitute ", an eligible authority of a State or ASIC,".

3 Subsection 5(1) (paragraph (a) of the definition of *permitted purpose*)

After "Immigration and Border Protection Department", insert "or ASIC".

4 Subsection 5(1) (at the end of the definition of *permitted purpose*)

Add:

; or (j) in the case of ASIC:

(i) an investigation by ASIC of a serious offence or of the likely commission of a serious offence; or

(ii) a report on such an investigation; or

(iii) the making of a decision whether or not to begin a prosecution for a serious offence if the prosecution arises from or relates to such an investigation; or

(iv) a prosecution for a serious offence if the prosecution arises from or relates to such an investigation.

5 Subsection 5(1)

Insert:

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staff member of ASIC has the same meaning as ***staff member*** in the *Australian Securities and Investments Commission Act 2001*.

6 Paragraph 5D(5C)(g)

Omit "subsection 1041G(1)", substitute "section 1041G".

7 Section 67 (heading)

Repeal the heading, substitute:

67 Dealing for permitted purposes

8 Before subsection 67(1)

Insert:

Dealing for permitted purposes in relation to an agency

9 Before subsection 67(2)

Insert:

Dealing for permitted purposes in relation to an eligible Commonwealth authority

10 At the end of section 67

Add:

Dealing for permitted purposes in relation to ASIC

(3) A member of ASIC or a staff member of ASIC may, for a permitted purpose, or permitted purposes, in relation to ASIC, and for no other purpose, communicate to another person, make use of, or make a record of the following:
  (a) lawfully intercepted information other than foreign intelligence information;
  (b) interception warrant information.

11 At the end of section 68

Add:

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; and (p) to a member of ASIC or a staff member of ASIC, if the information relates, or appears to relate, to a matter that may give rise to an investigation by ASIC of:

(i) a serious offence; or

(ii) the likely commission of a serious offence.

12 Application of amendments

The amendments made by this Schedule (other than item 6) apply in relation to lawfully intercepted information, or interception warrant information, that was originally obtained by an agency before, at or after the commencement of this Schedule.

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Schedule 3—Licensing and false or misleading documents

Part 1—Australian financial services licences

Corporations Act 2001

1 Section 9 (definition of *responsible officer*)

Repeal the definition.

2 At the end of subsection 912C(1)

Add:

; or (c) for the purposes of considering whether the requirement in section 913BA (fit and proper person test) is satisfied in relation to the licensee and the licence—any matters mentioned in section 913BB in relation to a person mentioned in a paragraph of subsection 913BA(1).

3 After section 912D

Insert:

912DA Obligation to notify ASIC of change in control

(1) If an entity starts to control, or stops controlling, a financial services licensee, the licensee must lodge a notification with ASIC:

(a) in the prescribed form; and

(b) before the end of 30 business days after the day the entity starts to control, or stops controlling, the financial services licensee.

Note: Failure to comply with this subsection is an offence: see subsection 1311(1).

(2) An offence based on subsection (1) is an offence of strict liability.

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

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912DB Obligation to notify ASIC if licensee does not provide financial service

(1) If a financial services licensee does not provide a financial service covered by the licence before the end of 6 months after the licence is granted, the licensee must lodge a notification with ASIC:
  (a) in the prescribed form; and
  (b) before the end of 15 business days after the end of the 6 months.

Note: Failure to comply with this subsection is an offence: see subsection 1311(1).

(2) An offence based on subsection (1) is an offence of strict liability.

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

4 Paragraphs 913B(1)(c) and (ca)

Repeal the paragraphs, substitute:

(c) the requirement in section 913BA (fit and proper person test) is satisfied in relation to the applicant and the licence applied for; and

5 Subsections 913B(2), (3) and (4)

Repeal the subsections, substitute:

(2) However, ASIC must refuse to grant the Australian financial services licence if ASIC is satisfied that:
  (a) the application for the licence, or any information, audit report or statement lodged with ASIC in accordance with subsection (3), was false in a material particular or materially misleading; or
  (b) there was an omission of a material matter from the application or the information, audit report or statement.

ASIC may request information etc. from applicant

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

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

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

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

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

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

(4) To avoid doubt:

(a) a notice under subsection (3), and the information, audit report or statement requested in the notice, may relate to any person mentioned in section 913BA in relation to the applicant and the licence applied for; and

(b) subsection (4B) applies in relation to such a request even if the applicant is unable to comply with the request.

(4A) ASIC may, by written notice to the applicant within the time specified in the notice:

(a) withdraw a request under subsection (3); or

(b) extend the time specified in the notice.

(4B) If the applicant does not lodge with ASIC the information, audit report or statement requested in a notice under subsection (3) within the specified time, the applicant is taken to have withdrawn the application.

(4C) To avoid doubt, subsection (5) does not apply to an application that is taken to have been withdrawn under subsection (4B).

(4D) The regulations may make provision in relation to audit reports that applicants may be requested to lodge under paragraph (3)(b).

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Applicant must be given hearing before refusal of licence

6 Subsection 913B(5)

Omit "However,".

