



# **National Consumer Credit Protection Act 2009**

**No. 134, 2009**

**An Act relating to credit, and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)



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# **National Consumer Credit Protection Act 2009**

**No. 134, 2009**

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**An Act relating to credit, and for related purposes**

*[Assented to 15 December 2009]*

The Parliament of Australia enacts:

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*National Consumer Credit Protection Act 2009 No. 134, 2009 1*

Section 1

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## Chapter 1—Introduction

### Part 1-1—Introduction

#### 1 Short title

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

#### 2 Commencement

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

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

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

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

### **3 The National Credit Code**

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

## **Part 1-2—Definitions**

### **Division 1—Introduction**

#### **4 Guide to this Part**

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

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

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

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



## **Division 2—The Dictionary**

### **5 The Dictionary**

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

*acts as an intermediary*: see section 9.

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

*adverse publicity order*: see section 182.

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

*affidavit* includes affirmation.

*ancillary offence*, in relation to another offence, means:

- (a) an offence against section 6 of the *Crimes Act 1914*; or
- (b) an ancillary offence within the meaning of the *Criminal Code*;

that relates to the other offence.

*appeal* includes:

- (a) an application for a new trial; and
- (b) proceedings to review or call in question the proceedings, decision or jurisdiction of a court or judge.

*approved external dispute resolution scheme*: see section 11.

*APRA* means the Australian Prudential Regulation Authority.

*ASIC* means the Australian Securities and Investments Commission.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**book** includes:

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

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

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

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

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

**coastal sea**:

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

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

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

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

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

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

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

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

**credit activity**: see section 6.

**credit assistance**: see section 8.

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

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

**credit legislation** means:

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

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

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

**credit registers**: see section 213.

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

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

**credit service**: see section 7.

**criminal procedure**: see section 205.

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

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

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

**document registers**: see section 219.

**engage in conduct** means:

- (a) do an act; or
- (b) omit to perform an act.

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

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

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

**financial records**: see subsection 88(2).

**financial year**: see subsection 100(6).

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**function** includes a duty.

**give:**

- (a) when used in Chapter 6 (which deals with compliance and enforcement) in relation to a document—has a meaning affected by section 314; and
- (b) when used in relation to information, includes:
  - (i) explaining or stating a matter; and
  - (ii) identifying a person, matter or thing; and
  - (iii) disclosing information; and
  - (iv) answering a question.

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

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

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

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

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

**insolvent** means:

- (a) in the case of a natural person—a person who is an insolvent under administration (within the meaning of the *Corporations Act 2001*); or
- (b) in the case of a body corporate—a body corporate that is an externally-administered body corporate (within the meaning of the *Corporations Act 2001*); or
- (c) in the case of a partnership—a partnership against which a creditor's petition or a debtor's petition is presented under Division 2 or 3 of Part IV of the *Bankruptcy Act 1966*.

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

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

- (a) has aided, abetted, counselled or procured the contravention; or
- (b) has induced the contravention, whether by threats or promises or otherwise; or
- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- (d) has conspired with others to effect the contravention.

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

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

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

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

***lessee*** means the lessee under a consumer lease.

***lessor*** means the lessor under a consumer lease, and includes a person who is a lessor because of section 10.

***licence*** means an Australian credit licence.

***licensee*** means a person who holds a licence.

***licensing anniversary***: see subsection 53(7).

***lodge with ASIC***: see section 216.

***lower court*** means:

- (a) the Federal Magistrates Court; or
- (b) a court of a State or Territory that is not a superior court.

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

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

**misleading**: see section 13.

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

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

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

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

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

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

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

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

**power** includes an authority.

**premises** includes:

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

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

**proceedings**:



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

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

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

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

***referred credit matter***: see subsection 20(1).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (a) the Federal Court;

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

**Territory** means:

- (a) the Australian Capital Territory; or
- (b) the Northern Territory; or
- (c) the Jervis Bay Territory;

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

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

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

**transfer matter**: see section 191.

**transferring court**: see section 191.

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

**tribunal** means:

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

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

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

- (a) for a representative who is an employee of the person or of a related body corporate of the person—the conduct is within the scope of the employee's employment; or
- (b) for a representative who is a director of the person or of a related body corporate of the person—the conduct is within the scope of the director's duties as director; or
- (c) for a representative who is a credit representative of the person—the conduct is within the scope of the authorisation

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of the credit representative under subsection 64(1) or 65(1);  
or

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

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

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

- (a) a record of the examination:
- (i) that is made in writing; or
  - (ii) as reduced to writing; or
- (b) a part of such a record.
- (2) In this Act (other than the National Credit Code), a reference to a provision is a reference to a provision of this Act, unless the contrary intention appears.

## **Division 3—Definitions relating to the meaning of credit activity**

### **6 Meaning of *credit activity***

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

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

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**Meaning of *credit activity***

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<b>Item</b>	<b>Topic</b>	<b>A person engages in a <i>credit activity</i> if:</b>
		guarantee or proposed guarantee, in relation to the guarantee or proposed guarantee (whether the person does so on the person's own behalf or on behalf of the other person); or
6	prescribed activities	the person engages in an activity prescribed by the regulations in relation to credit, being credit the provision of which the National Credit Code applies to, or would apply to if the credit were provided.

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

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

**7 Meaning of *credit service***

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

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

**8 Meaning of *credit assistance***

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

- (a) suggests that the consumer apply for a particular credit contract with a particular credit provider; or
- (b) suggests that the consumer apply for an increase to the credit limit of a particular credit contract with a particular credit provider; or
- (c) suggests that the consumer remain in a particular credit contract with a particular credit provider; or
- (d) assists the consumer to apply for a particular credit contract with a particular credit provider; or

- (e) assists the consumer to apply for an increase to the credit limit of a particular credit contract with a particular credit provider; or
- (f) suggests that the consumer apply for a particular consumer lease with a particular lessor; or
- (g) suggests that the consumer remain in a particular consumer lease with a particular lessor; or
- (h) assists the consumer to apply for a particular consumer lease with a particular lessor.

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

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

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

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

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

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

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

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

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

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



## **Division 4—Other definitions**

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

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

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

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

### **13 Meaning of *misleading***

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

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

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

- (1) This Act (other than the National Credit Code) applies to a partnership as if the partnership were a person, but it applies with the following changes:
- (a) obligations that would be imposed on the partnership are imposed instead on each partner, but may be discharged by any of the partners;
  - (b) any contravention of this Act (other than the National Credit Code) that would otherwise be a contravention by the partnership is taken (whether for the purposes of criminal or civil liability) to have been a contravention by each partner who:
    - (i) aided, abetted, counselled or procured the relevant act or omission; or
    - (ii) was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the partner).

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

- (2) For the purposes of this Act (other than the National Credit Code), a change in the composition of a partnership does not affect the continuity of the partnership.
- (3) Subsections (1) and (2) have effect subject to:
- (a) an express or implied contrary intention in a provision of this Act (other than the National Credit Code); and
  - (b) the regulations, which may exclude or modify the effect of those subsections in relation to specified provisions.

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

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

- (b) a single trustee who was a trustee of the trust at a time when it had 2 or more trustees.
- (2) Subject to subsections (3) and (4), during the period this Act (other than the National Credit Code) applies to the trust as if the trustee or trustees of the trust from time to time during the period were a single person (the *notional person*) that remained the same for the duration of that period.
- Note: So, for example, a licence granted under this Act during the period to the trustees of the trust will continue in force, despite a change in the persons who are the trustees.
- (3) If, during the period or any part of the period, the trust has 2 or more trustees, this Act (other than the National Credit Code) applies to the trustees as referred to in subsection (2), but it applies with the following changes:
- (a) obligations that would be imposed on the notional person are imposed instead on each trustee, but may be discharged by any of the trustees;
  - (b) any contravention of this Act (other than the National Credit Code) that would otherwise be a contravention by the notional person is taken (whether for the purposes of criminal or civil liability) to have been a contravention by each trustee who:
    - (i) aided, abetted, counselled or procured the relevant act or omission; or
    - (ii) was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the trustee).

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

- (4) If, during the period or any part of the period, the trust has only one trustee, this Act (other than the National Credit Code) applies to the trustee as referred to in subsection (2), but it applies with the following changes:
- (a) obligations that would be imposed on the notional person are imposed instead on that single trustee;
  - (b) any contravention of this Act (other than the National Credit Code) that would otherwise be a contravention by the

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

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

**16 Qualified privilege**

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

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

### **Division 1—Introduction**

#### **17 Guide to this Part**

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

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

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

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

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

#### *Application in a referring State*

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

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

#### *Application in a Territory*

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

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

#### *Application outside Australia*

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

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

*Application in a non-referring State*

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

## **19 Meaning of *referring State***

*Reference of matters by State Parliament to Commonwealth Parliament*

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

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

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

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

*Reference covering amendments of this Act or the Transitional Act*

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

*Effect of termination of reference*

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



*Definitions*

(8) In this section:

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

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

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

***referred provisions*** means:

- (a) the initial National Credit Act; and
- (b) the initial Transitional Act;

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

## **20 Meaning of referred credit matter**

- (1) ***Referred credit matter*** means a matter relating to either of the following:
  - (a) credit, being credit the provision of which would be covered by the expression “provision of credit to which this Code applies” in the initial National Credit Code;
  - (b) consumer leases, being consumer leases each of which would be covered by the expression “consumer lease to which Part 11 applies” in the initial National Credit Code.
- (2) ***Initial National Credit Code*** means Schedule 1 to the initial National Credit Act.

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

*Application in this jurisdiction*

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

*Geographical coverage of “this jurisdiction”*

- (2) **This jurisdiction** means the geographical area that consists of:
- (a) each referring State (including its coastal sea); and
  - (b) each Territory (including its coastal sea).
- (3) Throughout this Act and the Transitional Act, **this jurisdiction** therefore consists of either:
- (a) if all of the States are referring States—the whole of Australia; or
  - (b) if one or more States are not referring States—Australia (other than any State that is not a referring State).

*Application outside this jurisdiction*

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

*Application in non-referring States*

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

*Residence, place of formation etc.*

- (6) Each provision of this Act and the Transitional Act applies, according to its tenor, to:
- (a) natural persons whether:
    - (i) resident in this jurisdiction or not; and
    - (ii) resident in Australia or not; and

- (iii) Australian citizens or not; and
- (b) all bodies corporate and unincorporated bodies whether:
  - (i) formed or carrying on a business in this jurisdiction or not; and
  - (ii) formed or carrying on a business in Australia or not.

## **22 When Acts bind Crown**

- (1) This Act (other than the National Credit Code) and the Transitional Act do not bind the Crown in any of its capacities.
- (2) Despite subsection (1), the regulations may provide that this Act (other than the National Credit Code) and the Transitional Act, or specified provisions of this Act (other than the National Credit Code) or the Transitional Act, bind either or both of the following in circumstances (if any) prescribed by the regulations:
  - (a) the Crown in right of the Commonwealth;
  - (b) the Crown in all of its other capacities.
- (3) The National Credit Code binds the Crown in each of its capacities.
- (4) This Act and the Transitional Act do not make the Crown liable to be prosecuted for an offence or to any pecuniary penalty.

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

### **23 Concurrent operation intended**

- (1) This Act and the Transitional Act (the *Commonwealth credit legislation*) are not intended to exclude or limit the concurrent operation of any law of a State or Territory.
- (2) If:
  - (a) an act or omission of a person is both an offence against the Commonwealth credit legislation and an offence against the law of a State or Territory; and
  - (b) the person is convicted of either of those offences;the person is not liable to be convicted of the other of those offences.
- (3) This section does not apply to a law of a State or Territory if there is a direct inconsistency between that law and the Commonwealth credit legislation.

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

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

- (1) Subsection (2) applies if a provision of a law of a referring State or a Territory declares a matter to be an excluded matter for the purposes of this section in relation to:
  - (a) the whole of the Commonwealth credit legislation; or
  - (b) a specified provision of the Commonwealth credit legislation;or
  - (c) the Commonwealth credit legislation other than a specified provision; or
  - (d) the Commonwealth credit legislation otherwise than to a specified extent.
- (2) By force of this subsection:

- (a) none of the provisions of the Commonwealth credit legislation (other than this section) applies in or in relation to the State or Territory with respect to the matter if the declaration is one to which paragraph (1)(a) applies; and
  - (b) the specified provision of the Commonwealth credit legislation does not apply in or in relation to the State or Territory with respect to the matter if the declaration is one to which paragraph (1)(b) applies; and
  - (c) the provisions of the Commonwealth credit legislation (other than this section and the specified provisions) do not apply in or in relation to the State or Territory with respect to the matter if the declaration is one to which paragraph (1)(c) applies; and
  - (d) the provisions of the Commonwealth credit legislation (other than this section and otherwise than to the specified extent) do not apply in or in relation to the State or Territory with respect to the matter if the declaration is one to which paragraph (1)(d) applies.
- (3) Subsection (2) does not apply to the declaration to the extent to which the regulations provide that that subsection does not apply to that declaration.

## **25 Avoiding direct inconsistency between Commonwealth and State and Territory laws**

*This section overrides other Commonwealth credit legislation*

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

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

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

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

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*When this section applies to a State or Territory law*

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

*Effect of displacement provision*

- (4) The Commonwealth provision does not:
- (a) prohibit the doing of an act; or
  - (b) impose a liability (whether civil or criminal) for doing an act;
- if the displacement provision specifically permits, authorises or requires the doing of that act.
- (5) The Commonwealth provision does not operate in or in relation to the State or Territory to the extent necessary to ensure that no inconsistency arises between:
- (a) the Commonwealth provision; and
  - (b) the displacement provision to the extent to which the displacement provision would, apart from this subsection, be inconsistent with the Commonwealth provision.

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

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

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

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## **26 Regulations to deal with interaction between laws**

- (1) The regulations may modify the operation of the Commonwealth credit legislation so that:
  - (a) provisions of the Commonwealth credit legislation do not apply to a matter that is dealt with by a law of a referring State or a Territory specified in the regulations; or
  - (b) no inconsistency arises between the operation of a provision of the Commonwealth credit legislation and the operation of a provision of a law of a referring State or a Territory specified in the regulations.
- (2) Without limiting subsection (1), regulations made for the purposes of that subsection may provide that a provision of the Commonwealth credit legislation:
  - (a) does not apply to:
    - (i) a person specified in the regulations; or
    - (ii) a body specified in the regulations; or
    - (iii) circumstances specified in the regulations; or
    - (iv) a person or body specified in the regulations in the circumstances specified in the regulations; or
  - (b) does not prohibit an act to the extent to which the prohibition would otherwise give rise to an inconsistency with a law of a referring State or a Territory; or
  - (c) does not require a person to do an act to the extent to which the requirement would otherwise give rise to an inconsistency with a law of a referring State or a Territory; or
  - (d) does not authorise a person to do an act to the extent to which the conferral of that authority on the person would otherwise give rise to an inconsistency with a law of a referring State or a Territory; or
  - (e) does not impose an obligation on a person to the extent to which complying with that obligation would require the person not to comply with an obligation imposed on the person under a law of a referring State or a Territory; or
  - (f) authorises a person to do something for the purposes of the Commonwealth credit legislation that the person:

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



## **Chapter 2—Licensing of persons who engage in credit activities**

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

#### **Division 1—Introduction**

##### **27 Guide to this Part**

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

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

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

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

### **28 Application of this Division**

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

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

*Prohibition on engaging in credit activities without a licence*

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

Civil penalty: 2,000 penalty units.

*Offence*

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

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

*Defences*

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

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

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

- (4) For the purposes of subsections (1) and (2), it is a defence if:
  - (a) the person engages in the credit activity on behalf of another person (the *principal*); and
  - (b) the person is a representative of the principal; and
  - (c) the person's conduct in engaging in the credit activity is within the authority of the principal; and
  - (d) the principal is exempted from subsections (1) and (2) under paragraph 109(1)(a), 109(3)(a) or 110(a).

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

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

**30 Prohibitions on holding out and advertising etc.**

*Prohibitions on holding out and advertising etc.*

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

if that is not the case.

Civil penalty: 2,000 penalty units.

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

Civil penalty: 2,000 penalty units.

*Offence*

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

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

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**31 Prohibition on conducting business with unlicensed persons**

*Prohibition on conducting business with unlicensed persons*

- (1) A licensee must not:
- (a) engage in a credit activity; and
  - (b) in the course of engaging in that credit activity, conduct business with another person who is engaging in a credit activity;

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

Civil penalty: 2,000 penalty units.

*Offence*

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

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

**32 Prohibition on charging a fee etc.**

*Prohibition on charging a fee etc.*

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

Civil penalty: 2,000 penalty units.

*Offence*

- (2) A person commits an offence if:

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

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

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

*Prohibition on giving misleading information etc.*

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

Civil penalty: 2,000 penalty units.

*Offence*

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

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

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

### **Division 1—Introduction**

#### **34 Guide to this Part**

This Part is about Australian credit licences.

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

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

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

Division 5 is about conduct obligations of licensees.

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

## **Division 2—Australian credit licences**

### **35 Australian credit licences**

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



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

### **36 Applying for a licence**

- (1) A person may apply for a licence by lodging an application with ASIC on or after 1 July 2010, or a later day prescribed by the regulations.
- (2) The application must be in the approved form.

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

#### *When ASIC must grant a licence*

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

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

#### *Matters ASIC must have regard to*

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

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

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.

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

*ASIC may request information or audit report from applicant*

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

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

If:

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

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

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

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

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

- (a) some or all of sections 36 and 37 do not apply in relation to particular classes of applicants; and
- (b) alternative processes apply to applications for licences by, and the grant of licences to, those classes of applicants.

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

*Banning or disqualification order in force against person*

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

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

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

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

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

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

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

- (1) ASIC must give a person (the *applicant*) who has applied for a licence written notice of:
  - (a) ASIC's decision on the application; and
  - (b) if the decision is to grant the applicant a licence—the day on which the licence takes effect; and
  - (c) if the decision is not to grant the applicant a licence—the reasons for the decision.
- (2) The licence comes into force on the day specified in the notice, which must not be before the day on which the decision to grant the licence was made.

#### **43 Australian credit licence numbers**

- (1) ASIC must allocate each licence a unique Australian credit licence number when it is granted.
- (2) If:
  - (a) a person is granted a licence; and
  - (b) the person holds an Australian financial services licence;then the Australian credit licence number that ASIC gives to the licence held by that person must be the same number as the person's Australian financial services licence number.
- (3) ASIC must give the licensee written notice of the Australian credit licence number.

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

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

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

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

### **45 The conditions on the licence**

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

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

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

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

*ASIC must give the licensee a hearing*

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

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*Condition in relation to credit activities authorised*

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

*Regulations may prescribe conditions*

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

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

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

- (1) If the licensee, or a related body corporate, is a body (the **APRA body**) regulated by APRA (other than an ADI), then the following provisions apply:
- (a) ASIC cannot:
- (i) impose, vary or revoke a condition on the licence that, in ASIC's opinion, has or would have the result of preventing the APRA body from being able to carry on all or any of its usual activities (being activities in relation to which APRA has regulatory or supervisory responsibilities); or
  - (ii) vary a condition so that it would, in ASIC's opinion, become a condition that would have a result as described in subparagraph (i);
- unless ASIC has first consulted APRA about the proposed action;
- (b) if ASIC imposes, varies or revokes a condition on the licence and paragraph (a) does not apply to that action, ASIC must, within one week, inform APRA of the action that has been taken.



*Special procedures for ADIs*

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

## **Division 5—Obligations of licensees**

### **47 General conduct obligations of licensees**

#### *General conduct obligations*

- (1) A licensee must:
- (a) do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly; and
  - (b) have in place adequate arrangements to ensure that clients of the licensee are not disadvantaged by any conflict of interest that may arise wholly or partly in relation to credit activities engaged in by the licensee or its representatives; and
  - (c) comply with the conditions on the licence; and
  - (d) comply with the credit legislation; and
  - (e) take reasonable steps to ensure that its representatives comply with the credit legislation; and
  - (f) maintain the competence to engage in the credit activities authorised by the licence; and
  - (g) ensure that its representatives are adequately trained, and are competent, to engage in the credit activities authorised by the licence; and
  - (h) have an internal dispute resolution procedure that:
    - (i) complies with standards and requirements made or approved by ASIC in accordance with the regulations; and
    - (ii) covers disputes in relation to the credit activities engaged in by the licensee or its representatives; and
  - (i) be a member of an approved external dispute resolution scheme; and
  - (j) have compensation arrangements in accordance with section 48; and
  - (k) have adequate arrangements and systems to ensure compliance with its obligations under this section, and a

written plan that documents those arrangements and systems;  
and

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

*Assessment of whether compliance is adequate*

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

*Regulations in relation to internal dispute resolution procedures*

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

## **48 Requirements for compensation arrangements**

*Requirement to have adequate compensation arrangements*

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

*When arrangements are adequate*

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

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*Approval of arrangements by ASIC*

- (3) Before approving arrangements under paragraph (2)(b), ASIC must have regard to:
  - (a) the credit activities authorised by the licence; and
  - (b) whether the arrangements will continue to cover persons after the licensee ceases to engage in credit activities, and the length of time for which that cover will continue; and
  - (c) any other matters that are prescribed by the regulations.
- (4) Without limiting paragraph (3)(c), the regulations may, in particular, prescribe additional details in relation to the matters to which ASIC must have regard under paragraphs (3)(a) and (b).

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

*Notice to licensee to provide a statement*

- (1) ASIC may give a licensee a written notice directing the licensee to lodge with ASIC a written statement containing specified information about the credit activities engaged in by the licensee or its representatives.
- (2) Notices under subsection (1):
  - (a) may be given at any time; and
  - (b) may be given to one or more particular licensees, or to each licensee in one or more classes of licensee, or to all licensees; and
  - (c) may require all the same information, or may contain differences as to the information they require; and
  - (d) may require a statement containing information to be given on a periodic basis, or each time a particular event or circumstance occurs, without ASIC having to give a further written notice.

*Notice to licensee to obtain an audit report*

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

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

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

*Notice must specify day by which licensee must comply*

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

*Requirement to comply with notice*

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

Civil penalty: 2,000 penalty units.

*Offence*

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

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

*Strict liability offence*

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

Criminal penalty: 10 penalty units.

- (9) Subsection (8) is an offence of strict liability.
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Note: For strict liability, see section 6.1 of the *Criminal Code*.

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

*Regulations may require licensee to give information*

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

*Requirement to comply with regulations*

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

Civil penalty: 2,000 penalty units.

*Offence*

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

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

*Strict liability offence*

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

Criminal penalty: 10 penalty units.

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

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

## **51 Obligation to provide ASIC with assistance if reasonably requested**

### *Requirement to provide assistance*

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

Civil penalty: 2,000 penalty units.

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

### *Offence*

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

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

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

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

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

### *When this section applies*

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

### *Requirement to include licence number in documents*

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

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

Civil penalty: 2,000 penalty units.

*Strict liability offence*

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

Criminal penalty: 10 penalty units.

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

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

**53 Obligation to lodge annual compliance certificate**

*Requirement to lodge annual compliance certificate*

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

Civil penalty: 2,000 penalty units.

*Compliance certificate must be in approved form*

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

*Who must sign compliance certificate*

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



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

*Requirement to ensure compliance certificate is lodged*

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

Civil penalty: 2,000 penalty units.

*Strict liability offence*

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

Criminal penalty: 60 penalty units.

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

*Meaning of **licensing anniversary***

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

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

### **Subdivision A—Suspensions and cancellations**

#### **54 Suspension or cancellation without hearing**

- (1) ASIC may suspend or cancel a licensee's licence if:
  - (a) the licensee lodges with ASIC an application for the suspension or cancellation; or
  - (b) the licensee does not engage, or ceases to engage, in credit activities; or
  - (c) any of the matters set out in subsection (2) applies to any of the following persons:
    - (i) the licensee;
    - (ii) if the licensee is a body corporate—a director, secretary or senior manager of the body corporate who performs duties in relation to credit activities;
    - (iii) if the licensee is a partnership or the trustees of a trust—a partner or trustee who performs duties in relation to credit activities.
- (2) For the purposes of paragraph (1)(c), the matters are as follows:
  - (a) if the person is not the trustees of a trust—the person is insolvent;
  - (b) if the person is a natural person:
    - (i) the person is convicted of serious fraud; or
    - (ii) the person is incapable of managing his or her affairs because of physical or mental incapacity; or
    - (iii) a prescribed State or Territory order is in force against the person.
- (3) An application for suspension or cancellation of a licence must be in the approved form.

## 55 Suspension or cancellation after offering a hearing

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

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

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

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

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

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

*Special procedures for ADIs*

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

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

### **Subdivision B—Variations**

#### **57 Varying licences**

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

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

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

#### **58 Effect of suspension**

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

#### **59 Revocation of suspension**

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

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

- (1) ASIC must give a licensee written notice of a variation, suspension, revocation of a suspension, or cancellation of the licensee's licence.
- (2) A variation, suspension, revocation of a suspension, or cancellation of a licence comes into force when the written notice of that action is given to the licensee.
- (3) As soon as practicable after the notice is given to the licensee, ASIC must publish a notice of the action on ASIC's website. The notice must state when the action took effect.

**61 Statement of reasons**

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

**62 ASIC may allow licence to continue in force**

- (1) If ASIC gives a written notice of suspension or cancellation to a licensee, ASIC may include terms in the notice specifying that the licence continues in force as though the suspension or cancellation had not happened for the purposes of specified provisions of this Act in relation to specified matters, a specified period, or both.
- (2) If ASIC includes terms in a notice under subsection (1), the licence continues in force in accordance with the terms of the notice.

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

### **Division 1—Introduction**

#### **63 Guide to this Part**

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

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

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

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

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

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

### **64 Licensee may authorise credit representatives**

*Authorisation of credit representative by licensee*

- (1) A licensee may give a person a written notice authorising the person to engage in specified credit activities on behalf of the licensee.
- (2) A person who is authorised under subsection (1) is a ***credit representative*** of the relevant licensee.
- (3) The credit activities specified may be some or all of the credit activities authorised by the licensee's licence.

*When authorisation is of no effect*

- (4) The authorisation:
  - (a) is of no effect if subsection (5) applies to it when it is given; and
  - (b) ceases to have effect if and when subsection (5) starts to apply to it after it is given;to the extent that subsection (5) applies.
- (5) This section applies to the authorisation to the extent that it purports to authorise:
  - (a) a person to engage in a credit activity that is not authorised by the licensee's licence; or
  - (b) a person to engage in a credit activity, and a banning order or disqualification order under Part 2-4 is in force against the person in relation to the credit activity; or
  - (c) a person who is not a member of an approved external dispute resolution scheme; or
  - (d) a person who is banned from engaging in a credit activity under a law of a State or Territory; or
  - (e) a natural person who has been convicted, within the last 10 years, of serious fraud; or



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

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

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

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

*Licensee must give consent to authorisation*

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

*When authorisation is of no effect*

- (5) The authorisation:

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

**66 Credit representative of 2 or more licensees**

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

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

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

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

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

*Variation and revocation of authorisations*

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

*Variation and revocation of sub-authorisations*

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

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revoked the authorisation written notice of the variation or revocation.

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

*Requirement not to give authorisation*

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

Civil penalty: 2,000 penalty units.

*Offence*

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

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

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

*Requirement to vary or revoke authorisation*

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

Civil penalty: 2,000 penalty units.

*Offence*

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

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

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

*Requirement to notify ASIC when credit representative authorised*

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

Civil penalty: 2,000 penalty units.

*Requirement to notify licensee of sub-authorisation*

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

Civil penalty: 2,000 penalty units.

*Details to be included in notice*

- (3) The notice must include the following details:
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- (a) the name and business address of the credit representative;
- (b) details of the authorisation, including the date on which it was made and what the credit representative is authorised to do on behalf of the licensee;
- (c) details of the external dispute resolution scheme of which the credit representative is a member;
- (d) details of each other licensee on behalf of whom the credit representative is a credit representative.

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

- (4) If:
- (a) a person authorises a credit representative under subsection 64(1) or 65(1); and
  - (b) either:
    - (i) any of the details that are referred to in subsection (3) in relation to the credit representative changes; or
    - (ii) the person revokes the authorisation;

then the person must, within 10 business days of the change or revocation, lodge with ASIC a written notice of the change or revocation.

Civil penalty: 2,000 penalty units.

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

*Strict liability offence*

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

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

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

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

## **72 Credit representative numbers**

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

## **Division 3—Information about representatives**

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

*ASIC may give licensee information about representatives*

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

*Requirements about use of information*

- (2) A licensee to whom information is given under subsection (1) may make use of, make a record of, or give to another person, the information for a purpose connected with:
  - (a) the licensee making a decision about what action (if any) to take in relation to the representative, as a consequence of receiving the information; or
  - (b) the licensee taking action pursuant to such a decision.
- (3) A licensee to whom information is given under subsection (1) must not make use of, make a record of, or give to another person, the information other than as permitted by subsection (2).

Civil penalty: 2,000 penalty units.

- (4) A person to whom information has been given for a purpose or purposes under subsection (2) or this subsection may make use of, make a record of, or give to another person, that information for that purpose or any of those purposes.
- (5) A person to whom information has been given for a purpose or purposes under subsection (2) or (4) must not make use of, make a record of, or give to another person, the information other than as permitted by subsection (4).

Civil penalty: 2,000 penalty units.



*Offence*

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

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

*Qualified privilege*

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

*Use of information obtained under this section in court*

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

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

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

### **74 Application of this Division**

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

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

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

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

### **76 Representatives of multiple licensees**

*When this section applies*

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

*Conduct covered by only one authority*

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

*Conduct covered by multiple authorities*

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

*All other cases*

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

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

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

**78 Effect of this Division**

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

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

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

### **Division 1—Introduction**

#### **79 Guide to this Part**

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

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

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

## **Division 2—Banning orders**

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

- (1) ASIC may make a banning order against a person:
  - (a) if ASIC suspends or cancels a licence of the person; or
  - (b) for a person other than the trustees of a trust—if the person becomes insolvent; or
  - (c) for a natural person—if the person is convicted of fraud; or
  - (d) if the person has:
    - (i) contravened any credit legislation; or
    - (ii) been involved in a contravention of a provision of any credit legislation by another person; or
  - (e) if ASIC has reason to believe that the person is likely to:
    - (i) contravene any credit legislation; or
    - (ii) be involved in a contravention of a provision of any credit legislation by another person; or
  - (f) if ASIC has reason to believe that the person is not a fit and proper person to engage in credit activities; or
  - (g) if a prescribed State or Territory order is in force against the person; or
  - (h) in any other circumstances prescribed by the regulations.
- (2) For the purposes of paragraphs (1)(e) and (f), ASIC must (subject to Part VIIC of the *Crimes Act 1914*) have regard to the following:
  - (a) if the person is a natural person—the matters set out in paragraphs 37(2)(a) to (f) and subparagraph 37(2)(g)(i) in relation to the person;
  - (b) if the person is not a natural person:
    - (i) the matters set out in paragraphs 37(2)(a) to (f) in relation to the person; and
    - (ii) whether ASIC has reason to believe that any of the persons referred to in paragraph 37(2)(h) in relation to the person is not a fit and proper person to engage in credit activities;

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

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.

- (3) ASIC must (subject to Part VIIC of the *Crimes Act 1914*), in considering whether it has reason to believe that a person referred to in subparagraph (2)(b)(ii) is not a fit and proper person to engage in credit activities, have regard to the matters set out in paragraphs (2)(a), (c), (d) and (e) in relation to the person.
- (4) Despite subsection (1), ASIC may only make a banning order against a person after giving the person an opportunity:
  - (a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
  - (b) to make submissions to ASIC on the matter.
- (5) Subsection (4) does not apply if:
  - (a) ASIC's grounds for making the banning order against the person include that ASIC has suspended or cancelled a licence of the person (see paragraph (1)(a)); and
  - (b) the suspension or cancellation took place without a hearing under section 54.
- (6) Subsection (4) also does not apply if:
  - (a) ASIC's grounds for making the banning order against the person include that the person has been convicted of fraud (see paragraph (1)(c)); and
  - (b) the person has been convicted of serious fraud.
- (7) ASIC must give a copy of the banning order to the person against whom it was made.



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

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

### **82 Effect of banning orders**

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

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

Civil penalty: 2,000 penalty units.

#### *Offence*

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

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

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

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**83 Variation or cancellation of banning orders**

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

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

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

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

### **85 Statement of reasons**

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

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

### **86 Disqualification by the court**

- (1) ASIC may apply to the court for an order under subsection (2) in relation to a person if ASIC:
  - (a) cancels a licence of the person; or
  - (b) makes a banning order against the person that is to operate permanently.
- (2) The court may make:
  - (a) an order disqualifying the person, permanently or for a specified period, from engaging in credit activities, or specified credit activities, in specified circumstances or capacities; or
  - (b) any other order the court considers appropriate.

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

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

### **Division 1—Introduction**

#### **87 Guide to this Part**

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

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

Division 3 deals with trust accounts. Licensees that provide credit services and that receive money on behalf of others in the course of those services are required to maintain a trust account. Those licensees must also comply with requirements in relation to trust account money, trust account statements and trust account audit reports.

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

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## Division 2—Financial records of licensees

### 88 Obligation to keep financial records

*Requirement to keep financial records*

- (1) A licensee must:
- (a) keep financial records that correctly record and explain the transactions and financial position of any business of engaging in credit activities carried on by the licensee; and
  - (b) keep those records in accordance with this Division; and
  - (c) comply with subsection 90(2) in relation to the conversion of records into the English language; and
  - (d) comply with section 91 in relation to the location and production of records and particulars.

Civil penalty: 2,000 penalty units.

*Meaning of financial records*

- (2) **Financial records** includes:
- (a) invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers; and
  - (b) documents of prime entry; and
  - (c) any trust account statement or trust account report required under section 100.

*Offence*

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

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

*Financial records may be kept with other records*

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

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

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

The financial records must be kept in a way that:

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

## **90 Language of financial records**

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

## **91 Location of financial records**

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

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

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financial records as will enable true and fair profit and loss statements and balance sheets to be prepared; and

- (b) if required by ASIC to produce those financial records at a place in this jurisdiction, comply with the requirement not later than 28 days after the requirement is made.

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

The financial records must be kept in sufficient detail to show particulars of:

- (a) all money received or paid by the licensee; and
- (b) for each credit contract under which the licensee is the credit provider:
  - (i) the amount and day of all payments made by or on behalf of the debtor under the credit contract; and
  - (ii) all amounts (including principal, interest, fees and charges) owed by the debtor under the credit contract; and
- (c) for each consumer lease under which the licensee is the lessor—the amount and day of all payments made by or on behalf of the lessee under the consumer lease; and
- (d) for each guarantee under which the licensee is the beneficiary of the guarantee—the amount and day of all payments made by or on behalf of the guarantor under the guarantee; and
- (e) all income received by the licensee from commissions, interest, and other sources, and all expenses, commissions, and interest paid by the licensee; and
- (f) all the assets and liabilities (including contingent liabilities) of the licensee; and
- (g) any other matters prescribed by the regulations.

**93 Regulations may impose additional requirements**

The regulations may impose additional requirements to be complied with in relation to the financial records including, for example:

- (a) requirements for things to be contained in the records; and



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

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

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

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

##### *Requirement to retain financial records*

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

Civil penalty: 2,000 penalty units.

##### *Regulations*

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

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

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

##### *Offence*

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

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

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**96 Financial records are prima facie evidence of matters**

- (1) In proceedings in a court, a financial record kept under this Division is admissible as prima facie evidence of any matter in the financial record.
- (2) A document purporting to be a financial record kept by a licensee under this Division is, unless the contrary is proved, presumed to be a financial record kept by the licensee under this Division.
- (3) If:
  - (a) because of subsection (1) a financial record is prima facie evidence of a matter; and
  - (b) the financial record, or a part of the financial, is kept or prepared by recording or storing matters (including that matter) by means of a mechanical, electronic or other device; a written reproduction of that matter as so recorded or stored is admissible as prima facie evidence of that matter in a proceeding in a court.
- (4) A written document that purports to reproduce a matter recorded or stored by means of a mechanical, electronic or other device is, unless the contrary is proved, presumed to be a reproduction of that matter.

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

### **97 Application of this Division**

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

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

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

#### *Requirement to maintain trust account*

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

Civil penalty: 2,000 penalty units.

#### *Requirements for trust accounts*

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

#### *Offence*

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

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

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

*Requirement to pay money to credit of trust account*

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

Civil penalty: 2,000 penalty units.

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

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

Civil penalty: 2,000 penalty units.

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

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

Civil penalty: 2,000 penalty units.

*Offence*

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

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

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

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

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

## **100 Obligation to lodge trust account statement and trust account audit report**

### *Requirement to prepare and lodge trust account statement*

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

Civil penalty: 2,000 penalty units.

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

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

Civil penalty: 2,000 penalty units.

### *Requirements for statement and audit report*

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

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

*Offence*

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

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

*Meaning of financial year*

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

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

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

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approve an extension of the period for lodging the trust account statement and trust account audit report. The extension may be of the period originally applicable or the period applicable under a previous extension.

- (4) An approval may be given subject to any conditions imposed by ASIC.
- (5) If an approval is given subject to conditions, the licensee must comply with those conditions.

## Division 4—Matters relating to audit reports

### 102 Auditor's right of access to records, information etc.

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

- (1) An auditor (the **auditor**) who prepares one of the following audit reports (the **audit report**):
  - (a) an audit report required under subsection 49(3) in relation to a licensee;
  - (b) a trust account audit report required under subsection 100(2) in relation to a licensee;

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

- (2) The auditor is entitled to require:
  - (a) from the licensee; or
  - (b) if the licensee is a body corporate—from any director, secretary or senior manager of the licensee;any assistance and explanations that the auditor desires for purposes relating to the audit report.

*Requirement to give auditor access and assistance etc.*

- (3) The licensee, or a director, secretary or senior manager of the licensee if it is a body corporate, must not:
  - (a) refuse or fail to allow the auditor access, in accordance with subsection (1), to financial records or other credit books of the licensee; or
  - (b) refuse or fail to give assistance, or an explanation, to the auditor as and when required under subsection (2); or
  - (c) otherwise hinder, obstruct or delay the auditor in the performance or exercise of the auditor's duties or powers.

Civil penalty:           2,000 penalty units.



*Offence*

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

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

**103 Auditor's fees and expenses**

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

**104 Auditor to report on certain matters**

*Requirement for auditor to disclose matters*

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

Civil penalty: 2,000 penalty units.

*Matters that must be disclosed*

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

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

*Offence*

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

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

**105 Qualified privilege for auditor etc.**

*Qualified privilege for auditor*

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

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

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

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

the company, of the company's duties relating to the audit report; or

- (b) the lodging by the registered company auditor, on behalf of the company, of a report with ASIC under subsection 104(1); or
- (c) the giving by the registered company auditor, on behalf of the company, of a report to the licensee under subsection 104(1).

*Qualified privilege for subsequent publication*

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

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

The regulations may make provision in relation to:

- (a) the audit reports referred to in subsection 102(1); and
- (b) audit reports that persons who have applied for a licence may be requested to lodge under subsection 37(4); and
- (c) the auditors that prepare those reports; and
- (d) auditing standards that must be complied with in relation to those reports.

**Chapter 2** Licensing of persons who engage in credit activities

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

**Division 1** Introduction

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

### **Division 1—Introduction**

#### **107 Guide to this Part**

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

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

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

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

The provisions to which this Part applies are:

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

### **109 Exemptions and modifications by ASIC**

#### *Exemptions and modifications*

- (1) ASIC may:
  - (a) exempt:
    - (i) a person; or
    - (ii) a person and all of the person's credit representatives; from all or specified provisions to which this Part applies; or
  - (b) exempt a credit activity that is engaged in in relation to a specified credit contract, mortgage, guarantee or consumer lease from all or specified provisions to which this Part applies; or
  - (c) declare that provisions to which this Part applies apply in relation to a person, or a credit activity referred to in paragraph (1)(b), as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) An exemption or declaration under subsection (1) is not a legislative instrument.
- (3) ASIC may, by legislative instrument:
  - (a) exempt a class of persons from all or specified provisions to which this Part applies; or

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

*Conditions on exemptions*

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

*Publication of exemptions and declarations*

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

*Special rules in relation to offences*

- (6) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(c) or (3)(d) had not been made, that conduct does not constitute an offence unless, before the conduct occurred:
  - (a) the text of the declaration was published by ASIC on its website; or
  - (b) ASIC gave written notice setting out the text of the declaration to the person;(in addition to complying with the requirements of the *Legislative Instruments Act 2003* if the declaration is made under subsection (3)).

- (7) In a prosecution for an offence to which subsection (6) applies, the prosecution must prove that paragraph (6)(a) or (b) was complied with before the conduct occurred.

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

The regulations may:

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

## **Chapter 3—Responsible lending conduct**

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

#### **Division 1—Introduction**

##### **111 Guide to this Part**

This Part has rules that apply to licensees that provide credit assistance in relation to credit contracts. These rules are aimed at better informing consumers and preventing them from being in unsuitable credit contracts. However, these rules do not apply to a licensee that will be the credit provider under the credit contract.

Division 2 requires a licensee to give its credit guide to a consumer. The credit guide has information about the licensee and some of the licensee's obligations under this Act.

Division 3 requires a licensee to give a quote before providing credit assistance to a consumer. The quote must set out the maximum amount the consumer will be required to pay to the licensee. The licensee must not charge more than that amount.

Division 4 requires a licensee, before providing credit assistance to a consumer in relation to a credit contract, to make a preliminary assessment as to whether the contract will be unsuitable for the consumer. To do this, the licensee must make inquiries and verifications about the consumer's requirements, objectives and financial situation. The licensee must give the consumer a copy of the assessment if requested.

Division 5 requires a licensee, when providing credit assistance to a consumer in relation to a credit contract, to give the consumer a document that discloses certain information (for example, the commission the licensee is likely to receive).



Division 6 prohibits a licensee from providing credit assistance to a consumer in relation to a credit contract if the contract will be unsuitable for the consumer.

### **112 Application of this Part**

This Part does not apply in relation to credit assistance provided by a licensee in relation to a credit contract if the licensee is or will be the credit provider under the contract.

## Division 2—Credit guide of credit assistance providers

### 113 Credit guide of credit assistance providers

*Requirement to give credit guide*

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

Civil penalty: 2,000 penalty units.

- (2) The licensee's credit guide must:
- (a) be in writing; and
  - (b) be in the form (if any) prescribed by the regulations; and
  - (c) specify the licensee's name and contact details; and
  - (d) specify the licensee's Australian credit licence number; and
  - (e) give information about:
    - (i) any fees that are payable by a consumer to the licensee for the licensee's credit assistance; and
    - (ii) any charges that are payable by a consumer to the licensee for matters associated with providing the credit assistance; and
    - (iii) the method for working out the amount of the fees and charges; and
  - (f) give information about:
    - (i) if there are 6 or fewer credit providers that the licensee conducts business with when providing credit assistance in relation to credit contracts—the names of those credit providers; and
    - (ii) if there are more than 6 credit providers that the licensee conducts business with when providing credit assistance in relation to credit contracts—the names of the 6 credit providers with whom the licensee reasonably believes it conducts the most business; and
  - (g) give information about:

- (i) any commissions that the licensee, or an employee, director or credit representative of the licensee, is likely to receive, directly or indirectly, from credit providers in relation to credit contracts for which the licensee has provided credit assistance; and
  - (ii) a reasonable estimate of the amounts of those commissions or the range of those amounts; and
  - (iii) the method for working out those amounts; and
  - (h) give information about the licensee's procedure for resolving disputes with a consumer, including contact details for a consumer to access:
    - (i) the licensee's internal dispute resolution procedure; and
    - (ii) the approved external dispute resolution scheme of which the licensee is a member; and
  - (i) give information about the licensee's obligations under sections 120 and 123; and
  - (j) comply with any other requirements prescribed by the regulations.
- (3) The regulations may prescribe:
- (a) information that need not be included in the credit guide, despite subsection (2); and
  - (b) for the purposes of paragraph (2)(g):
    - (i) the method for working out amounts of commissions; and
    - (ii) how commissions or amounts of commissions must be described.