7 After section 913B

Insert:

913BA Fit and proper person test

(1) For the purposes of paragraph 913B(1)(c), subsection 914B(2) and paragraph 915C(1)(b), the requirement in this section is satisfied in relation to a person (the ***first person***) and a licence, or a proposed licence, if ASIC is satisfied that there is no reason to believe any of the following:

(a) that the first person is not a fit and proper person to provide the financial services covered by the licence;

(b) if the first person is a body corporate—that an officer of the first person is not a fit and proper person to perform one or more functions as an officer of an entity that provides the financial services covered by the licence;

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

(i) that any of the partners or trustees are not fit and proper persons to provide the financial services covered by the licence; or

(ii) that any of the senior managers of the partnership or the trust are not fit and proper persons to perform one or more functions as an officer of an entity that provides the financial services covered by the licence;

(d) that any person who controls the first person is not a fit and proper person to control an entity that provides the financial services covered by the licence;

(e) if a controller mentioned in paragraph (d) is a body corporate—that an officer of the controller is not a fit and proper person to perform one or more functions as an officer of an entity that controls an entity that provides the financial services covered by the licence;

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(f) if a controller mentioned in paragraph (d) is a partnership or the multiple trustees of a trust:
  (i) that any of the partners or trustees are not fit and proper persons to control an entity that provides the financial services covered by the licence; or
  (ii) that any of the senior managers of the partnership or the trust are not fit and proper persons to perform one or more functions as an officer of an entity that controls an entity that provides the financial services covered by the licence.

(2) In considering whether a person is fit and proper for a purpose mentioned in a paragraph of subsection (1), ASIC must have regard to the matters in section 913BB.

913BB Fit and proper person test—matters to which ASIC must have regard

(1) ASIC must have regard to the matters set out in subsection (2) (subject to Part VIIC of the *Crimes Act 1914*) for the purposes of applying any of the following provisions to a person:
  (a) a paragraph of subsection 913BA(1);
  (b) paragraph 920A(1)(d).

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

(2) The matters are as follows:
  (a) whether any of the following of the person has ever been suspended or cancelled:
    (i) an Australian financial services licence;
    (ii) an Australian credit licence, or a registration under the Transitional Act, within the meaning of the *National Consumer Credit Protection Act 2009*;
  (b) whether any of the following has ever been made against the person:
    (i) a banning order, or a disqualification order under Subdivision B of Division 8 of this Part;

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(ii) a banning order, or a disqualification order, under Part 2-4 of the *National Consumer Credit Protection Act 2009*;

(c) if the person is an individual—whether the person has ever been disqualified under this Act, or any other law of the Commonwealth or of a State or Territory, from managing corporations;

(d) whether the person has ever been banned from engaging in a credit activity (within the meaning of the *National Consumer Credit Protection Act 2009*) under a law of a State or Territory;

(e) whether the person has ever been linked to a refusal or failure to give effect to a determination made by AFCA;

(f) whether the person has ever:

(i) been a Chapter 5 body corporate or an insolvent under administration; or

(ii) if the person is a partnership—had a creditor's petition or a debtor's petition presented against it under Division 2 or 3 of Part IV of the *Bankruptcy Act 1966*;

(g) if the person is the multiple trustees of a trust—whether a trustee of the trust has ever been a Chapter 5 body corporate or an insolvent under administration;

(h) whether, in the last 10 years, the person has been convicted of an offence;

(i) any relevant information given to ASIC by a State or Territory, or an authority of a State or Territory, in relation to the person;

(j) any other matter prescribed by the regulations;

(k) any other matter ASIC considers relevant.

8 Subsection 914A(1)

After "this section", insert "and section 914B".

9 At the end of subsection 914A(3)

Add ", or imposing or varying conditions in accordance with an application under paragraph (2)(b)".

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10 At the end of Subdivision B of Division 4 of Part 7.6

Add:

914B ASIC may request information etc. in relation to an application for conditions to be varied

(1) This section applies if a financial services licensee applies under paragraph 914A(2)(b) for ASIC to:

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

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

However, this section does not apply in relation to a power to which paragraph 914A(5)(a) applies.

(2) Without limiting ASIC's power to refuse to grant the application, ASIC may refuse to grant the application if the requirement in section 913BA (fit and proper person test) is not satisfied in relation to the applicant and the licence as proposed to be varied.

ASIC may request information etc. from applicant

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

(a) information specified in the notice in relation to any matters that ASIC must have regard to for the purposes of deciding whether the requirement in section 913BA is satisfied as mentioned in subsection (2) of this section;

(b) an audit report, prepared by a suitably qualified person specified in the notice, in relation to matters that ASIC must have regard to for the purposes of deciding whether the requirement in section 913BA is satisfied as mentioned in subsection (2) of this section;

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

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

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

(4) To avoid doubt:

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(a) a notice under subsection (3), and the information, audit report or statement requested in the notice, may relate to any person mentioned in section 913BA in relation to the applicant and the licence as proposed to be varied; and
(b) subsection (6) applies in relation to such a request even if the applicant is unable to comply with the request.

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

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

(7) To avoid doubt, subsection (9) does not apply to an application that is taken to have been withdrawn under subsection (6).

(8) The regulations may make provision in relation to audit reports that applicants may be requested to lodge under paragraph (3)(b).

Applicant must be given hearing before refusal of application

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

11 Subsection 915B(1) (heading)

Omit "*a natural person*", substitute "*an individual*".

12 Subsection 915B(1)

Omit "a natural person", substitute "an individual".

13 After subsection 915B(1)

Insert:

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(1A) ASIC may also cancel an Australian financial services licence held by an individual, by giving written notice to the individual, if the individual does not provide a financial service covered by the licence before the end of 6 months after the licence is granted.

14 After paragraph 915B(2)(b)

Insert:

(ba) an officer of the partnership becomes an insolvent under administration; or

15 After subsection 915B(2)

Insert:

(2A) ASIC may also cancel an Australian financial services licence held by a partnership, by giving written notice to the partnership, if the partnership does not provide a financial service covered by the licence before the end of 6 months after the licence is granted.

16 Subsection 915B(3)

Omit "if the body", substitute "if".