*Manner of giving credit guide*

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

*Strict liability offence*

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

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(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

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

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

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

#### **114 Quote for providing credit assistance etc.**

*Requirement to give quote*

- (1) A licensee must not provide credit assistance to a consumer by:
- (a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular credit contract with a particular credit provider; or
  - (b) suggesting that the consumer apply, or assisting the consumer to apply, for an increase to the credit limit of a particular credit contract with a particular credit provider; or
  - (c) suggesting that the consumer remain in a particular credit contract with a particular credit provider;

unless:

- (d) the licensee has given the consumer a quote in accordance with subsection (2); and
- (e) the consumer has signed and dated that quote or otherwise indicated the consumer's acceptance of it (and the day that happens) in the manner (if any) prescribed by the regulations; and
- (f) the licensee has given the consumer a copy of the accepted quote.

Civil penalty: 2,000 penalty units.

- (2) The quote must:
- (a) be in writing; and
  - (b) give information about the credit assistance and other services that the quote covers; and
  - (c) specify the maximum amount that will be payable by the consumer to the licensee in relation to the licensee's credit assistance and other services; and

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

*Manner of giving quote*

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

*No demanding payment of amount exceeding quoted amount*

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

Civil penalty: 2,000 penalty units.

*No demanding payment before credit assistance provided*

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

Civil penalty: 2,000 penalty units.

*Caveats*

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

Civil penalty: 2,000 penalty units.

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

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

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

Civil penalty: 2,000 penalty units.

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



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Civil penalty: 2,000 penalty units.

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

- (1) For the purposes of paragraph 115(1)(c), the licensee must make a preliminary assessment that:
  - (a) specifies the period the assessment covers; and
  - (b) assesses whether the credit contract will be unsuitable for the consumer if the contract is entered or the credit limit is increased in that period.
- (2) For the purposes of paragraph 115(2)(a), the licensee must make a preliminary assessment that:
  - (a) specifies the period the assessment covers; and
  - (b) assesses whether the credit contract will be unsuitable for the consumer if the consumer remains in the contract in that period.

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

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

- (1) For the purposes of paragraph 115(1)(d) or 115(2)(b), the licensee must, before making the preliminary assessment:
  - (a) make reasonable inquiries about the consumer's requirements and objectives in relation to the credit contract; and
  - (b) make reasonable inquiries about the consumer's financial situation; and
  - (c) take reasonable steps to verify the consumer's financial situation; and
  - (d) make any inquiries prescribed by the regulations about any matter prescribed by the regulations; and
  - (e) take any steps prescribed by the regulations to verify any matter prescribed by the regulations.

Civil penalty: 2,000 penalty units.

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

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

*Requirement to assess the contract as unsuitable*

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

Civil penalty: 2,000 penalty units.

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

*Particular circumstances when the contract will be unsuitable*

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

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

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

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

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

*Requirement to assess the contract as unsuitable*

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

Civil penalty: 2,000 penalty units.

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

*Particular circumstances when the contract will be unsuitable*

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

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contract in the period covered by the preliminary assessment;  
or

- (b) the contract will not meet the consumer's requirements or objectives if the consumer remains in the contract in the period covered by the preliminary assessment; or
  - (c) if the regulations prescribe circumstances in which a credit contract is unsuitable—those circumstances will apply to the contract if the consumer remains in the contract in the period covered by the preliminary assessment.
- (3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the contract by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

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

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

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

*Requirement to give assessment if requested*

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

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

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

Civil penalty: 2,000 penalty units.

*Manner of giving assessment*

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

*No payment for assessment*

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

Civil penalty: 2,000 penalty units.

*Strict liability offence*

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

Criminal penalty: 50 penalty units.

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

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

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

### **121 Fees, commissions etc. relating to credit contracts**

*Requirement for disclosure*

- (1) A licensee must, at the same time as providing credit assistance to a consumer by:
- (a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular credit contract with a particular credit provider; or
  - (b) suggesting that the consumer apply, or assisting the consumer to apply, for an increase to the credit limit of a particular credit contract with a particular credit provider; or
  - (c) suggesting that the consumer remain in a particular credit contract with a particular credit provider;
- give the consumer a credit proposal disclosure document in accordance with subsection (2).

Civil penalty: 2,000 penalty units.

- (2) The credit proposal disclosure document must contain the following:
- (a) the total amount of any fees or charges that the consumer is liable to pay to the licensee in relation to the credit contract and the method used for working out that amount;
  - (b) a reasonable estimate of the total amount of any commissions that the licensee, or an employee, director or credit representative of the licensee, is likely to receive in relation to the credit contract and the method used for working out that amount;
  - (c) a reasonable estimate of the total amount of any fees or charges that the consumer is likely to be liable to pay to the credit provider in relation to applying for the credit contract;

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

*Manner of giving credit proposal disclosure document*

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

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

*Requirement not to profit*

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

Civil penalty: 2,000 penalty units.

*Offence*

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

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

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

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

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

- (1) A licensee must not provide credit assistance to a consumer by:
- (a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular credit contract with a particular credit provider; or
  - (b) suggesting that the consumer apply, or assisting the consumer to apply, for an increase to the credit limit of a particular credit contract with a particular credit provider;

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

Civil penalty: 2,000 penalty units.

*When the contract will be unsuitable*

- (2) The contract will be unsuitable for the consumer if, at the time the licensee provides the credit assistance, it is likely that:
- (a) the consumer will be unable to comply with the consumer's financial obligations under the contract, or could only comply with substantial hardship; or
  - (b) the contract will not meet the consumer's requirements or objectives; or
  - (c) if the regulations prescribe circumstances in which a credit contract is unsuitable—those circumstances will apply to the contract;

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



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

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

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

*Credit contract not unsuitable under regulations*

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

*Offence*

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

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

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

*Prohibition on suggesting to remain in unsuitable contracts*

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

Civil penalty: 2,000 penalty units.

*When the contract is unsuitable*

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

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

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

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

*Credit contract not unsuitable under regulations*

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

*Offence*

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

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

*Defence*

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

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

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

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

### **Division 1—Introduction**

#### **125 Guide to this Part**

This Part has rules that apply to licensees that are credit providers. These rules are aimed at better informing consumers and preventing them from being in unsuitable credit contracts.

Division 2 requires a licensee to give its credit guide to a consumer. The credit guide has information about the licensee and some of the licensee's obligations under this Act.

Division 3 requires a licensee, before entering or increasing the credit limit of a credit contract, to make an assessment as to whether the contract will be unsuitable. To do this, the licensee must make inquiries and verifications about the consumer's requirements, objectives and financial situation. The licensee must give the consumer a copy of the assessment if requested.

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

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

### **126 Credit guide of credit providers**

#### *Requirement to give credit guide*

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

Civil penalty: 2,000 penalty units.

- (2) The licensee's credit guide must:
- (a) be in writing; and
  - (b) be in the form (if any) prescribed by the regulations; and
  - (c) specify the licensee's name and contact details; and
  - (d) specify the licensee's Australian credit licence number; and
  - (e) give information about the licensee's procedure for resolving disputes with a consumer, including contact details for a consumer to access:
    - (i) the licensee's internal dispute resolution procedure; and
    - (ii) the approved external dispute resolution scheme of which the licensee is a member; and
  - (f) give information about the licensee's obligations under sections 132 and 133; and
  - (g) comply with any other requirements prescribed by the regulations.
- (3) The regulations may prescribe information that need not be included in the credit guide, despite subsection (2).

#### *Manner of giving credit guide*

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

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*Strict liability offence*

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

Criminal penalty: 50 penalty units.

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

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

**127 Credit guide of credit providers who are assignees**

*Requirement to give credit guide*

- (1) A licensee must, as soon as practicable after it has been assigned any rights or obligations of a credit provider under a credit contract, give the debtor under the contract the licensee's credit guide in accordance with subsection (2).

Civil penalty: 2,000 penalty units.

- (2) The licensee's credit guide must:
- (a) be in writing; and
  - (b) be in the form (if any) prescribed by the regulations; and
  - (c) specify the licensee's name and contact details; and
  - (d) specify the licensee's Australian credit licence number; and
  - (e) give information about the licensee's procedure for resolving disputes with a consumer, including contact details for a consumer to access:
    - (i) the licensee's internal dispute resolution procedure; and
    - (ii) the approved external dispute resolution scheme of which the licensee is a member; and
  - (f) comply with any other requirements prescribed by the regulations.
- (3) The regulations may prescribe information that need not be included in the credit guide, despite subsection (2).

*Manner of giving credit guide*

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

*Strict liability offence*

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

Criminal penalty: 50 penalty units.

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

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

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

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

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

A licensee must not:

- (a) enter a credit contract with a consumer who will be the debtor under the contract; or
- (b) increase the credit limit of a credit contract with a consumer who is the debtor under the contract;

on a day (the *credit day*) unless the licensee has, within 90 days (or other period prescribed by the regulations) before the credit day:

- (c) made an assessment that:
  - (i) is in accordance with section 129; and
  - (ii) covers the period in which the credit day occurs; and
- (d) made the inquiries and verification in accordance with section 130.

Civil penalty: 2,000 penalty units.

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

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

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

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



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

*Requirement to make inquiries and take steps to verify*

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

Civil penalty: 2,000 penalty units.

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

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

*Requirement to assess the contract as unsuitable*

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

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

*Particular circumstances when the contract will be unsuitable*

- (2) The contract will be unsuitable for the consumer if, at the time of the assessment, it is likely that:
  - (a) the consumer will be unable to comply with the consumer's financial obligations under the contract, or could only comply

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with substantial hardship, if the contract is entered or the credit limit is increased in the period covered by the assessment; or

- (b) the contract will not meet the consumer's requirements or objectives if the contract is entered or the credit limit is increased in the period covered by the assessment; or
- (c) if the regulations prescribe circumstances in which a credit contract is unsuitable—those circumstances will apply to the contract if the contract is entered or the credit limit is increased in the period covered by the assessment.

Civil penalty: 2,000 penalty units.

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

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

- (4) For the purposes of determining under subsection (2) whether the contract will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:
  - (a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 130(1)(d) or (e);
  - (b) at the time of the assessment:
    - (i) the licensee had reason to believe that the information was true; or
    - (ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 130.

**132 Giving the consumer the assessment**

*Requirement to give assessment if requested*

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

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

Civil penalty: 2,000 penalty units.

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

Civil penalty: 2,000 penalty units.

*Manner of giving assessment*

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

*No payment for assessment*

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

Civil penalty: 2,000 penalty units.

*Strict liability offence*

- (5) A person commits an offence if:
- (a) the person is subject to a requirement under subsection (1), (2) or (4); and

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- (b) the person engages in conduct; and
- (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

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

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

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

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

*Prohibition on entering etc. unsuitable contracts*

- (1) A licensee must not:
- (a) enter a credit contract with a consumer who will be the debtor under the contract; or
  - (b) increase the credit limit of a credit contract with a consumer who is the debtor under the contract;
- if the contract is unsuitable for the consumer under subsection (2).

Civil penalty: 2,000 penalty units.

*When the contract is unsuitable*

- (2) The contract is unsuitable for the consumer if, at the time it is entered or the credit limit is increased:
- (a) it is likely that the consumer will be unable to comply with the consumer's financial obligations under the contract, or could only comply with substantial hardship; or
  - (b) the contract does not meet the consumer's requirements or objectives; or
  - (c) if the regulations prescribe circumstances in which a credit contract is unsuitable—those circumstances apply to the contract.
- (3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the contract by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

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

- (4) For the purposes of determining under subsection (2) whether the contract will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:
- (a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 130(1)(d) or (e);
  - (b) at the time of the contract is entered or the credit limit is increased, the information:
    - (i) the licensee had reason to believe that the information was true; or
    - (ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 130.

*Credit contract not unsuitable under regulations*

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

*Offence*

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

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

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

### **Division 1—Introduction**

#### **134 Guide to this Part**

This Part has rules that apply to licensees that provide credit assistance in relation to consumer leases. These rules are aimed at better informing consumers and preventing them from being in unsuitable consumer leases. However, these rules do not apply to a licensee that will be the lessor under the consumer lease.

Division 2 requires a licensee to give its credit guide to a consumer. The credit guide has information about the licensee and some of the licensee's obligations under this Act.

Division 3 requires a licensee to give a quote before providing credit assistance to a consumer. The quote must set out the maximum amount the consumer will be required to pay to the licensee. The licensee must not charge more than that amount.

Division 4 requires a licensee, before providing credit assistance to a consumer in relation to a consumer lease, to make a preliminary assessment as to whether the lease will be unsuitable for the consumer. To do this, the licensee must make inquiries and verifications about the consumer's requirements, objectives and financial situation. The licensee must give the consumer a copy of the assessment if requested.

Division 5 requires a licensee, when providing credit assistance to a consumer in relation to a consumer lease, to give the consumer a document that discloses certain information (for example, the commission the licensee is likely to receive).

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Division 6 prohibits a licensee from providing credit assistance to a consumer in relation to a consumer lease if the lease will be unsuitable for the consumer.

**135 Application of this Part**

This Part does not apply in relation to credit assistance provided by a licensee in relation to a consumer lease if the licensee is or will be the lessor under the consumer lease.



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

### **136 Credit guide of credit assistance providers**

#### *Requirement to give credit guide*

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

Civil penalty: 2,000 penalty units.

- (2) The licensee's credit guide must:
- (a) be in writing; and
  - (b) be in the form (if any) prescribed by the regulations; and
  - (c) specify the licensee's name and contact details; and
  - (d) specify the licensee's Australian credit licence number; and
  - (e) give information about:
    - (i) any fees that are payable by a consumer to the licensee for the licensee's credit assistance; and
    - (ii) any charges that are payable by a consumer to the licensee for matters associated with providing the credit assistance; and
    - (iii) the method for working out the amount of the fees and charges; and
  - (f) give information about:
    - (i) if there are 6 or fewer lessors that the licensee conducts business with when providing credit assistance in relation to consumer leases—the names of those lessors; and
    - (ii) if there are more than 6 lessors that the licensee conducts business with when providing credit assistance in relation to consumer leases—the names of the 6 lessors with whom the licensee reasonably believes it conducts the most business; and
  - (g) give information about:

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- (i) any commissions that the licensee, or an employee, director or credit representative of the licensee, is likely to receive, directly or indirectly, from lessors in relation to consumer leases for which the licensee has provided credit assistance; and
  - (ii) a reasonable estimate of the amounts of those commissions or the range of those amounts; and
  - (iii) the method for working out those amounts; and
  - (h) give information about the licensee's procedure for resolving disputes with a consumer, including contact details for a consumer to access:
    - (i) the licensee's internal dispute resolution procedure; and
    - (ii) the approved external dispute resolution scheme of which the licensee is a member; and
  - (i) give information about the licensee's obligations under sections 143 and 146; and
  - (j) comply with any other requirements prescribed by the regulations.
- (3) The regulations may prescribe:
- (a) information that need not be included in the credit guide, despite subsection (2); and
  - (b) for the purposes of paragraph (2)(g):
    - (i) the method for working out amounts of commissions; and
    - (ii) how commissions or amounts of commissions must be described.

*Manner of giving credit guide*

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

*Strict liability offence*

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

(c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

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

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

### **Division 3—Quote for providing credit assistance etc. in relation to consumer leases**

#### **137 Quote for providing credit assistance etc.**

*Requirement to give quote*

- (1) A licensee must not provide credit assistance to a consumer by:
- (a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular consumer lease with a particular lessor; or
  - (b) suggesting that the consumer remain in a particular consumer lease with a particular lessor;
- unless:
- (c) the licensee has given the consumer a quote in accordance with subsection (2); and
  - (d) the consumer has signed and dated that quote or otherwise indicated the consumer's acceptance of it (and the day that happens) in the manner (if any) prescribed by the regulations; and
  - (e) the licensee has given the consumer a copy of the accepted quote.

Civil penalty: 2,000 penalty units.

- (2) The quote must:
- (a) be in writing; and
  - (b) give information about the credit assistance and other services that the quote covers; and
  - (c) specify the maximum amount that will be payable by the consumer to the licensee in relation to the licensee's credit assistance and other services; and
  - (d) give information about what that amount relates to, including:
    - (i) the maximum amount of the licensee's fee for providing the credit assistance and other services; and

- (ii) the maximum amount of charges that will be incurred by the licensee for matters associated with providing the credit assistance and other services; and
- (iii) the maximum amount of fees or charges that will be payable by the licensee to another person on the consumer's behalf; and
- (e) state whether the maximum amount or any other amount will be payable by the consumer to the licensee if a consumer lease is not entered; and
- (f) comply with any other requirements prescribed by the regulations.

*Manner of giving quote*

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

*No demanding payment of amount exceeding quoted amount*

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

Civil penalty: 2,000 penalty units.

*No demanding payment before credit assistance provided*

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

Civil penalty: 2,000 penalty units.

*Caveats*

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

Civil penalty: 2,000 penalty units.

**Division 4—Obligations of credit assistance providers before providing credit assistance for consumer leases**

**138 Obligations of credit assistance providers before providing credit assistance for consumer leases**

- (1) A licensee must not provide credit assistance to a consumer on a day (the *assistance day*) by:
- (a) suggesting that the consumer apply for a particular consumer lease with a particular lessor; or
  - (b) assisting the consumer to apply for a particular consumer lease with a particular lessor;
- unless the licensee has, within 90 days (or other period prescribed by the regulations) before the assistance day:
- (c) made a preliminary assessment that:
    - (i) is in accordance with subsection 139(1); and
    - (ii) covers the period proposed for the entering of the lease; and
  - (d) made the inquiries and verification in accordance with section 140.

Civil penalty: 2,000 penalty units.

- (2) A licensee must not provide credit assistance to a consumer on a day (the *assistance day*) by suggesting that the consumer remain in a particular consumer lease with a particular lessor unless the licensee has, within 90 days (or other period prescribed by the regulations) before the assistance day:
- (a) made a preliminary assessment that:
    - (i) is in accordance with subsection 139(2); and
    - (ii) covers a period in which the assistance day occurs; and
  - (b) made the inquiries and verification in accordance with section 140.

Civil penalty: 2,000 penalty units.

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**139 Preliminary assessment of unsuitability of the consumer lease**

- (1) For the purposes of paragraph 138(1)(c), the licensee must make a preliminary assessment that:
  - (a) specifies the period the assessment covers; and
  - (b) assesses whether the consumer lease will be unsuitable for the consumer if the lease is entered in that period.
- (2) For the purposes of paragraph 138(2)(a), the licensee must make a preliminary assessment that:
  - (a) specifies the period the assessment covers; and
  - (b) assesses whether the consumer lease will be unsuitable for the consumer if the consumer remains in the lease in that period.

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

**140 Reasonable inquiries etc. about the consumer**

- (1) For the purposes of paragraph 138(1)(d) or 138(2)(b), the licensee must, before making the preliminary assessment:
  - (a) make reasonable inquiries about the consumer's requirements and objectives in relation to the consumer lease; and
  - (b) make reasonable inquiries about the consumer's financial situation; and
  - (c) take reasonable steps to verify the consumer's financial situation; and
  - (d) make any inquiries prescribed by the regulations about any matter prescribed by the regulations; and
  - (e) take any steps prescribed by the regulations to verify any matter prescribed by the regulations.

Civil penalty: 2,000 penalty units.

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

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**141 When the consumer lease must be assessed as unsuitable—entering lease**

*Requirement to assess the lease as unsuitable*

- (1) For a preliminary assessment under subsection 139(1) about entering a consumer lease, the licensee must assess that the lease will be unsuitable for the consumer if the lease will be unsuitable for the consumer under subsection (2).

Civil penalty: 2,000 penalty units.

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

*Particular circumstances when the lease will be unsuitable*

- (2) The lease will be unsuitable for the consumer if, at the time of the preliminary assessment, it is likely that:
- (a) the consumer will be unable to comply with the consumer's financial obligations under the lease, or could only comply with substantial hardship, if the lease is entered in the period proposed for it to be entered; or
  - (b) the lease will not meet the consumer's requirements or objectives if the lease is entered in the period proposed for it to be entered; or
  - (c) if the regulations prescribe circumstances in which a consumer lease is unsuitable—those circumstances will apply to the lease if the lease is entered in the period proposed for it to be entered.
- (3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the lease by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.



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*Information to be used to determine if lease will be unsuitable*

- (4) For the purposes of determining under subsection (2) whether the lease will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:
- (a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 140(1)(d) or (e);
  - (b) at the time of the preliminary assessment:
    - (i) the licensee had reason to believe that the information was true; or
    - (ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 140.

**142 When the consumer lease must be assessed as unsuitable—  
remaining in lease**

*Requirement to assess the lease as unsuitable*

- (1) For a preliminary assessment under subsection 139(2) about remaining in a consumer lease, the licensee must assess that the lease will be unsuitable for the consumer if the lease will be unsuitable for the consumer under subsection (2).

Civil penalty: 2,000 penalty units.