17 Paragraph 915B(3)(a)

Before "ceases", insert "the body".

18 Paragraph 915B(3)(b)

Before "becomes", insert "the body".

19 After paragraph 915B(3)(b)

Insert:

(ba) an officer of the body becomes an insolvent under administration; or

20 Paragraphs 915B(3)(c), (caa) and (ca)

Before "is", insert "the body".

21 Paragraph 915B(3)(d)

Before "lodges", insert "the body".

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22 Paragraph 915B(3)(e)

Before "is liable", insert "the body".

23 After subsection 915B(3)

Insert:

(3A) ASIC may also cancel an Australian financial services licence held by a body corporate, by giving written notice to the body, if the body does not provide a financial service covered by the licence before the end of 6 months after the licence is granted.

24 Paragraph 915B(4)(b)

Omit "a natural person", substitute "an individual".

25 After paragraph 915B(4)(c)

Insert:

(ca) an officer of a trustee becomes an insolvent under administration; or

26 Subsection 915B(4) (note 1)

Omit "Note 1", substitute "Note".

27 Subsection 915B(4) (note 2)

Repeal the note.

28 At the end of section 915B

Add:

(4A) ASIC may also cancel an Australian financial services licence held by the trustees of a trust, by giving written notice to the trustees, if the trustees of the trust do not provide a financial service covered by the licence before the end of 6 months after the licence is granted.

29 Paragraph 915C(1)(b)

Repeal the paragraph, substitute:

(b) the requirement in section 913BA (fit and proper person test) is not satisfied in relation to the licensee and the licence;

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30 At the end of subsection 915C(1)

Add:

; (f) the application for the licence:

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

(ii) omitted a material matter;

(g) any information, audit report or statement lodged with ASIC in accordance with a request under subsection 913B(3) in relation to the application for the licence:

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

(ii) omitted a material matter;

(h) an application made by the licensee under paragraph 914A(2)(b) in relation to the licence:

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

(ii) omitted a material matter;

(i) any information, audit report or statement lodged with ASIC in accordance with a request under subsection 914B(3) in relation to an application made by the licensee under paragraph 914A(2)(b) in relation to the licence:

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

(ii) omitted a material matter.

31 Subsection 915C(2)

Repeal the subsection.

32 In the appropriate position in Chapter 10

Insert:

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Part 10.39—Transitional provisions relating to Schedule 3 to the Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020

1663 Definitions

In this Part:

amending Part means Part 1 of Schedule 3 to the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020*.

commencement day means the day the amending Part commences.

1664 Application—existing financial services licensee

(1) Subject to this section, the amendments made by the amending Part apply on and after the commencement day to a financial services licensee whose licence was granted before, on or after the commencement day.

(2) Section 912DA, as inserted by the amending Part, applies in relation to an entity that starts to control, or stops controlling, the licensee on or after the commencement day.

(3) In relation to an Australian financial services licence in force immediately before the commencement day, the period of 6 months referred to in subsection 912DB(1) or 915B(1A), (2A), (3A) or (4A), as inserted by the amending Part, begins at the start of the commencement day.

(4) The reference in paragraph 915C(1)(g), as inserted by the amending Part, to information lodged with ASIC in accordance with a request under subsection 913B(3) in relation to an application for a licence includes information provided in accordance with paragraph 913B(1)(ca) before the commencement day.

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1665 Application—applications made before commencement

(1) The following applications made before the commencement day, and not yet granted or refused at the start of the commencement day, are to be dealt with, on and after the commencement day, in accordance with this Act as amended by the amending Part:

(a) an application under section 913A for an Australian financial services licence;

(b) an application under paragraph 914A(2)(b) for conditions on an Australian financial services licence to be imposed, varied or revoked.

(2) A request for information under paragraph 913B(1)(ca) that was made before the commencement day and that has not, at the start of the commencement day, been complied with is taken, on and after the commencement day, to be a request for information under paragraph 913B(3)(a) as amended by the amending Part.

33 Schedule 3

Insert:

Subsection 912DA(1)	30 penalty units
Subsection 912DB(1)	30 penalty units

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Part 2—Australian credit licences

National Consumer Credit Protection Act 2009

34 Paragraphs 37(1)(c) and (d)

Repeal the paragraphs, substitute:

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

35 Subsections 37(2) and (3)

Repeal the subsections, substitute:

False, misleading or incomplete information

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

(a) the application for the licence, or any information, audit report or statement lodged with ASIC in accordance with subsection (4), was false in a material particular or materially misleading; or

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

36 Subsection 37(4) (heading)

Omit "*or audit report*", substitute "*etc.*".

37 Subsection 37(4)

Omit "either or both", substitute "any".

38 Paragraph 37(4)(a)

Omit "additional".

39 At the end of subsection 37(4)

Add:

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

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

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

40 Subsection 37(5)

Repeal the subsection, substitute:

(5) To avoid doubt:

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

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

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

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

(b) extend the time specified in the notice.

(7) If the applicant does not lodge with ASIC the information, audit report or statement requested by ASIC in a notice under subsection (4) within the specified time, the applicant is taken to have withdrawn the application.

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

41 After section 37

Insert:

37A Fit and proper person test

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

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

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

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

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

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

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

(e) if a controller mentioned in paragraph (d) is a body corporate—that an officer (within the meaning of the *Corporations Act 2001*) of the controller is not a fit and proper person to perform one or more functions as an officer of an entity (as defined by section 64A of that Act) that controls a person that engages in the credit activities authorised by the licence;

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

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

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

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

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

(1) ASIC must have regard to the matters set out in subsection (2) (subject to Part VIIC of the *Crimes Act 1914*) for the purposes of applying any of the following provisions to a person:
  (a) a paragraph of subsection 37A(1);
  (b) paragraph 80(1)(f).