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

*Particular circumstances when the lease will be unsuitable*

- (2) The lease will be unsuitable for the consumer if, at the time of the preliminary assessment, it is likely that:
- (a) the consumer will be unable to comply with the consumer's financial obligations under the lease, or could only comply with substantial hardship if the consumer remains in the lease in the period covered by the preliminary assessment; or

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- (b) the lease will not meet the consumer's requirements or objectives if the consumer remains in the lease in the period covered by the preliminary assessment; or
  - (c) if the regulations prescribe circumstances in which a consumer lease is unsuitable—those circumstances will apply to the lease if the consumer remains in the lease in the period covered by the preliminary assessment.
- (3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the lease by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

*Information to be used to determine if lease will be unsuitable*

- (4) For the purposes of determining under subsection (2) whether the lease will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:
- (a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 140(1)(d) or (e);
  - (b) at the time of the preliminary assessment:
    - (i) the licensee had reason to believe that the information was true; or
    - (ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 140.

**143 Providing the consumer with the preliminary assessment**

*Requirement to give assessment if requested*

- (1) If the consumer requests the licensee for a copy of the preliminary assessment within 7 years of the date of the credit assistance quote under section 137, the licensee must give the consumer a written copy of the assessment:
- (a) if the request is made within 2 years of the quote—before the end of 7 business days after the day the licensee receives the request; and

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- (b) otherwise—before the end of 21 business days after the day the licensee receives the request.

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

Civil penalty: 2,000 penalty units.

*Manner of giving assessment*

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

*No payment for assessment*

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

Civil penalty: 2,000 penalty units.

*Strict liability offence*

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

Criminal penalty: 50 penalty units.

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

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

## **Division 5—Fees, commissions etc. relating to consumer leases**

### **144 Fees, commissions etc. relating to consumer leases**

*Requirement for disclosure*

- (1) A licensee must, at the same time as providing credit assistance to a consumer by:
  - (a) suggesting that the consumer apply, or assisting the consumer to apply, for a particular consumer lease with a particular lessor; or
  - (b) suggesting that the consumer remain in a particular consumer lease with a particular lessor;give the consumer a lease proposal disclosure document in accordance with subsection (2).

Civil penalty:           2,000 penalty units.

- (2) The lease proposal disclosure document must contain the following:
  - (a) the total amount of any fees or charges that the consumer is liable to pay to the licensee in relation to the consumer lease and the method used for working out that amount;
  - (b) a reasonable estimate of the total amount of any commissions that the licensee, or an employee, director or credit representative of the licensee, is likely to receive in relation to the consumer lease and the method used for working out that amount;
  - (c) a reasonable estimate of the total amount of any fees or charges that the consumer is likely to be liable to pay to the lessor in relation to applying for the consumer lease;
  - (d) a reasonable estimate of the total amount of any fees or charges that the consumer is likely to be liable to pay to another person in relation to applying for the consumer lease.

- (3) For the purposes of paragraph (2)(b), the regulations may prescribe:
- (a) the method for working out amounts of commissions; and
  - (b) how amounts of commissions must be described.

*Manner of giving lease proposal disclosure document*

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

### **145 No profiting from fees etc. paid to third parties**

*Requirement not to profit*

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

Civil penalty: 2,000 penalty units.

*Offence*

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

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

**Division 6—Prohibition on suggesting, or assisting with, unsuitable consumer leases**

**146 Prohibition on suggesting, or assisting with, unsuitable consumer leases**

*Prohibition on suggesting, or assisting with, unsuitable leases*

- (1) A licensee must not provide credit assistance to a consumer by:
- (a) suggesting that the consumer apply for a particular consumer lease with a particular lessor; or
  - (b) assisting the consumer to apply for a particular consumer lease with a particular lessor;

if the lease will be unsuitable for the consumer under subsection (2).

Civil penalty: 2,000 penalty units.

*When the lease will be unsuitable*

- (2) The lease will be unsuitable for the consumer if, at the time the licensee provides the credit assistance, it is likely that:
- (a) the consumer will be unable to comply with the consumer's financial obligations under the lease, or could only comply with substantial hardship, if the lease is entered in the period proposed for it to be entered; or
  - (b) the lease will not meet the consumer's requirements or objectives if the lease is entered in the period proposed for it to be entered; or
  - (c) if the regulations prescribe circumstances in which a consumer lease is unsuitable—those circumstances will apply to the lease if the lease is entered in the period proposed for it to be entered.
- (3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the lease by selling the consumer's principal

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

*Information to be used to determine if lease will be unsuitable*

- (4) For the purposes of determining under subsection (2) whether the lease will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:
- (a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 140(1)(d) or (e);
  - (b) at the time the licensee provides the credit assistance:
    - (i) the licensee had reason to believe that the information was true; or
    - (ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 140.

*Consumer lease not unsuitable under regulations*

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

*Offence*

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

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

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**147 Prohibition on suggesting to consumers to remain in unsuitable consumer leases**

*Prohibition on suggesting to remain in unsuitable lease*

- (1) A licensee must not provide credit assistance to a consumer by suggesting that the consumer remain in a particular consumer lease with a particular lessor if the lease is unsuitable for the consumer under subsection (2).

Civil penalty: 2,000 penalty units.

*When the lease is unsuitable*

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

*Information to be used to determine if lease is unsuitable*

- (4) For the purposes of determining under subsection (2) whether the lease is unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:
- (a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 140(1)(d) or (e);
  - (b) at the time the licensee provides the credit assistance:



- (i) the licensee had reason to believe that the information was true; or
- (ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 140.

*Consumer lease not unsuitable under regulations*

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

*Offence*

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

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

*Defence*

- (7) For the purposes of subsections (1) and (6), it is a defence if:
  - (a) the licensee suggested that the consumer remain in the consumer lease because the licensee reasonably believed that there was no other consumer lease that was not unsuitable for the consumer; and
  - (b) the licensee informed the consumer that there is a procedure under sections 72 and 94 of the National Credit Code for consumers in hardship.

Note 1: For the purposes of subsection (6), a defendant bears an evidential burden in relation to the matter in subsection (7) (see subsection 13.3(3) of the *Criminal Code*).

Note 2: Sections 72 and 94 of the National Credit Code apply in relation to consumer leases because of section 177 of the Code.

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

## **Part 3-4—Licensees that are lessors under consumer leases**

### **Division 1—Introduction**

#### **148 Guide to this Part**

This Part has rules that apply to licensees that are lessors. These rules are aimed at better informing consumers and preventing them from being in unsuitable consumer leases.

Division 2 requires a licensee to give its credit guide to a consumer. The credit guide has information about the licensee and some of the licensee's obligations under this Act.

Division 3 requires a licensee, before entering a consumer lease, to make an assessment as to whether the lease will be unsuitable. To do this, the licensee must make inquiries and verifications about the consumer's requirements, objectives and financial situation. The licensee must give the consumer a copy of the assessment if requested.

Division 4 prohibits a licensee from entering a consumer lease that is unsuitable for a consumer.

## **Division 2—Credit guide of lessors**

### **149 Credit guide of lessors**

#### *Requirement to give credit guide*

- (1) A licensee must, as soon as practicable after it becomes apparent to the licensee that it is likely to enter a consumer lease with a consumer who will be the lessee under the lease, give the consumer the licensee's credit guide in accordance with subsection (2).

Civil penalty: 2,000 penalty units.

- (2) The licensee's credit guide must:
- (a) be in writing; and
  - (b) be in the form (if any) prescribed by the regulations; and
  - (c) specify the licensee's name and contact details; and
  - (d) specify the licensee's Australian credit licence number; and
  - (e) give information about the licensee's procedure for resolving disputes with a consumer, including contact details for a consumer to access:
    - (i) the licensee's internal dispute resolution procedure; and
    - (ii) the approved external dispute resolution scheme of which the licensee is a member; and
  - (f) give information about the licensee's obligations under sections 155 and 156; and
  - (g) comply with any other requirements prescribed by the regulations.
- (3) The regulations may prescribe information that need not be included in the credit guide, despite subsection (2).

#### *Manner of giving credit guide*

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

*Strict liability offence*

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

Criminal penalty: 50 penalty units.

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

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

## **150 Credit guide of lessors who are assignees**

*Requirement to give credit guide*

- (1) A licensee must, as soon as practicable after it has been assigned any rights or obligations of a lessor under a consumer lease, give the lessee under the lease the licensee's credit guide in accordance with subsection (2).

Civil penalty: 2,000 penalty units.

- (2) The licensee's credit guide must:
- (a) be in writing; and
  - (b) be in the form (if any) prescribed by the regulations; and
  - (c) specify the licensee's name and contact details; and
  - (d) specify the licensee's Australian credit licence number; and
  - (e) give information about the licensee's procedure for resolving disputes with a consumer, including contact details for a consumer to access:
    - (i) the licensee's internal dispute resolution procedure; and
    - (ii) the approved external dispute resolution scheme of which the licensee is a member; and
  - (f) comply with any other requirements prescribed by the regulations.
- (3) The regulations may prescribe information that need not be included in the credit guide, despite subsection (2).

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*Manner of giving credit guide*

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

*Strict liability offence*

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

Criminal penalty: 50 penalty units.

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

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

## **Division 3—Obligations of lessors before entering consumer leases**

### **151 Obligations of lessors before entering consumer leases**

A licensee must not enter a consumer lease with a consumer who will be the lessee under the lease on a day (the *lease day*) unless the licensee has, within 90 days (or other period prescribed by the regulations) before the lease day:

- (a) made an assessment that:
  - (i) is in accordance with section 152; and
  - (ii) covers a period in which the lease day occurs; and
- (b) made the inquiries and verification in accordance with section 130.

Civil penalty:            2,000 penalty units.

### **152 Assessment of unsuitability of the consumer lease**

For the purposes of paragraph 151(a), the licensee must make an assessment that:

- (a) specifies the period the assessment covers; and
- (b) assesses whether the consumer lease will be unsuitable for the consumer if the lease is entered in that period.

Note:            The licensee is not required to make the assessment under this section if the lease is not entered.

### **153 Reasonable inquiries etc. about the consumer**

*Requirement to make inquiries and take steps to verify*

- (1) For the purposes of paragraph 151(b), the licensee must, before making the assessment:
  - (a) make reasonable inquiries about the consumer's requirements and objectives in relation to the consumer lease; and
  - (b) make reasonable inquiries about the consumer's financial situation; and

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- (c) take reasonable steps to verify the consumer's financial situation; and
- (d) make any inquiries prescribed by the regulations about any matter prescribed by the regulations; and
- (e) take any steps prescribed by the regulations to verify any matter prescribed by the regulations.

Civil penalty: 2,000 penalty units.

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

**154 When consumer lease must be assessed as unsuitable**

*Requirement to assess the lease as unsuitable*

- (1) The licensee must assess that the consumer lease will be unsuitable for the consumer if the lease will be unsuitable for the consumer under subsection (2).

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

*Particular circumstances when the lease will be unsuitable*

- (2) The lease will be unsuitable for the consumer if, at the time of the assessment, it is likely that:
  - (a) the consumer will be unable to comply with the consumer's financial obligations under the lease, or could only comply with substantial hardship, if the lease is entered in the period covered by the assessment; or
  - (b) the lease will not meet the consumer's requirements or objectives if the lease is entered in the period covered by the assessment; or
  - (c) if the regulations prescribe circumstances in which a consumer lease is unsuitable—those circumstances will apply to the lease if the lease is entered in the period covered by the assessment.

Civil penalty: 2,000 penalty units.



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

*Information to be used to determine if lease will be unsuitable*

- (4) For the purposes of determining under subsection (2) whether the lease will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:
- (a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 153(1)(d) or (e);
  - (b) at the time of the preliminary assessment:
    - (i) the licensee had reason to believe that the information was true; or
    - (ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 153.

## **155 Giving the consumer the assessment**

*Requirement to give assessment if requested*

- (1) If, before entering the consumer lease, the consumer requests the licensee for a copy of the assessment, the licensee must give the consumer a written copy of the assessment before entering the lease.

Note: The licensee is not required to give the consumer a copy of the assessment if the lease is not entered.

Civil penalty: 2,000 penalty units.

- (2) If, during the period that:
- (a) starts on the day (the **lease day**) the consumer lease is entered; and
  - (b) ends 7 years after that day;

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the consumer requests the licensee for a copy of the assessment, the licensee must give the consumer a written copy of the assessment:

- (c) if the request is made within 2 years of the lease day—before the end of 7 business days after the day the licensee receives the request; and
- (d) otherwise—before the end of 21 business days after the day the licensee receives the request.

Civil penalty: 2,000 penalty units.

*Manner of giving assessment*

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

*No payment for assessment*

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

Civil penalty: 2,000 penalty units.

*Strict liability offence*

- (5) A person commits an offence if:
  - (a) the person is subject to a requirement under subsection (1), (2) or (4); and
  - (b) the person engages in conduct; and
  - (c) the conduct contravenes the requirement.

Criminal penalty: 50 penalty units.

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

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

## **Division 4—Prohibition on entering unsuitable consumer leases**

### **156 Prohibition on entering unsuitable consumer leases**

#### *Prohibition on entering unsuitable lease*

- (1) A licensee must not enter a consumer lease with a consumer who will be the lessee under the lease if the lease is unsuitable for the consumer under subsection (2).

Civil penalty: 2,000 penalty units.

#### *When the lease is unsuitable*

- (2) The lease is unsuitable for the consumer if, at the time it is entered:
  - (a) it is likely that the consumer will be unable to comply with the consumer's financial obligations under the lease, or could only comply with substantial hardship; or
  - (b) the lease does not meet the consumer's requirements or objectives; or
  - (c) if the regulations prescribe circumstances in which a consumer lease is unsuitable—those circumstances apply to the lease.
- (3) For the purposes of paragraph (2)(a), it is presumed that, if the consumer could only comply with the consumer's financial obligations under the lease by selling the consumer's principal place of residence, the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved.

#### *Information to be used to determine if lease is unsuitable*

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

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- (a) the information is about the consumer's financial situation, requirements or objectives, or any other matter prescribed by the regulations under paragraph 153(1)(d) or (e);
- (b) at the time the lease is entered:
  - (i) the licensee had reason to believe that the information was true; or
  - (ii) the licensee would have had reason to believe that the information was true if the licensee had made the inquiries or verification under section 153.

*Consumer lease not unsuitable under regulations*

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

*Offence*

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

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

## **Part 3-5—Credit representatives**

### **Division 1—Introduction**

#### **157 Guide to this Part**

This Part has rules that apply to credit representatives when they act on behalf of a licensee under Part 3-1, 3-2, 3-3 or 3-4. These rules are aimed at better informing consumers.

Division 2 requires a credit representative to give its credit guide to a consumer. The credit guide has information about the credit representative.

## **Division 2—Credit guide of credit representatives**

### **158 Credit guide of credit representatives**

#### *Requirement to give credit guide*

- (1) If a credit representative of a licensee gives a consumer the licensee's credit guide when acting on behalf of the licensee under Part 3-1, 3-2, 3-3 or 3-4, the credit representative must at the same time give the consumer the credit representative's credit guide in accordance with subsection (2).

Civil penalty: 2,000 penalty units.

- (2) The credit representative's credit guide must:
- (a) be in writing; and
  - (b) be in the form (if any) prescribed by the regulations; and
  - (c) specify the credit representative's name and contact details; and
  - (d) specify the credit representative's credit representative number; and
  - (e) give information about:
    - (i) any fees that are payable by a consumer to the credit representative for acting as a credit representative; and
    - (ii) any charges that are payable by a consumer to the credit representative for matters associated with acting as a credit representative; and
    - (iii) the method for working out the amount of the fees and charges; and
  - (f) give information about:
    - (i) if there are 6 or fewer licensees for whom the credit representative is a credit representative—the names of those licensees; and
    - (ii) if there are more than 6 licensees for whom the credit representative is a credit representative—the names of the 6 licensees for whom the credit representative reasonably believes it conducts the most business; and

- (iii) the credit activities the credit representative is authorised to engage in on behalf of the licensees referred to in subparagraph (i) or (ii); and
  - (g) give information about:
    - (i) any commissions the credit representative is likely to receive, directly or indirectly, from those licensees; and
    - (ii) a reasonable estimate of the amounts of those commissions or the range of those amounts; and
    - (iii) the method for working out those amounts; and
  - (h) give information about the credit representative's procedure for resolving disputes with a consumer, including contact details for a consumer to access the approved external dispute resolution scheme of which the credit representative's is a member; and
  - (i) comply with any other requirements prescribed by the regulations.
- (3) The regulations may prescribe:
- (a) information that need not be included in the credit guide, despite subsection (2); and
  - (b) for the purposes of paragraph (2)(g):
    - (i) the method for working out amounts of commissions; and
    - (ii) how commissions or amounts of commissions must be described.

*Manner of giving credit guide*

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

*Strict liability offence*

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

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Criminal penalty: 50 penalty units.

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

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



## **Part 3-6—Debt collectors**

### **Division 1—Introduction**

#### **159 Guide to this Part**

This Part has rules that apply to a person who is authorised to collect payments under a credit contract or consumer lease from a debtor or lessee. These rules are aimed at better informing consumers.

Division 2 requires the person to give the person's credit guide to the consumer. The credit guide has information about the person.

## **Division 2—Credit guide of debt collectors**

### **160 Credit guide of debt collectors**

#### *Requirement to give credit guide*

- (1) A person who is a licensee or credit representative must, as soon as practicable after it becomes authorised by a credit provider to collect, on the credit provider's behalf, repayments made by a debtor under a credit contract, give the debtor the person's credit guide in accordance with subsection (3).

Civil penalty: 2,000 penalty units.

- (2) A person who is a licensee or credit representative must, as soon as practicable after it becomes authorised by a lessor to collect, on the lessor's behalf, payments made by a lessee under a consumer lease, give the lessee the person's credit guide in accordance with subsection (3).

Civil penalty: 2,000 penalty units.

- (3) The person's credit guide must:
- (a) be in writing; and
  - (b) be in the form (if any) prescribed by the regulations; and
  - (c) specify the person's name and contact details; and
  - (d) if the person is a licensee—specify the person's Australian credit licence number; and
  - (e) if the person is a credit representative—specify the person's credit representative number; and
  - (f) give information about the person's procedure for resolving disputes with a consumer, including contact details for a consumer to access:
    - (i) if the person is a licensee—the person's internal dispute resolution procedure; and
    - (ii) in all cases—the approved external dispute resolution scheme of which the person is a member; and

- (g) comply with any other requirements prescribed by the regulations.
- (4) The regulations may prescribe information that need not be included in the credit guide, despite subsection (3).

*Manner of giving credit guide*

- (5) The person must give the consumer the person's credit guide in the manner (if any) prescribed by the regulations.

*Strict liability offence*

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

Criminal penalty: 50 penalty units.

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

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

## **Part 3-7—Exemptions and modifications relating to this Chapter**

### **Division 1—Introduction**

#### **161 Guide to this Part**

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

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

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

### **162 Provisions to which this Part applies**

The provisions to which this Part applies are:

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

### **163 Exemptions and modifications by ASIC**

- (1) ASIC may:
  - (a) exempt:
    - (i) a person; or
    - (ii) a person and all of the person's credit representatives; from all or specified provisions to which this Part applies; or
  - (b) exempt a credit contract from all or specified provisions to which this Part applies; or
  - (c) exempt a consumer lease from all or specified provisions to which this Part applies; or
  - (d) declare that provisions to which this Part applies apply in relation to a person, credit contract or consumer lease as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) An exemption or declaration under subsection (1) is not a legislative instrument.
- (3) ASIC may, by legislative instrument:
  - (a) exempt a class of persons from all or specified provisions to which this Part applies; or
  - (b) exempt a class of credit contracts from all or specified provisions to which this Part applies; or

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- (c) exempt a class of consumer leases from all or specified provisions to which this Part applies; or
  - (d) declare that provisions to which this Part applies apply in relation to a class of persons, credit contracts or consumer leases, as if specified provisions were omitted, modified or varied as specified in the declaration.
- (4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The court may order the person to comply with the condition in a specified way. Only ASIC may apply to the court for the order.
- (5) An exemption or declaration under subsection (1) must be in writing and ASIC must publish notice of it on its website.
- (6) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(d) or (3)(d) had not been made, that conduct does not constitute an offence unless, before the conduct occurred:
- (a) the text of the declaration was published by ASIC on its website; or
  - (b) ASIC gave written notice setting out the text of the declaration to the person;
- (in addition to complying with the requirements of the *Legislative Instruments Act 2003* if the declaration is made under subsection (3)).
- (7) In a prosecution for an offence to which subsection (6) applies, the prosecution must prove that paragraph (6)(a) or (b) was complied with before the conduct occurred.

**164 Exemptions and modifications by the regulations**

The regulations may:

- (a) exempt a person or class of persons from all or specified provisions to which this Part applies; or
- (b) exempt a credit contract or a class of credit contracts from all or specified provisions to which this Part applies; or

- (c) exempt a consumer lease or a class of consumer leases from all or specified provisions to which this Part applies; or
- (d) provide that the provisions to which this Part applies apply as if specified provisions were omitted, modified or varied as specified in the regulations.

## **Chapter 4—Remedies**

### **Part 4-1—Civil penalty provisions**

#### **Division 1—Introduction**

##### **165 Guide to this Part**

This Part is about civil penalty provisions. Civil penalty provisions impose obligations on certain persons. Civil remedies may be sought in relation to contraventions of these provisions.

Division 2 authorises the court to make a declaration that a person has contravened a civil penalty provision and order the person to pay a pecuniary penalty. Only ASIC may apply to the court for the declaration or order.

Division 3 has general provisions relating to civil penalty provisions, including rules about evidence and procedure.



## **Division 2—Declarations and pecuniary penalty orders for contraventions of civil penalty provisions**

### **166 Declaration of contravention of civil penalty provision**

*Application for declaration of contravention*

- (1) Within 6 years of a person contravening a civil penalty provision, ASIC may apply to the court for a declaration that the person contravened the provision.

*Declaration of contravention*

- (2) The court must make the declaration if it is satisfied that the person has contravened the provision.
- (3) The declaration must specify the following:
  - (a) the court that made the declaration;
  - (b) the civil penalty provision that was contravened;
  - (c) the person who contravened the provision;
  - (d) the conduct that constituted the contravention.

*Declaration of contravention conclusive evidence*

- (4) The declaration is conclusive evidence of the matters referred to in subsection (3).

### **167 Court may order person to pay pecuniary penalty for contravening civil penalty provision**

*Application for order*

- (1) Within 6 years of a person contravening a civil penalty provision, ASIC may apply to the court for an order that the person pay the Commonwealth a pecuniary penalty.

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*Court may order person to pay pecuniary penalty*

- (2) If a declaration has been made under section 166 that the person has contravened the provision, the court may order the person to pay to the Commonwealth a pecuniary penalty that the court considers is appropriate (but not more than the amount specified in subsection (3)).

*Determining amount of pecuniary penalty*

- (3) The pecuniary penalty must not be more than:
- (a) if the person is a natural person—the maximum number of penalty units referred to in the civil penalty provision; or
  - (b) if the person is a body corporate, a partnership or multiple trustees—5 times the maximum number of penalty units referred to in the civil penalty provision.

Note: This Act treats partnerships and multiple trustees as if they were persons (see sections 14 and 15).

*Recovery of penalty as a debt*

- (4) The pecuniary penalty may be recovered as a debt due to the Commonwealth.

### **Division 3—General provisions relating to civil penalty provisions**

#### **168 Contravening a civil penalty provision is not an offence**

A contravention of a civil penalty provision is not an offence.

#### **169 Involvement in contravention treated in same way as actual contravention**

A person who is involved in a contravention of a civil penalty provision is taken to have contravened that provision.

#### **170 Civil evidence and procedure rules for proceedings relating to civil penalty provisions**

The court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention, or proposed contravention, of a civil penalty provision.

#### **171 Criminal proceedings before civil proceedings**

The court must not make a declaration of contravention or a pecuniary penalty order against a person for a contravention of a civil penalty provision if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.

#### **172 Criminal proceedings during civil proceedings**

- (1) Proceedings for a declaration of contravention or a pecuniary penalty order against a person for a contravention of a civil penalty provision are stayed if:
  - (a) criminal proceedings are brought or have already been brought against the person for an offence; and

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- (b) the offence is constituted by conduct that is substantially the same as the conduct in relation to which the declaration or order would be made.
- (2) The proceedings for the declaration or order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings for the declaration or order are dismissed.

**173 Criminal proceedings after civil proceedings**

Criminal proceedings may be brought against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether a declaration of contravention or a pecuniary penalty order has been made against the person under this Division.

**174 Evidence given in proceedings for pecuniary penalty not admissible in criminal proceedings**

- (1) Evidence of information given, or evidence of production of documents, by a natural person is not admissible in criminal proceedings against the natural person if:
  - (a) the natural person previously gave the information or produced the documents in proceedings for a declaration of contravention or a pecuniary penalty order against the natural person for a contravention of a civil penalty provision (whether or not the declaration or order was made); and
  - (b) the conduct alleged to constitute the offence is substantially the same as the conduct in relation to which the declaration or order was sought.
- (2) However, this does not apply to criminal proceedings in relation to the falsity of the evidence given by the natural person in the proceedings for the declaration or order.

**175 Civil double jeopardy**

If a person is ordered to pay a pecuniary penalty under a civil penalty provision in relation to particular conduct, the person is not liable to be ordered to pay a pecuniary penalty under some other

provision of a law of the Commonwealth in relation to that conduct.

Note: A court may make other orders, such as an order for compensation, in relation to particular conduct even if the court has made a pecuniary penalty order in relation to that conduct (see section 184).

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

### **Division 1—Introduction**

#### **176 Guide to this Part**

This Part is about the remedies the court may grant.

Division 2 authorises the court to grant a range of remedies, including injunctions, compensation orders and other orders against those who engage in credit activities unlawfully.

## **Division 2—Power of the court to grant remedies**

### **177 Injunctions**

- (1) If, on the application of ASIC or any other person, the court is satisfied that a person has engaged or is proposing to engage in conduct that constitutes or would constitute:
  - (a) a contravention of this Act; or
  - (b) attempting to contravene this Act; or
  - (c) aiding, abetting, counselling or procuring a person to contravene this Act; or
  - (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
  - (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
  - (f) conspiring with others to contravene this Act;the court may grant an injunction on such terms as the court considers appropriate.
- (2) If an application for an injunction under subsection (1) has been made, the court may, if the court considers it appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the court is satisfied that the person has engaged, or is proposing to engage, in conduct of a kind referred to in subsection (1).
- (3) The court may, if the court considers it appropriate, grant an interim injunction pending determination of an application under subsection (1).
- (4) The court may revoke or vary an injunction granted under subsection (1) or (3).
- (5) The power of the court to grant an injunction restraining a person from engaging in conduct may be exercised:
  - (a) whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind; and

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- (b) whether or not the person has previously engaged in conduct of that kind; and
  - (c) whether or not there is an imminent danger of substantial damage to another person if the person engages in conduct of that kind.
- (6) The power of the court to grant an injunction requiring a person to do an act or thing may be exercised:
- (a) whether or not it appears to the court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
  - (b) whether or not the person has previously refused or failed to do that act or thing; and
  - (c) whether or not there is an imminent danger of substantial damage to another person if the person refuses or fails to do that act or thing.
- (7) If ASIC applies to the court for the grant of an injunction under this section, the court must not require ASIC or another person, as a condition of granting an interim injunction, to give an undertaking as to damages.
- (8) If the court has power under this section to grant an injunction against a person, the court may, either in addition to or in substitution for the grant of the injunction, order the person to pay damages to another person.

**178 Compensation orders**

*Court may order person to pay compensation*

- (1) The court may order a person (the **defendant**) to compensate another person (the **plaintiff**) for loss or damage suffered by the plaintiff if:
- (a) the defendant has contravened a civil penalty provision or has committed an offence against this Act (other than the National Credit Code); and
  - (b) the loss or damage resulted from the contravention or commission of the offence.

The order must specify the amount of compensation.



Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 166.

*When order may be made*

- (2) The court may make the order only if:
- (a) the plaintiff or ASIC (on behalf of the plaintiff) applies for an order under this section; and
  - (b) the application is made within 6 years of the day the cause of action that relates to the contravention or commission of the offence accrued.

*Applications for order*

- (3) For the purposes of paragraph (2)(a), ASIC may make an application on behalf of the plaintiff, but only if the plaintiff has given consent in writing before the application is made.

*Recovery of compensation as a debt*

- (4) If the court makes the order, the amount of compensation specified in the order that is to be paid to the plaintiff may be recovered as a debt due to the plaintiff.

## **179 Other orders to compensate loss or damage**

*Court may make other orders to compensate loss or damage*

- (1) If:
- (a) a person (the *defendant*) has contravened a civil penalty provision or has committed an offence against this Act (other than the National Credit Code); and
  - (b) another person (the *plaintiff*) has suffered, or is likely to suffer, loss or damage as a result of the contravention or commission of the offence;

the court may make such order as the court considers appropriate against the defendant to:

- (c) compensate the plaintiff, in whole or in part, for the loss or damage; or

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- (d) prevent or reduce the loss or damage suffered, or likely to be suffered, by the plaintiff.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 166.

- (2) Without limiting subsection (1), examples of orders the court may make include:
  - (a) an order declaring the whole or any part of a contract, deed or arrangement made between the defendant and the plaintiff to be void and, if the court considers it appropriate, to have been void from the time it was entered or at all times on and after a specified day before the order is made; and
  - (b) an order varying such a contract, deed or arrangement in such manner as is specified in the order and, if the court considers it appropriate, declaring the contract, deed or arrangement to have had effect as so varied on and after a specified day before the order is made; and
  - (c) an order refusing to enforce any or all of the terms of such a contract, deed or arrangement; and
  - (d) an order directing the defendant to refund money or return property to the plaintiff; and
  - (e) an order directing the defendant to pay to the plaintiff the amount of loss or damage the plaintiff suffered; and
  - (f) an order directing the defendant, at the defendant's own expense, to supply specified services to the plaintiff.

*When order may be made*

- (3) The court may make the order only if:
  - (a) the plaintiff or ASIC (on behalf of the plaintiff) applies for an order under this section; and
  - (b) the application is made within 6 years of the day the cause of action that relates to the contravention or commission of the offence accrued.

*Applications for order*

- (4) For the purposes of paragraph (3)(a), ASIC may make an application on behalf of the plaintiff, but only if the plaintiff has given consent in writing before the application is made.

*Recovery of amount as a debt*

- (5) If the court makes an order that the defendant pay an amount specified in the order to the plaintiff, the plaintiff may recover the amount as a debt due to the plaintiff.

## **180 Orders in relation to unlawful credit activities**

*Court may make orders in relation to unlawful credit activities*

- (1) If:
- (a) a person (the *defendant*) engages in a credit activity in relation to another person (the *plaintiff*); and
  - (b) the engaging in the activity contravenes section 29 (which requires the holding of licence);
- the court may make such order as the court considers appropriate against the defendant:
- (c) to prevent the defendant from profiting from the plaintiff by engaging in that activity; or
  - (d) to compensate the plaintiff, in whole or in part, for any loss or damage suffered as a result of the defendant engaging in that activity; or
  - (e) to prevent or reduce the loss or damage suffered, or likely to be suffered, by the plaintiff as a result of the defendant engaging in that activity.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 166.

- (2) Without limiting subsection (1), examples of orders the court may make include:
- (a) an order declaring the whole or any part of a contract, deed or arrangement made between the defendant and the plaintiff to be void and, if the court considers it appropriate, to have been

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void from the time it was entered or at all times on and after a specified day before the order is made; and

- (b) an order varying such a contract, deed or arrangement in such manner as is specified in the order and, if the court considers it appropriate, declaring the contract, deed or arrangement to have had effect as so varied on and after a specified day before the order is made; and
- (c) an order refusing to enforce any or all of the terms of such a contract, deed or arrangement; and
- (d) an order directing the defendant to refund money or return property to the plaintiff; and
- (e) an order directing the defendant to pay to the plaintiff the amount of loss or damage the plaintiff suffered; and
- (f) an order directing the defendant, at the defendant's own expense, to supply specified services to the plaintiff.

*When order may be made*

- (3) The court may make the order only if:
  - (a) the plaintiff or ASIC (on behalf of the plaintiff) applies for an order under this section; and
  - (b) the application is made within 6 years of the day the cause of action that relates to the contravention or commission of the offence accrued.

*Applications for order*

- (4) For the purposes of paragraph (3)(a), ASIC may make an application on behalf of the plaintiff, but only if the plaintiff has given consent in writing before the application is made.

*Recovery of amount as a debt*

- (5) If the court makes an order that the defendant pay an amount specified in the order to the plaintiff, the plaintiff may recover the amount as a debt due to the plaintiff.

**181 Preference must be given to compensate consumers**

If the court considers that:

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- (a) it is appropriate to make a pecuniary penalty order against a person in relation to a contravention of a civil penalty provision or impose a fine against a person in relation to a commission of an offence against this Act (other than the National Credit Code); and
  - (b) it is appropriate to make an order under 178, 179 or 180 that the person pay compensation to a consumer who has suffered loss or damage in relation to the contravention; and
  - (c) the person does not have sufficient financial resources to pay both the pecuniary penalty or fine and the compensation;
- the court must give preference to making the order for compensation.

### **182 Adverse publicity orders**

- (1) The court may, on application by ASIC, make an adverse publicity order against a person who has:
  - (a) contravened a civil penalty provision; or
  - (b) committed an offence against this Act.
- (2) An *adverse publicity order* is an order that:
  - (a) requires a person to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession of or access to; or
  - (b) requires a person to publish, at the person's expense and in the way specified in the order, an advertisement in the terms specified in, or determined in accordance with, the order.
- (3) The court may make the order only if:
  - (a) ASIC applies for an order under this section; and
  - (b) the application is made within 6 years of the contravention or the commission of the offence.

### **183 Relief from liability for contravention of civil penalty provision**

- (1) If:
    - (a) proceedings for a contravention of a civil penalty provision are brought against a person; and
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- (b) in the proceedings it appears to the court that the person has, or may have, contravened a civil penalty provision but that:
- (i) the person has acted honestly; and
  - (ii) having regard to all the circumstances of the case, the person ought fairly to be excused for the contravention;
- the court may relieve the person either wholly or partly from a liability to which the person would otherwise be subject, or that might otherwise be imposed on the person, because of the contravention.
- (2) If a person considers that proceedings for a contravention of a civil penalty provision will or may be brought against the person, the person may apply to the court for relief.
- (3) On an application under subsection (2), the court may grant relief under subsection (1) as if the proceedings had been begun in the court.

**184 Multiple remedies may be granted**

To avoid doubt, the court may make an order under a provision of this Act in addition to one or more orders under another provision of this Act.

## **Part 4-3—Jurisdiction and procedure of courts**

### **Division 1—Introduction**

#### **185 Guide to this Part**

This Part is about court jurisdiction and procedure.

Division 2 deals with civil proceedings. It confers jurisdiction on the Federal Court, the Federal Magistrates Court and State and Territory courts, subject to specified limits. It also contains rules about the transfer of civil proceedings between courts and other matters (such as when proceedings may be dealt with as small claims proceedings and when adverse cost orders can be made).

Division 3 deals with criminal proceedings. It confers criminal jurisdiction on the State and Territory courts and sets out the laws that are to be applied in relation to criminal proceedings.

Division 4 contains rules about proceedings generally (such as ASIC's power to intervene in proceedings and the power of courts to punish for contempt).

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## Division 2—Civil proceedings

### Subdivision A—Application of this Division

#### 186 Application of this Division

- (1) This Division applies to the exclusion of:
  - (a) the *Jurisdiction of Courts (Cross-vesting) Act 1987*; and
  - (b) section 39B of the *Judiciary Act 1903*.
- (2) This Division does not limit the application of the provisions of the *Judiciary Act 1903* (other than section 39B). In particular, it does not limit the application of subsection 39(2) of that Act in relation to matters arising under this Act.
- (3) Nothing in this Division affects any other jurisdiction of any court.
- (4) Despite anything else in this Division, jurisdiction is conferred on the courts of a Territory only to the extent that the Constitution permits.

### Subdivision B—Conferral of civil jurisdiction

#### 187 Civil jurisdiction of courts

- (1) Jurisdiction is conferred on a court referred to in an item in the following table in relation to civil matters arising under this Act, subject to the limits on the court's jurisdiction (if any) specified in the item:

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Civil jurisdiction of courts		
Item	Court on which civil jurisdiction is conferred	Limits of jurisdiction
1	The Federal Court	No specified limits.
2	The Federal Magistrates Court	The court does not have jurisdiction to award an amount for loss or damage that exceeds:

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**Civil jurisdiction of courts**

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<b>Item</b>	<b>Court on which civil jurisdiction is conferred</b>	<b>Limits of jurisdiction</b>
		(a) \$750,000; or (b) if another amount is prescribed by the regulations—that other amount.
3	A superior court, or lower court, of a State or Territory	The court's general jurisdictional limits, including limits as to locality and subject matter.

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(2) This section has effect subject to section 188.

**188 Jurisdiction—decisions to prosecute and related criminal justice process decisions made by Commonwealth officers**

- (1) If a decision to prosecute a person for an offence against this Act has been made by an officer of the Commonwealth, and the prosecution is proposed to be brought in a court of a State or Territory:
  - (a) the Federal Court does not have jurisdiction in relation to any matter in which a person seeks a writ of mandamus or prohibition, or an injunction, against the officer in relation to that decision; and
  - (b) jurisdiction in relation to any such matter is conferred on the Supreme Court of the State or Territory in which the prosecution is proposed to be brought.
- (2) Subject to subsection (4), at any time when:
  - (a) a prosecution for an offence against this Act is before a court of a State or Territory; or
  - (b) an appeal arising out of such a prosecution is before a court of a State or Territory;the following apply:
  - (c) the Federal Court does not have jurisdiction in relation to any matter in which the person who is or was the defendant in the prosecution seeks a writ of mandamus or prohibition, or an

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- injunction, against an officer of the Commonwealth in relation to a related criminal justice process decision;
- (d) jurisdiction in relation to any such matter is conferred on the Supreme Court of the State or Territory in which the prosecution or appeal is before a court.
- (3) A ***related criminal justice process decision***, in relation to an offence, means a decision (other than a decision to prosecute) made in the criminal justice process in relation to the offence, including:
- (a) a decision in connection with the investigation, committal for trial or prosecution of the defendant; and
  - (b) a decision in connection with the appointment of investigators or inspectors for the purposes of such an investigation; and
  - (c) a decision in connection with the issue of a warrant, including a search warrant or a seizure warrant; and
  - (d) a decision requiring the production of documents, the giving of information or the summoning of persons as witnesses; and
  - (e) a decision in connection with an appeal arising out of the prosecution.
- (4) Subsection (2) does not apply if a person has applied for a writ of mandamus or prohibition, or an injunction, against an officer of the Commonwealth in relation to a related criminal justice process decision before the commencement of a prosecution for an offence against a law of the Commonwealth, or of a State or a Territory.
- (5) If subsection (4) applies, the prosecutor may apply to the court for a permanent stay of the proceedings referred to in that subsection and the court may grant such a stay if the court determines that:
- (a) the matters that are the subject of the proceedings are more appropriately dealt with in the criminal justice process; and
  - (b) a stay of proceedings will not substantially prejudice the person.
- (6) Subsections (1), (2), (4) and (5) have effect despite anything in this Act or in any other law. In particular:

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- (a) neither this Act, nor any other law, has the effect of giving the Federal Court jurisdiction contrary to subsection (1) or (2); and
- (b) neither section 9 of the *Administrative Decisions (Judicial Review) Act 1977*, nor any other law, has the effect of removing from the Supreme Court of a State or Territory the jurisdiction given to that court by subsection (1) or (2).

**189 Cross-jurisdictional appeals**

The following table has effect:

<b>Cross-jurisdictional appeals</b>		
<b>Item</b>	<b>Despite any other law of the Commonwealth, an appeal in relation to a matter arising under this Act does not lie from a decision of ...</b>	<b>to any of the following courts:</b>
1	the Federal Court	(a) a court of a State; (b) a court of a Territory; (c) the Federal Magistrates Court.
2	the Federal Magistrates Court	(a) a court of a State; (b) a court of a Territory.
3	a court of a State	(a) the Federal Court; (b) the Federal Magistrates Court; (c) a court of another State; (d) a court of a Territory.
4	a court of the Australian Capital Territory	(a) the Federal Court; (b) the Federal Magistrates Court; (c) a court of a State; (d) a court of another Territory.
5	a court of the Northern Territory	(a) the Federal Court; (b) the Federal Magistrates Court; (c) a court of a State; (d) a court of another Territory.

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**190 Courts to act in aid of each other**

All of the following must severally act in aid of, and be auxiliary to, each other in civil matters arising under this Act:

- (a) courts on which jurisdiction is conferred under this Division;
- (b) officers of, or under the control of, those courts.

**Subdivision C—Transfers between courts**

**191 Transfers—application of Subdivision**

*Scope of Subdivision*

- (1) This Subdivision applies if all the following conditions are satisfied:
  - (a) proceedings in relation to a civil matter arising under this Act are pending, or have come, before a court (the **transferring court**) on which jurisdiction is conferred under this Division in relation to the matter;
  - (b) jurisdiction is also conferred on another court (the **receiving court**) under this Division in relation to either of the following (the **transfer matter**):
    - (i) the entire proceedings;
    - (ii) an application in the proceedings;
  - (c) the receiving court has the power to grant the remedies sought before the transferring court in relation to the transfer matter.

*Transfers to which other legislation applies*

- (2) This Subdivision does not apply to a transfer between the Federal Court and the Federal Magistrates Court, except as provided by paragraph 192(2)(b).

Note 1: Paragraph 192(2)(b) gives the Federal Magistrates Court the power to transfer a matter to the Federal Court with a recommendation that the Federal Court transfer the matter to another superior court.

Note 2: Transfers from the Federal Court are covered by section 32AB of the *Federal Court of Australia Act 1976* and transfers from the Federal Magistrates Court are covered by section 39 of the *Federal Magistrates Act 1999*.

## **192 Transfers—exercise of transfer power**

### *General rule*

- (1) If section 193 (which deals with the criteria for transfers) is satisfied, the transferring court may transfer to the receiving court:
  - (a) the transfer matter; and
  - (b) if the transferring court considers it necessary or convenient—any related application (or all related applications) in the proceedings.

### *Cross-jurisdictional transfers between lower courts and superior courts*

- (2) However, if the transferring court is a lower court, and the transferring court considers that section 193 is satisfied in relation to the transfer of a matter referred to in subsection (1) of this section to a receiving court that is a superior court other than the relevant superior court:
  - (a) the transferring court does not have the power to transfer the matter to that receiving court; but
  - (b) the transferring court may:
    - (i) transfer the matter to the relevant superior court; and
    - (ii) give the relevant superior court a recommendation that the matter be transferred to that receiving court by the relevant superior court.

## **193 Transfers—criteria for transfer**

### *General*

- (1) The transferring court may make a transfer under section 192 only if it appears to the transferring court, taking into account the considerations covered by subsection (2) of this section, that:
  - (a) the transfer matter arises out of, or is related to, other proceedings pending, or that have come, before the receiving court; or
  - (b) it is otherwise in the interests of justice that the transfer matter be determined by the receiving court.