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

(2) The matters are as follows:
  (a) whether any of the following of the person has ever been suspended or cancelled:
    (i) a licence, or a registration under the Transitional Act;
    (ii) an Australian financial services licence;
  (b) whether any of the following has ever been made against the person:
    (i) a banning order, or a disqualification order under Part 2-4;
    (ii) a banning order, or a disqualification order, under Division 8 of Part 7.6 of the *Corporations Act 2001*;
  (c) if the person is an individual—whether the person has ever been disqualified under the *Corporations Act 2001*, or any other law of the Commonwealth or of a State or Territory, from managing corporations;
  (d) whether the person has ever been banned from engaging in a credit activity under a law of a State or Territory;
  (e) whether the person has ever been linked to a refusal or failure to give effect to a determination made by AFCA (as defined in section 910C of the *Corporations Act 2001*);
  (f) if the person is not the multiple trustees of a trust—whether the person has ever been insolvent;

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(g) if the person is the multiple trustees of a trust—whether a trustee of the trust has ever been insolvent;
(h) whether, in the last 10 years, the person has been convicted of an offence;
(i) any relevant information given to ASIC by a State or Territory, or an authority of a State or Territory, in relation to the person;
(j) any other matter prescribed by the regulations;
(k) any other matter ASIC considers relevant.

42 Subsection 45(1)

Before "ASIC may", insert "Subject to section 46A,".

43 At the end of subsection 45(5)

Add ", or imposing or varying conditions in accordance with an application under paragraph (2)(b)".

44 At the end of Division 4 of Part 2-2

Add:

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

(1) This section applies if a licensee applies under paragraph 45(2)(b) for ASIC to:
(a) impose conditions, or additional conditions, on the licence; or
(b) vary or revoke conditions imposed on the licence.
However, this section does not apply in relation to a power to which paragraph 46(2)(a) applies.

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

ASIC may request information etc. from applicant

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

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

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

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

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

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

(4) To avoid doubt:

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

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

(5) ASIC may, by written notice to the applicant within the time specified in the notice:

(a) withdraw the request; or

(b) extend the time specified in the notice.

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

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

Applicant must be given hearing before refusal of application

(8) ASIC may only refuse to grant the application after giving the applicant an opportunity:

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

45 Subsection 49(1)

Omit all the words after "containing specified information", substitute:

about:
(a) the credit activities engaged in by the licensee or its representatives; or
(b) for the purposes of considering whether the requirement in section 37A (fit and proper person test) is satisfied in relation to the licensee and the licence—any matters mentioned in section 37B in relation to a person mentioned in a paragraph of subsection 37A(1).

46 At the end of Division 5 of Part 2-2

Add:

53A Obligation to notify ASIC of change in control

Requirement to notify ASIC of change in control

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

Strict liability offence

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

Criminal penalty: 30 penalty units.

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(3) Subsection (2) is an offence of strict liability.

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

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

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

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

Strict liability offence

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

Criminal penalty: 30 penalty units.

(3) Subsection (2) is an offence of strict liability.

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

47 Paragraph 54(1)(b)

Omit “does not engage, or ceases to engage,”, substitute “ceases to engage”.

48 Subparagraphs 54(1)(c)(ii) and (iii)

Omit “who performs duties in relation to credit activities”.

49 After subsection 54(1)

Insert:

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

50 Paragraph 55(1)(c)

Repeal the paragraph, substitute:

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

51 At the end of subsection 55(1)

Add:

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

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

(ii) omitted a material matter; or

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

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

(ii) omitted a material matter; or

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

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

(ii) omitted a material matter.

52 Subsections 55(2) and (3)

Repeal the subsections.

53 Paragraph 106(b)

After "subsection 37(4)", insert "or 46A(3)".

54 After subparagraph 243(1)(c)(i)

Insert:

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(ia) section 46A (which deals with when ASIC may grant an application for a variation of the conditions on a licence); or

National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009

55 In the appropriate position

Insert:

Schedule 13—Application and transitional provisions for Schedule 3 to the Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020

1 Definitions

In this Schedule:

amending Part means Part 2 of Schedule 3 to the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020*.

commencement day means the day the amending Part commences.

2 Application—existing licensee

(1) Subject to this item, the amendments made by the amending Part apply on and after the commencement day to a licensee whose licence was granted before, on or after the commencement day.

(2) Section 53A of the National Credit Act, as inserted by the amending Part, applies in relation to an entity that starts to control, or stops controlling, the licensee on or after the commencement day.

(3) In relation to a licence in force immediately before the commencement day, the period of 6 months referred to in subsection 53B(1) or 54(1A) of the National Credit Act, as inserted by the amending Part, begins at the start of the commencement day.

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(4) The reference in paragraph 55(1)(e) of the National Credit Act, as inserted by the amending Part, to information, an audit report or a statement lodged with ASIC in accordance with a request under subsection 37(4) of that Act in relation to an application for a licence includes such information provided in accordance with such a request before the commencement day.

3 Application—applications made before commencement

The following applications made before the commencement day, and not yet granted or refused at the start of the commencement day, are to be dealt with, on and after the commencement day, in accordance with the National Credit Act as amended by the amending Part:

(a) an application under section 36 of the National Credit Act for a licence;

(b) an application under paragraph 45(2)(b) of the National Credit Act for conditions on a licence to be imposed, varied or revoked.