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*Relevant considerations*

- (2) The considerations covered by this subsection include the following:
- (a) the principal location, or place of business, of the parties in relation to the transfer matter;
  - (b) where the event (or events) that are the subject of the transfer matter took place;
  - (c) if the transfer matter involves secured real property—the jurisdiction in which the real property is located;
  - (d) the desirability of related proceedings being heard in the same State or Territory;
  - (e) any relevant recommendation received under subsection 192(2);
  - (f) the suitability (taking into account the considerations referred to in paragraphs (a) to (e) and any other consideration) of having the transfer matter determined by the receiving court.

**194 Transfers—how initiated**

A court may make a transfer under section 192:

- (a) on the application of a party made at any stage; or
- (b) at the court’s own initiative.

**195 Transfers—documents and procedure**

If the transferring court transfers proceedings or an application to the receiving court under section 192:

- (a) the Registrar (or other proper officer) of the transferring court must give the Registrar (or other proper officer) of the receiving court all documents filed in the transferring court in relation to the proceedings or application; and
- (b) the receiving court must proceed as if:
  - (i) the proceedings or application had been originally brought or made in the receiving court; and
  - (ii) the same proceedings had been taken in the receiving court as were taken in the transferring court.

### **196 Transfers—conduct of proceedings**

- (1) Subject to any applicable rules of court, in dealing with the transfer matter transferred to the court under section 192, the receiving court must apply rules of evidence and procedure that:
  - (a) are applied in any superior court; and
  - (b) the court considers appropriate to be applied in the circumstances.
- (2) If proceedings are transferred under section 192 from the transferring court to the receiving court, the receiving court must deal with the proceedings as if, subject to any order of the transferring court, the steps that had been taken for the purposes of the proceedings in the transferring court (including the making of an order), or similar steps, had been taken in the receiving court.

### **197 Transfers—entitlement to practise as a lawyer**

- (1) If proceedings (the *transferred proceedings*) in the transferring court are transferred to the receiving court under section 192, a person who is entitled to practise as a lawyer (however described) in the transferring court has the same entitlements to practise in relation to the matters covered by subsection (2) in the receiving court that the person would have if the receiving court were a federal court exercising federal jurisdiction.
- (2) This subsection covers the following matters:
  - (a) the transferred proceedings;
  - (b) any other proceedings out of which the transferred proceedings arise or to which the transferred proceedings are related, if the other proceedings are to be determined together with the transferred proceedings.

### **198 Transfers—limitation on appeals**

An appeal does not lie from a decision of a court:

- (a) in relation to the transfer of proceedings under section 192;  
or
- (b) as to which rules of evidence and procedure are to be applied under subsection 196(1).

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**Subdivision D—Other matters**

**199 Plaintiffs may choose small claims procedure**

*Application for small claims procedure*

- (1) Proceedings are to be dealt with as small claims proceedings under this section if:
- (a) a person applies to a magistrates court, local court or the Federal Magistrates Court for an order covered by subsection (2); and
  - (b) the person indicates, in the manner (if any) prescribed by the regulations or by the rules of the court, that the person wants the small claims procedure to apply to the proceedings.

*Orders for which small claims procedure triggered*

- (2) The following table sets out when an order is covered by this subsection:

<b>Orders for which small claims procedure triggered</b>		
<b>Item</b>	<b>An order is covered by this subsection if it is made under ...</b>	<b>but only if (if applicable) ...</b>
1	Section 178	the order is for an amount that is not more than: (a) \$40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
2	Section 37 of the National Credit Code	the value of the credit contract, mortgage, guarantee or consumer lease to which the order relates is not more than: (a) \$40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
3	Subsection 38(7) of the National	the value of the credit contract,



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**Orders for which small claims procedure triggered**

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Item	An order is covered by this subsection if it is made under ...	but only if (if applicable) ...
	Credit Code	mortgage, guarantee or consumer lease to which the order relates is not more than: (a) \$40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
4	Section 74 of the National Credit Code	not applicable.
5	Section 75 of the National Credit Code	not applicable.
6	Section 76 of the National Credit Code	the value of the credit contract, mortgage, guarantee or consumer lease to which the order relates is not more than: (a) \$40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
7	Section 78 of the National Credit Code	the value of the credit contract, mortgage, guarantee or consumer lease to which the order relates is not more than: (a) \$40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
8	Section 96 of the National Credit Code	not applicable.
9	Section 101 of the National Credit Code	the value of the credit contract, mortgage, guarantee or consumer lease to which the order relates is not more than: (a) \$40,000; or (b) if a higher amount is prescribed

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**Orders for which small claims procedure triggered**

<b>Item</b>	<b>An order is covered by this subsection if it is made under ...</b>	<b>but only if (if applicable) ...</b>
		by the regulations—that higher amount.
10	Section 106 of the National Credit Code	the order is for an amount that is not more than: (a) \$40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
11	Subsection 107(3) of the National Credit Code	the order is for an amount that is not more than: (a) \$40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
12	Section 108 of the National Credit Code	the value of the credit contract, mortgage, guarantee or consumer lease to which the order relates is not more than: (a) \$40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.
13	Section 118 of the National Credit Code	the order is for an amount that is not more than: (a) \$40,000; or (b) if a higher amount is prescribed by the regulations—that higher amount.

(3) The *value of a credit contract, mortgage, guarantee or consumer lease* is:

- (a) worked out in accordance with the regulations; or
- (b) if there are no regulations in force for the purposes of paragraph (a):

- (i) for a credit contract—the amount of credit that has been, or may be, provided under the contract; and
- (ii) for a mortgage—the amount of credit that has been, or may be, provided under the credit contract to which the mortgage relates; and
- (iii) for a guarantee—the amount of credit that has been, or may be, provided under the credit contract to which the guarantee relates; and
- (iv) for a consumer lease—the amount payable under the consumer lease, as referred to in paragraph 170(1)(b) of the National Credit Code.

*Court may make ancillary or consequential orders*

- (4) To avoid doubt, the court may make any ancillary or consequential orders it considers appropriate in relation to the orders made under the provisions referred to in subsection (2). The limits referred to in column 3 of the table do not apply to those ancillary or consequential orders.

*Procedure*

- (5) In small claims proceedings, the court is not bound by any rules of evidence and procedure and may act:
  - (a) in an informal manner; and
  - (b) without regard to legal forms and technicalities.
- (6) At any stage of the small claims proceedings, the court may amend the papers commencing the proceedings if sufficient notice is given to any party adversely affected by the amendment.

*Legal representation*

- (7) A party to small claims proceedings may be represented in the proceedings by a lawyer only with the leave of the court.
- (8) If the court grants leave for a party to the proceedings to be represented by a lawyer, the court may, if it considers appropriate, do so subject to conditions designed to ensure that no other party is unfairly disadvantaged.

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- (9) For the purposes of this section, a person is taken not to be represented by a lawyer if the lawyer is an employee or officer of the person.

**200 Costs only if proceedings brought vexatiously etc.**

- (1) In proceedings that:
- (a) are dealt with as small claims proceedings (see section 199); or
  - (b) relate to section 74 or 96 of the National Credit Code (which deal with hardship and postponement orders);
- a party to the proceedings may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2).
- (2) The party may be ordered to pay the costs only if:
- (a) the court is satisfied that the party brought the proceedings vexatiously or without reasonable cause; or
  - (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs.

**201 Civil proceedings not to be stayed**

No civil proceedings under this Act are to be stayed merely because the proceedings disclose, or arise out of, the commission of an offence.

**202 Standard of proof in civil proceedings**

If, in proceedings (other than proceedings for an offence), it is necessary to establish, or for the court to be satisfied, for any purpose relating to a matter arising under this Act, that:

- (a) a person has contravened a provision of this Act; or
- (b) default has been made in complying with a provision of this Act; or
- (c) an act or omission was unlawful because of a provision of this Act; or
- (d) a person has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to a

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contravention, or a default in complying with, a provision of this Act;

it is sufficient if the matter referred to in paragraph (a), (b), (c) or (d) is established, or the court is so satisfied on the balance of probabilities.

## Division 3—Criminal proceedings

### Subdivision A—Application of this Division

#### 203 Application of this Division

- (1) This Division applies to the exclusion of sections 68, 70 and 70A of the *Judiciary Act 1903*.
- (2) However, this Division does not limit the application of the provisions of the *Judiciary Act 1903* (other than sections 68, 70 and 70A). In particular, it does not limit the application of subsection 39(2) of that Act in relation to criminal matters arising under this Act.
- (3) Despite anything else in this Division, jurisdiction is conferred on the courts of a Territory only to the extent that the Constitution permits.

### Subdivision B—Conferral of criminal jurisdiction

#### 204 Criminal jurisdiction of courts

*Cross-vesting of criminal jurisdiction of courts*

- (1) Subject to this section, if a court of a State or Territory exercises jurisdiction in relation to a matter covered by subsection (2) in relation to offenders or persons (*State offenders*) charged with offences against the laws of the State or Territory, the court has the equivalent jurisdiction in relation to offenders or persons charged with offences against this Act.
- (2) The matters covered by this subsection are as follows:
  - (a) the summary conviction of State offenders;
  - (b) their examination and commitment for trial on indictment;
  - (c) their trial and conviction on indictment;
  - (d) their sentencing, punishment and release;

- (e) the liability to make reparation in connection with their offences;
- (f) the forfeiture of property in connection with their offences;
- (g) the proceeds of their crimes;
- (h) the hearing and determination of:
  - (i) proceedings connected with; or
  - (ii) appeals arising out of; or
  - (iii) appeals arising out of proceedings connected with; any trial or conviction referred to in paragraph (a), (b) or (c), or any matter of a kind referred to in paragraph (d), (e), (f) or (g).

*Certain aspects of jurisdiction to be exercised only by magistrate*

- (3) Only a magistrate may exercise the jurisdiction conferred by subsection (1) in relation to the summary conviction, or examination and commitment for trial, of any person.

*Person who pleads guilty to an indictable offence may be sentenced or otherwise dealt with without trial*

- (4) The jurisdiction conferred by subsection (1) includes jurisdiction in accordance with provisions of a relevant criminal law of a State or Territory, and:
  - (a) the reference in paragraph (2)(h) to “any trial or conviction” includes a reference to any conviction or sentencing in accordance with the provisions of a relevant criminal law; and
  - (b) unless the contrary intention appears, a reference to jurisdiction conferred by subsection (1) includes a reference to such included jurisdiction.
- (5) **Relevant criminal law** means a law providing that if, in proceedings before a court, a person pleads guilty to a charge for which the person could be prosecuted on indictment, the person may be committed, to a court having jurisdiction to try offences on indictment, to be sentenced or otherwise dealt with without being tried in that last-mentioned court.

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- (6) A person may be dealt with in accordance with a relevant criminal law even if, apart from this section, the offence concerned:
- (a) would be required to be prosecuted on indictment; or
  - (b) would be required to be prosecuted either summarily or on indictment.
- (7) For the purposes of the application of a relevant criminal law as provided by subsection (4):
- (a) a reference in that law to an indictable offence is taken to include a reference to an offence that may be prosecuted on indictment; and
  - (b) in order to determine the sentence that may be imposed on a person by a court pursuant to the relevant criminal law, the person is taken to have been prosecuted and convicted on indictment in that court.

*Jurisdiction in relation to summary offences is unlimited*

- (8) Subject to subsection (10), the jurisdiction conferred on a court of a State or Territory by subsection (1) is conferred despite any limits as to locality of the jurisdiction of that court under the law of that State or Territory.

*Court may decline to exercise jurisdiction in relation to summary offences*

- (9) If:
- (a) jurisdiction is conferred on a court of a State or Territory in relation to the summary conviction of persons charged with offences against this Act by subsection (1); and
  - (b) the court is satisfied that it is appropriate to do so, having regard to all the circumstances (including the public interest);
- the court may decline to exercise that jurisdiction in relation to an offence committed in another State or Territory.

*Limits on jurisdiction in relation to indictable offences*

- (10) The jurisdiction conferred on a court of a State or Territory by subsection (1) in relation to:
- (a) the examination and commitment for trial on indictment; and



- (b) the trial and conviction on indictment;  
of offenders or persons charged with offences against this Act is  
conferred only in relation to:
  - (c) offences committed outside Australia (not including the  
coastal sea); and
  - (d) offences committed, begun or completed in the State or the  
Territory concerned.

## **205 Criminal proceedings—laws to be applied**

### *Laws to be applied*

- (1) Subject to this Division, the laws of a State or Territory in relation  
to:
  - (a) the arrest and custody in the State or Territory of offenders or  
persons charged with offences; and
  - (b) criminal procedure in the State or Territory in relation to such  
persons; and
  - (c) the rules of evidence applied in criminal procedure in the  
State or Territory in relation to such persons;apply in the State or Territory, so far as they are applicable, to  
persons who are charged with offences against this Act.

### *Meaning of criminal procedure*

- (2) **Criminal procedure** means the procedure for:
  - (a) the summary conviction; and
  - (b) the examination and commitment for trial on indictment; and
  - (c) the trial and conviction on indictment; and
  - (d) the hearing and determination of appeals arising out of any  
such trial or conviction or out of any related proceedings;of offenders or persons charged with offences, and includes the  
procedure for holding accused persons to bail.

## **206 Criminal proceedings—how taken**

- (1) In any proceedings for an offence against this Act, any  
information, charge, complaint or application may be laid or made  
by:
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- (a) ASIC; or
  - (b) a delegate of ASIC; or
  - (c) another person authorised in writing by the Minister to bring the proceedings.
- (2) A delegation for the purposes of paragraph (1)(b), or an authorisation for the purposes of paragraph (1)(c), may relate to all offences, or to specified offences, against this Act.
- (3) Nothing in this section affects the operation of the *Director of Public Prosecutions Act 1983*.

**207 Certain persons to assist in prosecutions**

- (1) If a prosecution in relation to an offence against this Act has been brought, or ASIC is of the opinion that a prosecution in relation to an offence against this Act ought to be brought, against a person (the *defendant*), ASIC may:
- (a) if the defendant is a natural person—require any person who is or was a partner, employee or agent of the defendant; or
  - (b) if the defendant is a body corporate—require any person who is or was an officer (within the meaning of the *Corporations Act 2001*), employee or agent of the defendant;
- to assist in the prosecution, and the person who is so required must give all assistance in connection with the prosecution that that person is reasonably able to give.
- (2) A person commits an offence if:
- (a) the person is subject to a requirement under subsection (1); and
  - (b) the person engages in conduct; and
  - (c) the conduct contravenes the requirement.

Penalty: 5 penalty units.

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

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

- (4) For the purposes of subsection (2), it is a defence if the person:
- (a) is the defendant; or

(b) is or has been the defendant's lawyer.

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

- (5) If a person (other than the defendant or a person who is, or has been, the defendant's lawyer) does not comply with a requirement under subsection (1), the court may, on the application of ASIC, order the person to comply with the requirement within such time, and in such manner, as the court orders.
- (6) If ASIC makes a requirement under subsection (1) in writing, the requirement is not a legislative instrument.

**208 Privilege against self-incrimination not available to bodies corporate in criminal proceedings**

- (1) In proceedings in a court when exercising jurisdiction in relation to a criminal matter arising under this Act, a body corporate is not entitled to refuse or fail to comply with a requirement:
- (a) to answer a question or give information; or
  - (b) to produce a book or any other thing; or
  - (c) to do any other act whatever;
- on the ground that the answer or information, production of the book or other thing, or doing that other act might tend:
- (d) to incriminate the body (whether in relation to an offence to which the proceedings relate or otherwise); or
  - (e) to make the body liable to a penalty (whether in relation to anything to which the proceedings relate or otherwise).
- (2) Subsection (1) applies whether or not the body concerned is a defendant in the proceedings or in any other proceedings.

## **Division 4—Proceedings generally**

### **209 ASIC’s power to intervene in proceedings**

- (1) ASIC may intervene in any proceedings relating to a matter arising under this Act.
- (2) If ASIC intervenes in proceedings referred to in subsection (1), ASIC is taken to be a party to the proceedings and, subject to this Act, has all the rights, duties and liabilities of such a party.
- (3) Without limiting subsection (2), ASIC may appear and be represented in any proceedings in which it wishes to intervene pursuant to subsection (1):
  - (a) by an ASIC staff member; or
  - (b) by a natural person to whom, or by an officer or employee of a person or body to whom or to which, ASIC has delegated its functions and powers under this Act or such of those functions and powers as relate to a matter to which the proceedings relate; or
  - (c) by a lawyer.

### **210 Evidence of contravention**

For the purposes of this Act, a certificate that:

- (a) purports to be signed by the Registrar or other proper officer of an Australian court; and
- (b) states:
  - (i) that a person was convicted by that court on a specified day of a specified offence; or
  - (ii) that a person charged before that court with a specified offence was, on a specified day, found in that court to have committed the offence but that the court did not proceed to convict the person of the offence;

is, unless it is proved that the conviction was quashed or set aside, or that the finding was set aside or reversed, as the case may be, conclusive evidence:

- (c) if subparagraph (b)(i) applies—that the person was convicted of the offence on that day; and
- (d) if the offence was constituted by a contravention of a provision of a law—that the person contravened that provision.

### **211 Power of court to punish for contempt of court**

Nothing in a provision of this Act that provides:

- (a) that a person must not contravene an order of the court; or
  - (b) that a person who contravenes an order of the court contravenes a provision of this Act or commits an offence;
- affects the powers of the court in relation to the punishment of contempts of the court.

## **Chapter 5—Administration**

### **Part 5-1—Registers relating to credit activities**

#### **Division 1—Introduction**

##### **212 Guide to this Part**

This Part is about registers relating to credit activities that must be established and maintained by ASIC.

Division 2 requires ASIC to establish and maintain one or more registers relating to credit activities. It also deals with how those registers are to be maintained, and the inspection and public availability of those registers.

## **Division 2—Registers relating to credit activities**

### **213 Credit registers**

*ASIC must establish and maintain credit registers*

- (1) ASIC must establish and maintain one or more registers (the *credit registers*) relating to credit activities.

*How credit registers are to be maintained*

- (2) The regulations may prescribe the way in which the credit registers must be established or maintained, including the details that ASIC must enter in the credit registers in relation to the following persons:
  - (a) licensees;
  - (b) persons registered to engage in credit activities under the Transitional Act;
  - (c) credit representatives of licensees or persons registered to engage in credit activities under the Transitional Act;
  - (d) persons against whom a banning order or disqualification order is made under Part 2-4;
  - (e) persons who are banned from engaging in a credit activity under a law of a State or Territory;
  - (f) any other persons prescribed by the regulations.
- (3) Without limiting subsection (2), the credit registers:
  - (a) may be maintained in an electronic form; and
  - (b) may be maintained as part of, or together with, any register in relation to financial services maintained under section 922A of the *Corporations Act 2001*.

*Credit register is not a legislative instrument*

- (4) A credit register established under this section is not a legislative instrument.

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**Part 5-1** Registers relating to credit activities

**Division 2** Registers relating to credit activities

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**214 Inspection and public availability of credit registers**

- (1) A person may inspect the credit registers and may make copies of, or take extracts from, them.
- (2) ASIC may make the credit registers, or any part of them, available to the public on its website or by other means.
- (3) Any disclosure necessary for the purposes of this section is authorised by this section.



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

### **Division 1—Introduction**

#### **215 Guide to this Part**

This Part deals with the lodging of documents with ASIC. It also has offences relating to making false statements in documents.

Division 2 deals with how documents are lodged with ASIC and the approved forms in which the documents must be lodged. It also deals with ASIC's power to refuse to receive documents (in which case, the documents will not be treated as having been lodged with ASIC).

Division 3 deals with ASIC's register of documents that have been lodged with ASIC.

Division 4 has other provisions relating to documents (such as offences for making false statements in documents lodged with ASIC or required for the purposes of this Act).

## Division 2—Lodgment of documents with ASIC

### 216 When documents are lodged with ASIC

- (1) A document is *lodged with ASIC* under this Act if the document:
  - (a) is transmitted to ASIC in an electronic format approved by ASIC; or
  - (b) if ASIC approves another manner for the lodgment of a document with ASIC—is given to ASIC in that manner.

- (2) However, a document is not *lodged with ASIC* under this Act if ASIC refuses to receive the document under subsection 218(1).

Note: Subsection 232(3) provides for when a compliance certificate under section 53 is taken not to be lodged with ASIC.

- (3) If a document is lodged with ASIC, then any other material that is lodged with the document as required by this Act or an approved form is taken to be included in that document.

Note: For example, this subsection means that a person will contravene section 225 if the person makes a false or misleading statement in the other material.

### 217 Approved forms for documents to be lodged with ASIC

- (1) A document that this Act requires to be lodged with ASIC in an approved form must, if ASIC has approved a form for the document:
  - (a) be in the approved form; and
  - (b) include the information, statements, explanations or other matters required by the form; and
  - (c) be accompanied by any other material required by the form.
- (2) If:
  - (a) this Act requires a document to be lodged with ASIC in an approved form; and
  - (b) a provision of this Act either specifies, or provides for regulations to prescribe, information, statements, explanations or other matters that must be included in the

document, or other material that must accompany the document;

that other provision is not taken to exclude or limit the operation of subsection (1) in relation to the approved form (and so the approved form may also require information etc. to be included in the form or material to accompany the form).

## **218 ASIC may refuse to receive document etc.**

*ASIC may refuse to receive document etc.*

- (1) If ASIC considers that a document submitted to ASIC for lodgment under this Act:
- (a) contains matter contrary to law; or
  - (b) contains matter that, in a material particular, is false or misleading in the form or context in which it is included; or
  - (c) is incomplete; or
  - (d) contravenes this Act; or
  - (e) contains an error, alteration or erasure;

ASIC may refuse to receive the document and may make a request under subsection (2).

Note: The effect of ASIC refusing to receive the document is that the document is not lodged with ASIC (see subsection 216(2)).