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Part 3—False or misleading documents

Corporations Act 2001

56 Subsection 922M(4) (note)

Repeal the note, substitute:

Note: A person may commit an offence or contravene a civil penalty provision if the person gives false or misleading information (see section 1308 of this Act and section 137.1 of the *Criminal Code*).

57 Subsection 922N(1) (note)

Repeal the note, substitute:

Note: A person may commit an offence or contravene a civil penalty provision if the person gives false or misleading information (see section 1308 of this Act and section 137.1 of the *Criminal Code*).

58 Section 1308

Repeal the section, substitute:

1308B False or misleading statements about share capital

(1) A corporation must not advertise or publish:
  (a) a statement of the amount of its capital that is misleading; or
  (b) a statement in which the total of all amounts paid and unpaid on shares in the company is stated but the amount of paid up capital or the amount of any charge on uncalled capital is not stated.

(2) An offence based on subsection (1) is an offence of strict liability.

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

1308 False or misleading documents

Fault-based offence

(1) A person commits an offence if:
  (a) a document:
    (i) is required under or for the purposes of this Act; or

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(ii) is lodged with or submitted to ASIC; and

(b) the person:

(i) makes, or authorises the making of, a statement in the document; or

(ii) omits, or authorises the omission of, a matter or thing from the document; and

(c) the person knows that the document is materially false or misleading because of the statement or omission.

Note: For when a document is ***materially false or misleading***, see subsection (6).

(2) A person is not liable to be proceeded against for an offence in consequence of a regulation made under section 1364 as well as for an offence against subsection (1) of this section.

Strict liability offence—failure to take reasonable steps

(3) A person commits an offence of strict liability if:

(a) a document:

(i) is required under or for the purposes of this Act; or

(ii) is lodged with or submitted to ASIC; and

(b) the person:

(i) makes, or authorises the making of, a statement in the document; or

(ii) omits, or authorises the omission of, a matter or thing from the document; and

(c) the document is materially false or misleading because of the statement or omission; and

(d) the person did not take all reasonable steps to ensure that the document was not materially false or misleading because of the statement or omission.

Note 1: For when a document is ***materially false or misleading***, see subsection (6).

Note 2: For strict liability, see section 6.1 of the *Criminal Code*.

Civil penalty—knowledge or recklessness

(4) A person contravenes this subsection if:

(a) a document:

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(i) is required under or for the purposes of this Act; or
(ii) is lodged with or submitted to ASIC; and

(b) the person:
(i) makes, or authorises the making of, a statement in the document; or
(ii) omits, or authorises the omission of, a matter or thing from the document; and

(c) the person knows that, or is reckless as to whether, the document is materially false or misleading because of the statement or omission.

Note 1: For when a document is ***materially false or misleading***, see subsection (6).

Note 2: This subsection is a civil penalty provision (see section 1317E).

Civil penalty—failure to take reasonable steps

(5) A person contravenes this subsection if:
(a) a document:
(i) is required under or for the purposes of this Act; or
(ii) is lodged with or submitted to ASIC; and

(b) the person:
(i) makes, or authorises the making of, a statement in a document; or
(ii) omits, or authorises the omission of, a matter or thing from a document; and

(c) the document is materially false or misleading because of the statement or omission; and

(d) the person did not take all reasonable steps to ensure that the document was not materially false or misleading because of the statement or omission.

Note 1: For when a document is ***materially false or misleading***, see subsection (6).

Note 2: This subsection is a civil penalty provision (see section 1317E).

When a document is materially false or misleading

(6) For the purposes of this section, a document is ***materially false or misleading*** if:

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(a) the document includes a statement that:
  (i) is false in a material particular or materially misleading; or
  (ii) is based on information that is false in a material particular or materially misleading, or has omitted from it a matter or thing the omission of which renders the document materially misleading; or
(b) a matter or thing is omitted from the document and, without the matter or thing, the document is false in a material particular or materially misleading.

Other interpretive provisions

(7) For the purposes of this section, a person who votes in favour of a resolution approving, or who otherwise approves, a document is taken to have authorised:
  (a) the making of any statement in the document; and
  (b) the omission of any matter or thing from the document.

(8) For the purposes of this section, a statement, report or other document that:
  (a) relates to affairs of a company or of a subsidiary of a company; and
  (b) is attached to or included with a report of the directors provided under section 314 to members of the company or laid before the company at an annual general meeting of the company;

  is taken to be part of the report referred to in paragraph (b) of this subsection, even if it is not otherwise required by this Act to be laid before the company in general meeting.

(9) For the purposes of this section:
  (a) a notice under subsection 708AA(2), 708A(5), 1012DAA(2) or 1012DA(5) is taken to be a notice required for the purposes of this Act; and
  (b) a notice under subsection 708AA(2), 708A(5), 1012DAA(2) or 1012DA(5) is taken to be misleading in a material respect if it fails to comply with paragraph 708AA(7)(d), 708A(6)(e), 1012DAA(7)(e) or 1012DA(6)(f).

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59 Subsection 1317E(3) (after table item dealing with subsections 1211B(1) and (2))

Insert:

subsections 1308(4) and (5)	false or misleading documents	uncategorised

60 Schedule 3 (table items dealing with subsections 1308(1), (2), (4) and (8))

Repeal the items, substitute:

Subsection 1308B(1)	20 penalty units
Subsection 1308(1)	5 years imprisonment
Subsection 1308(3)	20 penalty units

National Consumer Credit Protection Act 2009

61 Section 225

Repeal the section, substitute:

225 False or misleading documents

Fault-based offence

(1) A person commits an offence if:
  (a) a document:
    (i) is required under or for the purposes of this Act; or
    (ii) is lodged with or submitted to ASIC under or for the purposes of this Act; and
  (b) the person:
    (i) makes, or authorises the making of, a statement in the document; or
    (ii) omits, or authorises the omission of, a matter or thing from the document; and

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(c) the person knows that the document is materially false or misleading because of the statement or omission.

Criminal penalty: 5 years imprisonment.

Note: For when a document is ***materially false or misleading***, see subsection (5).

Strict liability offence—failure to take reasonable steps

(2) A person commits an offence of strict liability if:
(a) a document:
(i) is required under or for the purposes of this Act; or
(ii) is lodged with or submitted to ASIC under or for the purposes of this Act; and
(b) the person:
(i) makes, or authorises the making of, a statement in the document; or
(ii) omits, or authorises the omission of, a matter or thing from the document; and
(c) the document is materially false or misleading because of the statement or omission; and
(d) the person did not take all reasonable steps to ensure that the document was not materially false or misleading because of the statement or omission.

Criminal penalty: 20 penalty units.

Note 1: For when a document is ***materially false or misleading***, see subsection (5).

Note 2: For strict liability, see section 6.1 of the *Criminal Code*.

Civil penalty—knowledge or recklessness

(3) A person contravenes this subsection if:
(a) a document:
(i) is required under or for the purposes of this Act; or
(ii) is lodged with or submitted to ASIC under or for the purposes of this Act; and
(b) the person:

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(i) makes, or authorises the making of, a statement in the document; or
(ii) omits, or authorises the omission of, a matter or thing from the document; and

(c) the person knows that, or is reckless as to whether, the document is materially false or misleading because of the statement or omission.

Civil penalty: 5,000 penalty units.

Note: For when a document is ***materially false or misleading***, see subsection (5).

Civil penalty—failure to take reasonable steps

(4) A person contravenes this subsection if:

(a) a document:
(i) is required under or for the purposes of this Act; or
(ii) is lodged with or submitted to ASIC under or for the purposes of this Act; and

(b) the person:
(i) makes, or authorises the making of, a statement in a document; or
(ii) omits, or authorises the omission of, a matter or thing from a document; and

(c) the document is materially false or misleading because of the statement or omission; and

(d) the person did not take all reasonable steps to ensure that the document was not materially false or misleading because of the statement or omission.

Civil penalty: 5,000 penalty units.

Note: For when a document is ***materially false or misleading***, see subsection (5).

When a document is materially false or misleading

(5) For the purposes of this section, a document is ***materially false or misleading*** if:

(a) the document includes a statement that:

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

(ii) is based on information that is false in a material particular or materially misleading, or has omitted from it a matter or thing the omission of which renders the document materially misleading; or

(b) a matter or thing is omitted from the document and, without the matter or thing, the document is false in a material particular or materially misleading.

Authorisations

(6) For the purposes of this section, a person who votes in favour of a resolution approving, or who otherwise approves, a document is taken to have authorised:

(a) the making of any statement in the document; and

(b) the omission of any matter or thing from the document.

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Schedule 4—Banning orders

Part 1—Corporations amendments

Corporations Act 2001

1 Section 9

Insert:

banning order means an order made under subsection 920A(1).

2 Section 9 (definition of *control*)

Repeal the definition, substitute:

control:

(a) unless paragraph (b) applies—has the meaning given by section 50AA; and

(b) when used in Part 7.6—has the meaning given by section 910B.

3 Section 9

Insert:

linked to a refusal or failure to give effect to a determination made by AFCA has the meaning given by section 910C.

4 Section 910A (definition of *control*)

Repeal the definition.

5 At the end of Division 1 of Part 7.6

Add:

910B Meaning of *control*

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

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

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

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

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

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

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

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

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

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

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

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

910C Meaning of *linked to a refusal or failure to give effect to a determination made by AFCA*

(1) An entity is ***linked to a refusal or failure to give effect to a determination made by AFCA*** if:

(a) a complaint is made under the AFCA scheme; and

(b) AFCA makes a determination relating to the complaint; and

(c) AFCA becomes aware that a party to the complaint (the ***primary entity***) may have refused or failed to give effect to the determination; and

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(d) AFCA gives particulars of the refusal or failure in accordance with subsection 1052E(1); and

(e) the first-mentioned entity is the primary entity or is covered by subsection (2) of this section.

(2) This subsection covers an entity if, at any time during the period starting when AFCA makes the determination and ending when AFCA so gives the particulars, the entity is:

(a) an officer of the primary entity; or

(b) if the primary entity is an individual—substantially or significantly involved in the management of:

(i) a financial services business carried on by the primary entity; or

(ii) credit activities (within the meaning of the *National Consumer Credit Protection Act 2009*) engaged in by the primary entity; or

(c) if the primary entity is the multiple trustees of a trust—one of the trustees of the trust.

6 Before subsection 920A(1)

Insert:

Making a banning order

7 Subsection 920A(1)

Omit "make a banning order against a person, by giving written notice to the person,", substitute ", in writing, make one or more orders (***banning orders***) against a person".

8 Paragraph 920A(1)(bb)

Before "an insolvent under administration", insert "a Chapter 5 body corporate or".

9 Paragraphs 920A(1)(d) and (da)

Repeal the paragraphs, substitute:

(d) ASIC has reason to believe that the person is not a fit and proper person to:

(i) provide one or more financial services; or

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(ii) perform one or more functions as an officer of an entity that carries on a financial services business; or

(iii) control an entity that carries on a financial services business; or

(da) ASIC has reason to believe that the person is not adequately trained, or is not competent, to:

(i) provide one or more financial services; or

(ii) perform one or more functions as an officer of an entity that carries on a financial services business; or

(iii) control an entity that carries on a financial services business; or

10 At the end of subsection 920A(1)

Add:

; or (j) the person has, at least twice, been linked to a refusal or failure to give effect to a determination made by AFCA relating to a complaint that relates to:

(i) a financial services business; or

(ii) credit activities (within the meaning of the *National Consumer Credit Protection Act 2009*); or

(k) subsection (1C) applies to the person in relation to 2 or more corporations.