- (2) For the purposes of subsection (1), ASIC may request:
- (a) that the document be appropriately amended or completed and resubmitted; or
  - (b) that a fresh document be submitted in its place; or
  - (c) if the document is incomplete—that a supplementary document in the approved form be lodged.

*Notice to provide further document or information*

- (3) ASIC may give a written notice to a person who submits a document (the *first document*) for lodgment under this Act, requiring the person to:
- (a) give to ASIC any other document; or
  - (b) give to ASIC any information;

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that ASIC considers necessary in order to form an opinion as to whether it may refuse to receive the first document.

*Notice must specify day by which person must comply*

- (4) The notice must specify the day by which the person must comply with the notice (which must be a reasonable period after the notice is given). ASIC may extend the day by giving a written notice to the person.

*Requirement to comply with notice*

- (5) The person must comply with the notice within the time specified in the notice.

Civil penalty: 2,000 penalty units.

*Strict liability offence*

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

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

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

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

## **Division 3—ASIC's register of documents**

### **219 Register of documents lodged with ASIC**

*ASIC may maintain document registers*

- (1) ASIC may establish and maintain one or more registers (the **document registers**) of documents that have been lodged with ASIC under this Act.

*How document registers to be maintained*

- (2) ASIC may establish and maintain the document registers in any form it considers appropriate.
- (3) Without limiting subsection (2), the document registers may be maintained in an electronic form.

*No entitlement to inspect document registers*

- (4) ASIC is not required to:
  - (a) permit persons to inspect the document registers, or make copies of, or take extracts from, the document registers; or
  - (b) make any part of the document registers available to the public.

*Document register is not a legislative instrument*

- (5) A document register established under this section is not a legislative instrument.

### **220 ASIC may require person to give information for document registers**

*Notice to person to give information*

- (1) If information about a person is included on the document registers, ASIC may, at any time, give the person a written notice requiring the person to give to ASIC specified information about

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the person, being information of the kind included on the document registers.

*Notice must specify day by which person must comply*

- (2) The notice must specify the day by which the person must comply with the notice (which must be a reasonable period after the notice is given). ASIC may extend the day by giving a written notice to the person.

*Requirement to comply with notice*

- (3) The person must comply with the notice within the time specified in the notice.

Civil penalty: 2,000 penalty units.

*Strict liability offence*

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

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

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

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

**221 Written document setting out information from document registers is prima facie evidence of matters**

- (1) ASIC may, by using a mechanical, electronic or other device for processing data, prepare a written document that sets out information obtained by ASIC from the document registers.
- (2) In proceedings in a court, a written document that purports to be a document prepared by ASIC under subsection (1) is admissible as prima facie evidence of the matters in the document.

- (3) A written document need not be certified by ASIC, or signed, in order to be taken to purport to have been prepared by ASIC.

## **Division 4—Other provisions relating to documents lodged with ASIC or required under this Act**

### **222 Certified copy or extract of document lodged with ASIC is admissible in evidence**

- (1) In proceedings in a court, a copy of, or extract from, any document lodged with ASIC under this Act, and certified by ASIC, is admissible in evidence as of equal validity with the original document.
- (2) The reference in subsection (1) to a document includes, if a copy of that document has been included in the document register by ASIC, a reference to that copy.

### **223 ASIC may destroy or dispose of certain documents**

ASIC may destroy or otherwise dispose of any document that is lodged with ASIC under this Act if:

- (a) ASIC considers that it is no longer necessary or desirable to retain it; and
- (b) either of the following apply:
  - (i) it has been in ASIC's possession for the period prescribed by the regulations;
  - (ii) a copy of the document has been included in the document register.

### **224 Court may order lodgment of document etc.**

- (1) If a person has failed to comply with:
  - (a) any provision of this Act that requires the lodgment of any document with ASIC; or
  - (b) any request of ASIC under subsection 218(2) (which deals with requests to resubmit documents etc.);ASIC may give the person a written notice requiring the person to comply with the requirement or request within 14 days.



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- (2) If the person does not comply with the notice within 14 days, the court may, on an application by ASIC, make an order directing the person to comply with the requirement or request.
- (3) The order may provide that all costs of and incidental to the application are to be borne by one or more of the following:
  - (a) the person;
  - (b) if the person is a body corporate—a director, secretary or senior manager of the body corporate who is responsible for the failure to comply;
  - (c) if the person is a partnership or the trustees of a trust—a partner or trustee who is responsible for the failure to comply.

## **225 Offences relating to documents lodged with ASIC etc.**

*Documents this section applies to*

- (1) This section applies to the following documents:
  - (a) any document required under or for the purposes of this Act;
  - (b) any document lodged with or submitted to ASIC under or for the purposes of this Act.

*Requirement where person knows matter is false or misleading*

- (2) A person must not:
  - (a) make, or authorise the making of, a statement in the document if the person knows, or is reckless as to whether, the statement:
    - (i) is false in a material particular or materially misleading; or
    - (ii) has omitted from it a matter or thing the omission of which renders the document materially misleading; or
    - (iii) 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) omit, or authorise the omission of, a matter from the document if the person knows, or is reckless as to whether,

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without the matter, the document is false in a material particular or materially misleading.

Civil penalty: 2,000 penalty units.

*Offences*

- (3) A person commits an offence if:
- (a) the person makes, or authorises the making of, a statement in the document; and
  - (b) the person knows that the statement:
    - (i) is false in a material particular or materially misleading; or
    - (ii) has omitted from it a matter or thing the omission of which renders the document materially misleading; or
    - (iii) 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.

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

- (4) A person commits an offence if:
- (a) the person omits, or authorises the omission of, a matter from the document; and
  - (b) the person knows that, without the matter, the document is false in a material particular or materially misleading.

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

*Requirement to take reasonable steps*

- (5) A person must take reasonable steps to ensure that the person does not:
- (a) make, or authorise the making of, a statement in the document that:
    - (i) is false in a material particular or materially misleading; or

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- (ii) has omitted from it a matter or thing the omission of which renders the document materially misleading; or
- (iii) 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) omit, or authorise the omission of, a matter from the document, without which the document is false in a material particular or materially misleading.

Civil penalty: 2,000 penalty units.

*Offence*

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

Criminal penalty: 5 penalty units.

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

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

*Approval of document taken to be authorisation*

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

## **Part 5-3—Concealment or falsification of credit books**

### **Division 1—Introduction**

#### **226 Guide to this Part**

This Part deals with the concealment or falsification of credit books.

Division 2 includes requirements not to conceal or falsify credit books, and a requirement to take precautions against the falsification of credit books.

## **Division 2—Prohibitions relating to the concealment or falsification of credit books**

### **227 Concealing etc. of credit books**

*Prohibition on concealing credit books etc.*

- (1) A person must not:
- (a) conceal, destroy, mutilate or alter a credit book; or
  - (b) send a credit book out of this jurisdiction.

Civil penalty:        2,000 penalty units.

*Offence*

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

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

*Defence*

- (3) For the purposes of subsections (1) and (2), it is a defence if the person did not act with intent to:
- (a) defraud; or
  - (b) prevent, delay or obstruct the carrying out of an examination, investigation or audit, or the exercise of a power, under this Act.

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

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*Meaning of credit book*

- (4) **Credit book** means:
- (a) a book (by whatever name it is known) that this Act requires to be kept; or
  - (b) a document that is:
    - (i) prepared; or
    - (ii) lodged with or submitted to ASIC; or
    - (iii) given to a person; under, or for the purposes of, this Act; or
  - (c) a book relating to the credit activities engaged in by a licensee or a credit representative; or
  - (d) a financial record.

**228 Falsification of credit books**

*Requirements in relation to falsification of credit books*

- (1) A person must not engage in conduct that results in the falsification of a credit book.

Civil penalty: 2,000 penalty units.

*Offence*

- (2) A person commits an offence if:
- (a) the person engages in conduct; and
  - (b) the conduct results in the falsification of a credit book.

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

*Defence*

- (3) For the purposes of subsections (1) and (2), it is a defence if:
- (a) the person acted honestly; and
  - (b) in all the circumstances, the act or omission constituting the offence should be excused.

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

## **229 Precautions against falsification of credit books**

### *Requirement to take precautions against falsification*

- (1) A person who is required by this Act to keep a credit book must take reasonable steps to:
- (a) guard against the falsification of the credit book; and
  - (b) facilitate the discovery of any falsification of the credit book.

Civil penalty: 2,000 penalty units.

### *Offence*

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

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

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

### **Division 1—Introduction**

#### **230 Guide to this Part**

This Part deals with fees imposed by the *National Consumer Credit Protection (Fees) Act 2009*.

Division 2 includes provisions relating to fees, including the payment of fees, the lodgment of documents or doing of acts without the payment of fees, and the waiver or refund of fees.



## **Division 2—Fees imposed by the National Consumer Credit Protection (Fees) Act 2009**

### **231 Fees are payable to the Commonwealth**

The fees imposed under the *National Consumer Credit Protection (Fees) Act 2009* in relation to this Act are payable to the Commonwealth.

### **232 Lodgment of document without payment of fee**

- (1) This section applies where:
  - (a) a fee is payable under section 231 for the lodgment of a document under this Act; and
  - (b) the document was submitted for lodgment without payment of the fee.
- (2) The document is not taken not to have been lodged merely because of non-payment of the fee.
- (3) Despite subsection (2), a compliance certificate that is required to be lodged under section 53 is taken not to have been lodged until the fee is paid.

### **233 Doing act without payment of fee**

If a fee is payable under section 231 for a matter involving the doing of an act by the Minister or ASIC under this Act, the Minister or ASIC may refuse to do that act until the fee is paid.

### **234 Effect of sections 232 and 233**

Sections 232 and 233 have effect despite anything in another Part of this Act.

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**235 Waiver and refund of fees**

Nothing in this Division or the *National Consumer Credit Protection (Fees) Act 2009* prevents the Commonwealth from:

- (a) waiving or reducing, in a particular case or in particular classes of cases, fees that would otherwise be payable under this Act; or
- (b) refunding, in whole or in part, in a particular case or in particular classes of cases, fees paid under this Act.

**236 Debts due to the Commonwealth**

ASIC may, on behalf of the Commonwealth, recover a debt due under this Division.

**237 Payment of fee does not give right to inspect or search**

To avoid doubt, nothing in this Division, and nothing done under this Division:

- (a) imposes on ASIC a duty to allow the inspection or search of a register or document, or to make available information; or
- (b) confers a right to inspect or search a register or document or to have information made available;

under this Act except so far as such a duty or right would, but for the effect of section 233, exist under a provision of another Part of this Act or under some other law.

## **Part 5-5—Other administrative matters**

### **Division 1—Introduction**

#### **238 Guide to this Part**

This Part includes miscellaneous provisions relating to administrative matters.

## **Division 2—Other administrative matters**

### **239 ASIC has general administration of this Act**

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

### **240 Obstructing or hindering ASIC etc.**

- (1) A person must not engage in conduct that results in the obstruction or hindering of ASIC, or any other person, in the performance of a function or the exercise of a power under this Act.

Civil penalty: 2,000 penalty units.

- (2) A person commits an offence if:
- (a) the person engages in conduct; and
  - (b) the conduct results in the obstruction or hindering of ASIC, or any other person, in the performance of a function or the exercise of a power under this Act.

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

- (3) For the purposes of subsections (1) and (2), it is a defence if the person has a reasonable excuse.

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

### **241 Approved codes of conduct**

- (1) ASIC may, on application, approve codes of conduct that relate to any aspect of the activities of:
- (a) licensees; or
  - (b) credit representatives;
- being activities in relation to which ASIC has a regulatory responsibility. The approval must be in writing.

- (2) ASIC may, on application, approve a variation of an approved code of conduct. The approval must be in writing.
- (3) ASIC must not approve a code of conduct, or a variation of a code of conduct, unless it is satisfied that:
  - (a) the code of conduct, or the code of conduct as proposed to be varied, is not inconsistent with this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities; and
  - (b) it is appropriate to approve the code of conduct or variation, having regard to the following matters:
    - (i) the ability of the applicant to ensure that persons who hold out that they comply with the code of conduct will comply with the code of conduct as in force from time to time;
    - (ii) the desirability of codes of conduct being harmonised to the greatest extent possible;
    - (iii) any other matter ASIC considers relevant.
- (4) ASIC may revoke an approval of a code of conduct:
  - (a) on application by the person who applied for the approval; or
  - (b) if ASIC is no longer satisfied as referred to in subsection (3).The revocation must be in writing.
- (5) The following are legislative instruments:
  - (a) an approval of a code of conduct under subsection (1);
  - (b) an approval of a variation of a code of conduct under subsection (2);
  - (c) a revocation of a code of conduct under subsection (4).

**242 ASIC may arrange for use of computer programs to make decisions**

- (1) ASIC may arrange for the use, under ASIC's control, of computer programs for any purposes for which ASIC may make decisions under this Act.

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- (2) A decision made by the operation of a computer program under an arrangement made under subsection (1) is taken to be a decision made by ASIC.

**243 Qualified privilege for information given to ASIC**

- (1) A person has qualified privilege in relation to the giving of any information to ASIC:
- (a) that the person is required or expressly permitted to give under this Act; or
  - (b) that relates to a contravention, or possible contravention, of the credit legislation; or
  - (c) that relates to a matter that is relevant to a decision of ASIC under:
    - (i) section 37 (which deals with when ASIC must grant a licence); or
    - (ii) section 54 or 55 (which deal with ASIC's powers to suspend or cancel licences); or
    - (iii) subsection 80(1) (which deals with ASIC's power to make banning orders).
- (2) A person who has qualified privilege under subsection (1) in relation to conduct is also not liable for any action based on breach of confidence in relation to that conduct.
- (3) The protections given by this section to a person in relation to conduct extend to representatives of the person.

**244 ASIC certificate is prima facie evidence of matters**

- (1) ASIC may issue a certificate stating that a requirement of this Act specified in the certificate:
- (a) had or had not been complied with at a date or within a period specified in the certificate; or
  - (b) had been complied with at a date specified in the certificate but not before that date.
- (2) In proceedings in a court, a certificate issued by ASIC under subsection (1) is admissible as prima facie evidence of the matters stated in the certificate.

**245 Operator of approved external dispute resolution scheme may give information to ASIC**

The operator of an approved external dispute resolution scheme may give information to ASIC about:

- (a) a person becoming a member of the scheme; or
- (b) a person ceasing to be a member of the scheme.

## **Chapter 6—Compliance and enforcement**

### **Part 6-1—Investigations**

#### **Division 1—Introduction**

##### **246 Guide to this Part**

This Part is about investigations made by ASIC.

Division 2 includes powers of ASIC to make investigations. ASIC may make investigations in certain circumstances for the due administration of the Commonwealth credit legislation. The Minister may also direct ASIC to investigate matters in certain circumstances.

Division 2 also deals with reports about investigations.



## **Division 2—Investigations**

### **247 General powers of investigation**

- (1) ASIC may make such investigation as it considers expedient for the due administration of the Commonwealth credit legislation if it has reason to suspect that there may have been committed:
  - (a) a contravention of the credit legislation; or
  - (b) a contravention of a law of the Commonwealth, or of a law of a referring State or a Territory, being a contravention that:
    - (i) concerns the management, conduct or affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity; or
    - (ii) involves fraud or dishonesty and relates to a credit activity engaged in by a person, or a credit contract, mortgage, guarantee or consumer lease.

### **248 Minister may direct investigations**

- (1) If, in the Minister's opinion, it is in the public interest in relation to this jurisdiction for a particular matter to which subsection (2) applies to be investigated, he or she may by writing direct ASIC to investigate that matter.
- (2) This subsection applies to a matter relating to any of the following:
  - (a) an alleged or suspected contravention of the Commonwealth credit legislation;
  - (b) an alleged or suspected contravention of a law of the Commonwealth, or a law of a referring State or a Territory, being a contravention that:
    - (i) concerns the management, conduct or affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity; or
    - (ii) involves fraud or dishonesty and relates to a credit activity engaged in by a person, or a credit contract, mortgage, guarantee or consumer lease;
  - (c) a credit activity engaged in by a person.

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- (3) ASIC must comply with a direction under subsection (1).
- (4) A direction under subsection (1) does not prevent ASIC from delegating a function or power.
- (5) A direction under subsection (1) is not a legislative instrument.

**249 Interim report on investigation**

- (1) If, in the course of an investigation under this Part, ASIC forms the opinion that:
  - (a) a serious contravention of a law of the Commonwealth, or a law of a referring State or a Territory, has been committed; or
  - (b) to prepare an interim report about the investigation would enable or assist the protection, preservation or prompt recovery of property; or
  - (c) there is an urgent need for the Commonwealth credit legislation to be amended;it must prepare an interim report that relates to the investigation and sets out:
  - (d) if paragraph (a) applies—its findings about the contravention, and the evidence and other material on which those findings are based; or
  - (e) if paragraph (b) applies—such matters as, in its opinion, will so enable or assist; or
  - (f) if paragraph (c) applies—its opinion about amendment of that legislation, and its reasons for that opinion;and such other matters relating to, or arising out of, the investigation as it considers appropriate.
- (2) ASIC may prepare an interim report about an investigation under this Part and must do so if the Minister so directs.
- (3) A report under subsection (2) must set out such matters relating to, or arising out of, the investigation as ASIC considers appropriate or the Minister directs.
- (4) An interim report prepared under this section is not a legislative instrument.

## **250 Final report on investigation**

- (1) At the end of an investigation under section 247, ASIC may prepare a report about the investigation and must do so if the Minister so directs.
- (2) At the end of an investigation under section 248, ASIC must prepare a report about the investigation.
- (3) A report under this section must set out:
  - (a) ASIC's findings about the matters investigated; and
  - (b) the evidence and other material on which those findings are based; and
  - (c) such other matters relating to, or arising out of, the investigation as ASIC considers appropriate or the Minister directs.
- (4) A direction under subsection (1) is not a legislative instrument.
- (5) A report prepared under this section is not a legislative instrument.

## **251 Distribution of report**

- (1) As soon as practicable after preparing a report under this Part, ASIC must give a copy of the report to the Minister.
- (2) If a report, or part of a report, under this Part relates to a serious contravention of a law of the Commonwealth, or a law of a referring State or a Territory, ASIC may give a copy of the whole or a part of the report to:
  - (a) the Australian Federal Police; or
  - (b) the Chief Executive Officer of the Australian Crime Commission or a member of the staff of the ACC (within the meaning of the *Australian Crime Commission Act 2002*); or
  - (c) the Director of Public Prosecutions; or
  - (d) an agency, authority, body or person prescribed by the regulations.
- (3) If a report, or part of a report, under this Part relates to a person's affairs to a material extent, ASIC may, at the person's request or of

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its own motion, give to the person a copy of the report or of part of the report.

- (4) The Minister may cause the whole or a part of a report under this Part to be printed and published.

## **Part 6-2—Examination of persons**

### **Division 1—Introduction**

#### **252 Guide to this Part**

This Part is about the examination of persons by ASIC.

Division 2 allows ASIC to examine a person if ASIC suspects or believes, on reasonable grounds, that the person can give information relevant to an investigation under Part 6-1.

Division 2 also includes rules relating to the procedure for examination of persons by ASIC.

## Division 2—Examination of persons

### 253 Notice requiring appearance for examination

- (1) This section applies if ASIC, on reasonable grounds, suspects or believes that a person can give information relevant to a matter that it is investigating, or is to investigate, under Part 6-1.
- (2) ASIC may, by written notice given to the person in the form prescribed by the regulations, require the person:
  - (a) to give to ASIC all reasonable assistance in connection with the investigation; and
  - (b) to appear before a specified ASIC member or ASIC staff member for examination on oath and to answer questions.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

- (3) A notice given under subsection (2) must:
  - (a) state the general nature of the matter referred to in subsection (1); and
  - (b) set out the effect of subsection 257(1) and section 295.

### 254 Proceedings at examination

The remaining provisions of this Part apply if, pursuant to a requirement made under section 253 for the purposes of an investigation under Part 6-1, a person (the *examinee*) appears before another person (the *inspector*) for examination.

### 255 Requirements made of examinee

- (1) The inspector may examine the examinee on oath or affirmation and may, for that purpose:
  - (a) require the examinee to either take an oath or make an affirmation; and
  - (b) administer an oath or affirmation to the examinee.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

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- (2) An offence under subsection 290(2) relating to subsection (1) of this section is an offence of strict liability.

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

- (3) The oath or affirmation to be taken or made by the examinee for the purposes of the examination is an oath or affirmation that the statements that the examinee will make will be true.
- (4) The inspector may require the examinee to answer a question that is put to the examinee at the examination and is relevant to a matter that ASIC is investigating, or is to investigate, under Part 6-1.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

### **256 Examination to take place in private**

- (1) The examination must take place in private and the inspector may give directions about who may be present during it, or during a part of it.
- (2) A person must not be present at the examination unless he or she:
- (a) is the inspector, the examinee or an ASIC member; or
  - (b) is an ASIC staff member approved by ASIC; or
  - (c) is entitled to be present by virtue of:
    - (i) a direction under subsection (1); or
    - (ii) subsection 257(1).

Criminal penalty: 10 penalty units, or 3 months imprisonment, or both.

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

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

### **257 Examinee's lawyer may attend**

- (1) The examinee's lawyer may be present at the examination and may, at such times during it as the inspector determines:
- (a) address the inspector; and
  - (b) examine the examinee;

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about matters about which the inspector has examined the examinee.

- (2) If, in the inspector's opinion, a person is trying to obstruct the examination by exercising rights under subsection (1), the inspector may require the person to stop addressing the inspector, or examining the examinee, as the case requires.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

- (3) An offence under subsection 290(3) relating to subsection (2) of this section is an offence of strict liability.

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

**258 Record of examination**

- (1) The inspector may, and must if the examinee so requests, cause a record to be made of statements made at the examination.