Note: To work out whether a person has been linked as described in paragraph (j), see section 910C.

11 Subsection 920A(1A)

Repeal the subsection, substitute:

When a person is not a fit and proper person

(1A) For the purposes of paragraph (1)(d), ASIC must have regard to the matters in section 913BB.

12 Before subsection 920A(1B)

Insert:

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When a person contravenes a financial services law

13 After subsection 920A(1B)

Insert:

When a person has been an officer of a corporation unable to pay its debts

(1C) This subsection applies to a person in relation to a corporation if, within the last 7 years:

(a) the person was an officer of the corporation when the corporation was:

(i) carrying on a financial services business; or

(ii) engaging in credit activities (within the meaning of the *National Consumer Credit Protection Act 2009*); and

(b) the corporation was wound up either:

(i) while the person was an officer of the corporation; or

(ii) within the 12 months after the person ceased to be an officer of the corporation; and

(c) a liquidator lodged a report under subsection 533(1) (including that subsection as applied by section 526-35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation's inability to pay its debts.

Person to be given an opportunity to be heard

14 Subsection 920A(3)

Omit "the banning order", substitute "a banning order".

15 At the end of section 920A

Add:

Copy of banning order to be given to the person

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

16 Section 920B (heading)

Repeal the heading, substitute:

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920B What a banning order prohibits

17 Subsections 920B(1) and (2)

Repeal the subsections, substitute:

(1) A banning order made against a person may specify that the person is prohibited from doing one or more of the following:
  (a) providing any financial services;
  (b) providing specified financial services in specified circumstances or capacities;
  (c) controlling, whether alone or in concert with one or more other entities, an entity that carries on a financial services business;
  (d) performing any function involved in the carrying on of a financial services business (including as an officer, manager, employee, contractor or in some other capacity);
  (e) performing specified functions involved in the carrying on of a financial services business.

(2) The banning order may specify that a particular prohibition specified in the order applies against the person:
  (a) if the sole ground for the banning order is because paragraph 920A(1)(k) applies—for a specified period of up to 5 years; or
  (b) otherwise—either permanently or for a specified period.

Note: This subsection applies separately to each prohibition specified in the order.

18 Paragraph 921A(2)(a)

Repeal the paragraph, substitute:

(a) one or more orders disqualifying the person, permanently or for a specified period, from doing one or more of the following:
  (i) providing any financial services;
  (ii) providing specified financial services in specified circumstances or capacities;
  (iii) controlling, whether alone or in concert with one or more other entities, an entity that carries on a financial services business;

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(iv) performing any function involved in the carrying on of a financial services business (including as an officer, manager, employee, contractor or in some other capacity);

(v) performing specified functions involved in the carrying on of a financial services business; or

19 Paragraph 1200G(6)(c)

Omit "under section 920A".

20 Paragraph 1317P(1)(e)

Repeal the paragraph, substitute:

(e) a banning order, or an order by the Court under section 921A (about disqualification by the Court), has been made against the person.

21 Paragraphs 1349(1)(j), (3)(h) and (4)(e)

Omit "under section 920A of this Act".

22 In the appropriate position in Chapter 10

Insert:

Part 10.40—Transitional provisions relating to Schedule 4 to the Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020

1666 Application—conduct etc. relevant to new banning and disqualification orders

When making either of the following orders at or after the commencement of Part 1 of Schedule 4 to the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020*:

(a) a banning order;

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(b) a disqualification order described in paragraph 921A(2)(a) of this Act;

regard may be had to acts, omissions, states of affairs or matters before, at or after that commencement.

1667 Transitional—existing banning and disqualification orders

(1) An order made under subsection 920A(1), that is in force immediately before the commencement of Part 1 of Schedule 4 to the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020*, continues in force (and may be dealt with) as if it had been made under that subsection as amended by that Act.

(2) An order described in paragraph 921A(2)(a) that:

(a) was made under subsection 921A(2); and

(b) is in force immediately before the commencement of Part 1 of Schedule 4 to the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020*;

continues in force (and may be dealt with) as if it had been made under that subsection as amended by that Act.

(3) Section 920D applies to an order covered by subsection (1) of this section as if the words "because of a change in any of the circumstances based on which ASIC made the order" were omitted from subsection 920D(1).

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Part 2—Consumer credit amendments

National Consumer Credit Protection Act 2009

23 Subsection 5(1) (definition of *banning order*)

Repeal the definition, substitute:

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

24 Subsection 5(1)

Insert:

control has the meaning given by section 16A.

25 After section 16

Insert:

16A Meaning of *control*

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

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

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

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

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

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

(ii) any practice or pattern of behaviour affecting the body corporate's financial or operating policies (whether or

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not it involves a breach of an agreement or a breach of trust).

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

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

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

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

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

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

26 Section 79

Repeal the section, substitute:

79 Guide to this Part

This Part is about banning or disqualifying persons from:

(a) engaging in credit activities; or

(b) controlling others who engage in credit activities; or

(c) performing some or any functions involved in others engaging in credit activities.

The bans are orders made by ASIC under Division 2.

The disqualifications are orders made by the court under Division 3.

27 Before subsection 80(1)

Insert:

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Making a banning order

28 Subsection 80(1)

Omit "make a banning order", substitute ", in writing, make one or more orders (***banning orders***)".

29 Paragraph 80(1)(b)

Omit "for a person other than the trustees of a trust—".

30 Paragraph 80(1)(f)

Repeal the paragraph, substitute:

(f) if ASIC has reason to believe that the person is not a fit and proper person to:
  (i) engage in one or more credit activities; or
  (ii) perform one or more functions as an officer (within the meaning of the *Corporations Act 2001*) of another person who engages in credit activities; or
  (iii) control another person who engages in credit activities; or

(fa) if ASIC has reason to believe that the person is not adequately trained, or is not competent, to:
  (i) engage in one or more credit activities; or
  (ii) perform one or more functions as an officer (within the meaning of the *Corporations Act 2001*) of another person who engages in credit activities; or
  (iii) control another person who engages in credit activities; or

(fb) if the person has, at least twice, been linked to a refusal or failure to give effect to a determination made by AFCA (as defined in section 910C of the *Corporations Act 2001*) relating to a complaint that relates to:
  (i) credit activities; or
  (ii) a financial services business (within the meaning of the *Corporations Act 2001*); or

(fc) if subsection (3) applies to the person in relation to 2 or more corporations; or

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31 Subsections 80(2) and (3)

Repeal the subsections, substitute:

When a person is not a fit and proper person

(2) For the purposes of paragraph (1)(f), ASIC must have regard to the matters in section 37B.

When a person has been an officer of a corporation unable to pay its debts

(3) This subsection applies to a person in relation to a corporation if, within the last 7 years:

(a) the person was an officer (within the meaning of the *Corporations Act 2001*) of the corporation when the corporation was:

(i) engaging in credit activities; or

(ii) carrying on a financial services business (within the meaning of the *Corporations Act 2001*); and

(b) the corporation was wound up either:

(i) while the person was such an officer of the corporation; or

(ii) within the 12 months after the person ceased to be such an officer of the corporation; and

(c) a liquidator lodged a report under subsection 533(1) of the *Corporations Act 2001* (including that subsection as applied by section 526-35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation's inability to pay its debts.

Person to be given an opportunity to be heard

32 Paragraphs 80(5)(a) and (6)(a)

Omit "the banning order against the person", substitute "a banning order against a person".

33 Before subsection 80(7)

Insert:

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Copy of banning order to be given to the person

34 Subsection 80(7)

Omit "the banning order", substitute "a banning order".

35 Section 81 (heading)

Repeal the heading, substitute:

81 What a banning order prohibits

36 Subsections 81(1) and (2)

Repeal the subsections, substitute:

(1) A banning order made against a person may specify that the person is prohibited from doing one or more of the following:
  (a) engaging in any credit activities;
  (b) engaging in specified credit activities in specified circumstances or capacities;
  (c) controlling, whether alone or in concert with one or more other entities (as defined by section 64A of the *Corporations Act 2001*), another person who engages in credit activities;
  (d) performing any function involved in the engaging in of credit activities (including as an officer (within the meaning of the *Corporations Act 2001*), manager, employee, contractor or in some other capacity);
  (e) performing specified functions involved in the engaging in of credit activities.

(2) The banning order may specify that a particular prohibition specified in the order applies against the person:
  (a) if the sole ground for the banning order is because paragraph 80(1)(fc) applies—for a specified period of up to 5 years; or
  (b) otherwise—either permanently or for a specified period.

Note: This subsection applies separately to each prohibition specified in the order.

37 Subsection 86(1)

Omit "an order", substitute "one or more orders".

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38 Paragraph 86(2)(a)

Repeal the paragraph, substitute:

(a) one or more orders disqualifying the person, permanently or for a specified period, from doing one or more of the following:

(i) engaging in any credit activities;

(ii) engaging in specified credit activities in specified circumstances or capacities;

(iii) controlling, whether alone or in concert with one or more other entities (as defined by section 64A of the *Corporations Act 2001*), another person who engages in credit activities;

(iv) performing any function involved in the engaging in of credit activities (including as an officer (within the meaning of the *Corporations Act 2001*), manager, employee, contractor or in some other capacity);

(v) performing specified functions involved in the engaging in of credit activities; or

National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009

39 In the appropriate position

Insert:

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Schedule 14—Application and transitional provisions for Schedule 4 to the Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020

1 Application—conduct etc. relevant to new banning and disqualification orders

When making either of the following orders at or after the commencement of Part 2 of Schedule 4 to the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020*:

(a) a banning order;

(b) a disqualification order described in paragraph 86(2)(a) of the National Credit Act;

regard may be had to acts, omissions, states of affairs or matters before, at or after that commencement.

2 Transitional—existing banning and disqualification orders

(1) An order made under subsection 80(1) of the National Credit Act, that is in force immediately before the commencement of Part 2 of Schedule 4 to the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020*, continues in force (and may be dealt with) as if it had been made under that subsection as amended by that Part.

(2) An order described in paragraph 86(2)(a) of the National Credit Act that:

(a) was made under subsection 86(2) of that Act; and

(b) is in force immediately before the commencement of Part 2 of Schedule 4 to the *Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2019 Measures)) Act 2020*;

continues in force (and may be dealt with) as if it had been made under that subsection as amended by that Part.

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(3) Section 83 of the National Credit Act applies to an order covered by subitem (1) as if the words "because of a change in any of the circumstances based on which ASIC made the order" were omitted from subsection 83(1) of that Act.

[*Minister's second reading speech made in—*
House of Representatives on 28 November 2019
Senate on 5 February 2020]

(229/19)

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