- (2) If a record made under subsection (1) is in writing or is reduced to writing:

(a) the inspector may require the examinee to read it, or to have it read to him or her, and may require him or her to sign it; and

(b) the inspector must, if requested in writing by the examinee to give to the examinee a copy of the written record, comply with the request without charge but subject to such conditions (if any) as the inspector imposes.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

- (3) An offence under subsection 290(2) relating to paragraph (2)(a) of this section is an offence of strict liability.

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

**259 Giving to other persons copies of record**

- (1) ASIC may give a copy of a written record of the examination, or such a copy together with a copy of any related book, to a person's lawyer if the lawyer satisfies ASIC that the person is carrying on,



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or is contemplating in good faith, proceedings in relation to a matter to which the examination related.

- (2) If ASIC gives a copy to a person under subsection (1), the person, or any other person who has possession, custody or control of the copy or a copy of it, must not, except in connection with preparing, beginning or carrying on, or in the course of, proceedings:
- (a) use the copy or a copy of it; or
  - (b) publish, or communicate to a person, the copy, a copy of it, or any part of the copy's contents.

Criminal penalty: 10 penalty units, or 3 months imprisonment, or both.

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

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

- (4) ASIC may, subject to such conditions (if any) as it imposes, give to a person a copy of a written record of the examination, or such a copy together with a copy of any related book.

**260 Copies given subject to conditions**

- (1) If a copy is given to a person under subsection 258(2) or 259(4) subject to conditions, the person, and any other person who has possession, custody or control of the copy or a copy of it, must comply with the conditions.

Criminal penalty: 10 penalty units, or 3 months imprisonment, or both.

- (2) Subsection (1) is an offence of strict liability.

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

**261 Record to accompany report**

- (1) If a report about the investigation referred to in section 254 is prepared under section 250, each record (if any) of the examination must accompany the report.
- (2) If:

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- (a) in ASIC's opinion, a statement made at an examination is relevant to any other investigation under Part 6-1; and
  - (b) a record of the statement was made under section 258; and
  - (c) a report about the other investigation is prepared under section 250;
- a copy of the record must accompany the report.

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

### **Division 1—Introduction**

#### **262 Guide to this Part**

This Part is about powers of ASIC in relation to the inspection of books and gathering of information about audits.

Division 2 includes powers of ASIC to inspect books, and to require persons to produce books or documents, or give information, in some circumstances.

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.

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

### 263 When certain powers may be exercised

A power conferred by this Part (other than sections 264, 265, 269 and 270) may only be exercised:

- (a) for the purposes of the performance or exercise of any of ASIC's functions and powers under the Commonwealth credit legislation; or
- (b) for the purposes of ensuring compliance with the Commonwealth credit legislation; or
- (c) in relation to an alleged or suspected contravention of the credit legislation; or
- (d) in relation to a contravention of a law of the Commonwealth, or of a law of a referring State or a Territory, being a contravention that:
  - (i) concerns the management, conduct or affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity; or
  - (ii) involves fraud or dishonesty and relates to a credit activity engaged in by a person, or a credit contract, mortgage, guarantee or consumer lease; or
- (e) for the purposes of an investigation under Part 6-1.

### 264 ASIC may inspect books without charge

- (1) A book that the Commonwealth credit legislation requires a person to keep must be open for inspection (without charge) by a person authorised in writing by ASIC.
- (2) A person (the *authorised person*) authorised under this section may require a person in whose possession, custody or control the book is to make the book available for inspection by the authorised person.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

- (3) An offence under subsection 290(2) relating to subsection (2) of this section is an offence of strict liability.

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

- (4) An authorisation under this section may be of general application or may be limited by reference to the books to be inspected.

### **265 Notice to auditors concerning information and books**

- (1) Subject to subsection (2), ASIC may give an auditor who prepares an audit report required under the Commonwealth credit legislation a written notice requiring the auditor:

- (a) to give specified information; or
- (b) to produce specified books;

to a specified ASIC member or ASIC staff member at a specified place and time.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

- (2) The power in subsection (1) may only be exercised:
- (a) for the purposes of ascertaining compliance with audit requirements under the Commonwealth credit legislation; or
  - (b) in relation to an alleged or suspected contravention of audit requirements under the Commonwealth credit legislation; or
  - (c) in relation to an alleged or suspected contravention of a law of the Commonwealth, or of a law of a referring State or a Territory, being a contravention that:
    - (i) concerns the management, conduct or affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity; or
    - (ii) involves fraud or dishonesty and relates to a credit activity engaged in by a person, or a credit contract, mortgage, guarantee or consumer lease; or
  - (d) for the purposes of an investigation under Part 6-1 relating to a contravention referred to in paragraph (b) or (c).
- (3) Without limiting subsection (1), a notice under that subsection may specify information or books that relate to any or all of the following:
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- (a) the policies relating to audit that the auditor has adopted or proposes to adopt, or the procedures relating to audit that the auditor has put in place or proposes to put in place;
  - (b) audits the auditor has conducted or proposes to conduct or in which the auditor has participated or proposes to participate;
  - (c) any other matter pertaining to audit that is prescribed by the regulations for the purposes of this paragraph.
- (4) Without limiting subsection (1), a notice under that subsection may require the auditor to give information or produce books even if doing so would involve a breach of an obligation of confidentiality that the auditor owes an audited person.
- (5) ASIC may, by written notice to an auditor who has received a notice under subsection (1), extend the period within which the auditor must give the information or produce the books to which the notice under that subsection relates.

**266 Notice to produce books about credit activities**

ASIC may give to:

- (a) a person who engages in a credit activity (either alone or together with any other person or persons); or
- (b) a person who, in ASIC's opinion, has been a party to engaging in a credit activity; or
- (c) a representative, banker, lawyer or auditor of a person referred to in paragraph (a) or (b);

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

- (d) a credit activity engaged in by a person; or
- (e) the character or financial situation of, or a business carried on by, a person who engages, or has engaged, in a credit activity.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

### **267 Notice to produce documents in person's possession**

- (1) ASIC may give to a person (the *recipient*) a written notice requiring the production to a specified ASIC member or ASIC staff member, at a specified place and time, of specified books that are in the recipient's possession, custody or control and relate to:
  - (a) affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity; or
  - (b) a matter referred to in paragraph 266(1)(d) or (e).
- (2) ASIC may give to a person (the *recipient*) a written notice requiring the production to a specified ASIC member or ASIC staff member, at a specified place and time, of specified books that are in the recipient's possession, custody or control and that relate to the question whether an auditor has complied with audit requirements under the Commonwealth credit legislation.

Note: Failure to comply with a requirement made under this section is an offence (see section 290).

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

- (1) ASIC may by writing authorise an ASIC member or ASIC staff member (an *authorised person*) to make a requirement of a kind that this Part empowers ASIC to make.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

- (2) An authorisation under this section may be of general application or may be limited by reference to all or any of the following:
  - (a) the persons of whom requirements may be made;
  - (b) the books that may be required to be produced;
  - (c) the information that may be required to be given.
- (3) If an authorisation of an authorised person is in force under this section, the authorised person may make a requirement in accordance with the authorisation as if, in sections 265, 266 and 267:
  - (a) a reference to ASIC were a reference to the authorised person; and

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- (b) a reference to specified books were a reference to books that the authorised person specifies, whether in the requirement or not and whether orally or in writing, to the person of whom the requirement is made; and
- (c) a reference to specified information were a reference to information that the authorised person specifies, whether in the requirement or not and whether orally or in writing, to the person of whom the requirement is made; and
- (d) a reference to giving or producing to a specified person were a reference to giving or producing to the authorised person.

**269 Application for warrant to seize books not produced**

- (1) If an ASIC member or ASIC staff member has reasonable grounds to suspect that there are, or may be within the next 3 days, on particular premises in Australia, books:
  - (a) whose production has been required under this Part; and
  - (b) that have not been produced in compliance with that requirement;he or she may:
  - (c) lay before a magistrate an information on oath setting out those grounds; and
  - (d) apply for the issue of a warrant to search the premises for those books.
- (2) On an application under this section, the magistrate may require further information to be given, either orally or by affidavit, in connection with the application.

**270 Grant of warrant**

- (1) This section applies if, on an application under section 269, the magistrate is satisfied that there are reasonable grounds to suspect that there are, or may be within the next 3 days, on particular premises, particular books:
  - (a) whose production has been required under this Part; and
  - (b) that have not been produced in compliance with that requirement.



- (2) The magistrate may issue a warrant authorising a member of the Australian Federal Police, whether or not named in the warrant, together with any person so named, with such assistance, and by such force, as is necessary and reasonable:
  - (a) to enter on or into the premises; and
  - (b) to search the premises; and
  - (c) to break open and search anything, whether a fixture or not, in or on the premises; and
  - (d) to take possession of, or secure against interference, books that appear to be any or all of those books.
- (3) If the magistrate issues such a warrant, he or she must set out on the information laid before him or her under subsection 269(2) for the purposes of the application:
  - (a) which of the grounds set out in the information; and
  - (b) particulars of any other grounds;he or she has relied on to justify the issue of the warrant.
- (4) A warrant under this section must:
  - (a) specify the premises and books referred to in subsection (1); and
  - (b) state whether entry is authorised to be made at any time of the day or night or only during specified hours; and
  - (c) state that the warrant ceases to have effect on a specified day that is not more than 7 days after the day of issue of the warrant.

### **271 Powers if books produced or seized**

- (1) This section applies if:
  - (a) books are produced to a person under a requirement made under this Part; or
  - (b) under a warrant issued under section 270, a person:
    - (i) takes possession of books; or
    - (ii) secures books against interference; or
  - (c) by virtue of a previous application of subsection (8) of this section, books are delivered into a person's possession.

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- (2) If paragraph (1)(a) applies, the person may take possession of any of the books.
- (3) The person may inspect, and may make copies of, or take extracts from, any of the books.
- (4) The person may use, or permit the use of, any of the books for the purposes of proceedings.
- (5) The person may retain possession of any of the books for so long as is necessary:
  - (a) for the purposes of exercising a power conferred by this section (other than this subsection and subsection (7)); or
  - (b) for any of the purposes referred to in paragraphs 263(a), (b) and (e) or 265(2)(a) and (d), as the case requires; or
  - (c) for a decision to be made about whether or not proceedings (including proceedings under a law of the Commonwealth, or a law of a referring State or a Territory) to which the books concerned would be relevant should be begun; or
  - (d) for such proceedings to be begun and carried on.
- (6) No-one is entitled, as against the person, to claim a lien on any of the books, but such a lien is not otherwise prejudiced.
- (7) While the books are in the possession of a person (the *possessor*), the possessor:
  - (a) must permit another person to inspect at all reasonable times such (if any) of the books as the other person would be entitled to inspect if they were not in the possessor's possession; and
  - (b) may permit another person to inspect any of the books.
- (8) Unless subparagraph (1)(b)(ii) applies, the person may deliver any of the books into the possession of ASIC or of a person authorised by it to receive them.
- (9) If paragraph (1)(a) or (b) applies, the person, or a person into whose possession the person delivers any of the books under subsection (8), may require:
  - (a) if paragraph (1)(a) applies—a person who so produced any of the books; or

(b) in any case—a person who was a party to the compilation of any of the books;

to explain any matter about the compilation of any of the books or to which any of the books relate.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

## **272 Powers if books not produced**

If a person (the *first person*) fails or refuses to produce particular books in compliance with a requirement made by another person under this Part, the other person may require the first person to state:

- (a) if the books may be found; and
- (b) who last had possession, custody or control of the books and if that person may be found.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

## **Part 6-4—Proceedings after an investigation**

### **Division 1—Introduction**

#### **273 Guide to this Part**

This Part is about criminal and civil proceedings that ASIC may bring after it has conducted an investigation under this Chapter.

Division 2 deals with criminal proceedings. After an investigation of a person under this Chapter, ASIC may prosecute the person for an offence against the Commonwealth credit legislation (i.e. this Act or the National Credit Transitional Act). It may also require others to provide it with reasonable assistance in connection with the prosecution.

Division 2 also deals with civil proceedings. After an investigation of a person under this Chapter, ASIC may bring civil proceedings against a person in particular circumstances. However, under this Division, ASIC cannot bring civil proceedings under the Commonwealth credit legislation. This is because Part 4-2 (which deals with remedies) and the National Credit Code deal with when ASIC can bring those proceedings.

## **Division 2—Proceedings after an investigation**

### **274 ASIC may prosecute**

- (1) This section applies if:
  - (a) as a result of an investigation; or
  - (b) from a record of an examination;  
conducted under this Chapter, it appears to ASIC that a person:
  - (c) may have committed an offence against the Commonwealth credit legislation; and
  - (d) ought to be prosecuted for the offence.
- (2) ASIC may cause a prosecution of the person for the offence to be brought and carried on.
- (3) ASIC may make a requirement under subsection (4) if:
  - (a) ASIC, on reasonable grounds, suspects or believes that a person can give information relevant to a prosecution for the offence; or
  - (b) the offence relates to matters being, or connected with, affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity, or to matters including such matters.
- (4) ASIC may, whether before or after a prosecution for the offence is begun, by writing given to any of the following persons:
  - (a) the person referred to in paragraph (3)(a);
  - (b) a representative, banker, lawyer or auditor of a person referred to in paragraph (3)(b);require the person to give all reasonable assistance in connection with such a prosecution.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

- (5) An offence under subsection 290(2) relating to subsection (4) of this section is an offence of strict liability.

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

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- (6) Subsection (4) does not apply in relation to:
- (a) the person referred to in subsection (1); or
  - (b) a person who is or has been that person's lawyer.

Note: A defendant bears an evidential burden in relation to the matter in subsection (6), see subsection 13.3(3) of the *Criminal Code*.

- (7) A requirement made by ASIC under subsection (4) is not a legislative instrument.
- (8) Nothing in this section affects the operation of the *Director of Public Prosecutions Act 1983*.

**275 ASIC may bring civil proceedings**

If, as a result of an investigation or from a record of an examination (being an investigation or examination conducted under this Chapter), it appears to ASIC to be in the public interest for a person to bring and carry on proceedings (other than proceedings under the Commonwealth credit legislation) for:

- (a) the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed in connection with a matter to which the investigation or examination related; or
- (b) recovery of property of the person;

ASIC:

- (c) if the person is a company (within the meaning of the *Corporations Act 2001*)—may cause; or
  - (d) otherwise—may, with the person's written consent, cause;
- such proceedings to be begun and carried on in the person's name.

## **Part 6-5—Hearings**

### **Division 1—Introduction**

#### **276 Guide to this Part**

This Part is about hearings held by ASIC.

Division 2 gives ASIC the power to hold hearings for the purpose of the performance of its functions and powers under the Commonwealth credit legislation (other than Part 6-1).

Division 2 also includes rules and procedures for the conduct of hearings, including rules in relation to whether the hearing is conducted in private, and rules in relation to evidence and proceedings at hearings.

## **Division 2—Hearings**

### **277 Power to hold hearings**

ASIC may hold hearings for the purposes of the performance or exercise of any of its functions and powers under the Commonwealth credit legislation, other than a function or power conferred on it by Part 6-1 (which deals with investigations).

### **278 General discretion to hold hearing in public or private**

- (1) Subject to sections 279 and 280, ASIC may direct that a hearing take place in public or take place in private.
- (2) In exercising its discretion under subsection (1), ASIC must have regard to:
  - (a) whether evidence that may be given, or a matter that may arise, during the hearing is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence against a law of the Commonwealth, a State or a Territory; and
  - (b) any unfair prejudice to a person's reputation that would be likely to be caused if the hearing took place in public; and
  - (c) whether it is in the public interest that the hearing take place in public; and
  - (d) any other relevant matter.

### **279 Request by person appearing at hearing that it take place in public**

- (1) Subject to section 280, if:
  - (a) the Commonwealth credit legislation requires ASIC to give a person an opportunity to appear at a hearing; and
  - (b) the person requests that the hearing or part of the hearing take place in public;the hearing or part must take place in public.



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- (2) Despite subsection (1), if ASIC is satisfied, having regard to the matters referred to in subsection 278(2), that it is desirable that a hearing or part of a hearing take place in private, it may direct that the hearing or part take place in private.
- (3) If a direction given under subsection (2) is in writing, it is not a legislative instrument.

**280 Certain hearings to take place in private**

If the Commonwealth credit legislation (other than this section) requires a hearing to take place in private, the hearing must take place in private.

**281 ASIC may restrict publication of certain material**

- (1) If, at a hearing that is taking place in public or in private, ASIC is satisfied that it is desirable to do so, ASIC may give directions preventing or restricting the publication of evidence given before, or of matters contained in documents lodged with, ASIC.

Note: Failure to comply with a direction given under this subsection is an offence (see section 293).

- (2) In determining whether or not to give a direction under subsection (1), ASIC must have regard to:
  - (a) whether evidence that has been or may be given, or a matter that has arisen or may arise, during the hearing is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence against a law of the Commonwealth, a State or a Territory; and
  - (b) any unfair prejudice to a person's reputation that would be likely to be caused unless ASIC exercises its powers under this section; and
  - (c) whether it is in the public interest that ASIC exercises its powers under this section; and
  - (d) any other relevant matter.
- (3) If a direction given under subsection (1) is in writing, it is not a legislative instrument.

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**282 Who may be present when hearing takes place in private**

- (1) ASIC may give directions about who may be present during a hearing that is to take place in private.
- (2) A direction under subsection (1) does not prevent:
  - (a) a person whom the Commonwealth credit legislation requires to be given the opportunity to appear at a hearing; or
  - (b) a person representing under section 285:
    - (i) a person of a kind referred to in paragraph (a) of this subsection; or
    - (ii) a person who, by virtue of such a direction, is entitled to be present at a hearing;from being present during the hearing.
- (3) If ASIC directs that a hearing take place in private, a person must not be present at the hearing unless he or she:
  - (a) is an ASIC member; or
  - (b) is an ASIC staff member approved by ASIC; or
  - (c) is entitled to be present by virtue of:
    - (i) a direction under subsection (1); or
    - (ii) subsection (2).

Criminal penalty: 10 penalty units or 3 months imprisonment or both.

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

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

- (5) If a direction given under subsection (1) is in writing, it is not a legislative instrument.

**283 Involvement of person entitled to appear at hearing**

- (1) This section applies if the Commonwealth credit legislation requires ASIC to give a person an opportunity to appear at a hearing and to make submissions and give evidence to it.
- (2) ASIC must appoint a place and time for the hearing and cause written notice of that place and time to be given to the person.

## Section 284

- (3) If the person does not wish to appear at the hearing, the person may, before the day of the hearing, lodge with ASIC any written submissions that the person wishes ASIC to take into account in relation to the matter concerned.

**284 Power to summon witnesses and take evidence**

- (1) An ASIC member may, by written summons given to a person in the form prescribed by the regulations:
- (a) require the person to appear before ASIC at a hearing to give evidence, to produce specified documents, or to do both; and
  - (b) require the person to attend from day to day unless excused, or released from further attendance, by an ASIC member.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

- (2) At a hearing, ASIC may take evidence on oath or affirmation, and for that purpose an ASIC member may:
- (a) require a witness at the hearing to either take an oath or make an affirmation; and
  - (b) administer an oath or affirmation to a witness at the hearing.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

- (3) The oath or affirmation to be taken or made by a person for the purposes of this section is an oath or affirmation that the evidence the person will give will be true.

- (4) The ASIC member presiding at a hearing:
- (a) may require a witness at the hearing to answer a question put to the witness; and
  - (b) may require a person appearing at the hearing pursuant to a summons issued under this section to produce a document specified in the summons.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 290).

- (5) An offence under subsection 290(2) relating to subsection (1), (2) or (4) of this section is an offence of strict liability.

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

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- (6) ASIC may permit a witness at a hearing to give evidence by tendering, and if ASIC so requires, verifying by oath, a written statement.

**285 Proceedings at hearings**

- (1) A hearing must be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Commonwealth credit legislation and a proper consideration of the matters before ASIC permit.
- (2) At a hearing, ASIC:
- (a) is not bound by the rules of evidence; and
  - (b) may, on such conditions as it considers appropriate, permit a person to intervene; and
  - (c) must observe the rules of natural justice.
- (3) Subject to subsection (4), Division 4 of Part 4 of the ASIC Act (other than section 104 of that Act) applies, so far as practicable, in relation to a hearing as if the hearing were a meeting of ASIC.
- (4) At a hearing before a Division of ASIC (established under section 97 of the ASIC Act), 2 members of the Division form a quorum.
- (5) At a hearing, a natural person may appear in person or be represented by an employee of the person approved by ASIC.
- (6) A body corporate may be represented at a hearing by an officer (within the meaning of section 5 of the ASIC Act) or employee of the body corporate approved by ASIC.
- (7) An unincorporated association, or a person in the person's capacity as a member of an unincorporated association, may be represented at a hearing by a member, officer (within the meaning of section 5 of the ASIC Act) or employee of the association approved by ASIC.
- (8) Any person may be represented at a hearing by a lawyer.

**286 ASIC to take account of evidence and submissions**

ASIC must take into account:

- (a) evidence given, or a submission made, to it at a hearing; or
  - (b) a submission lodged with it under section 283;
- in making a decision on a matter to which the evidence or submission relates.

**287 Reference to court of question of law arising at hearing**

- (1) ASIC may, of its own motion or at a person's request, refer to the court for decision a question of law arising at a hearing.
- (2) If a question has been referred under subsection (1), ASIC must not, in relation to a matter to which the hearing relates:
  - (a) give while the reference is pending a decision to which the question is relevant; or
  - (b) proceed in a manner, or make a decision, that is inconsistent with the court's opinion on the question.
- (3) If a question is referred under subsection (1):
  - (a) ASIC must send to the court all documents that were before ASIC in connection with the hearing; and
  - (b) at the end of the proceedings in the court in relation to the reference, the court must cause the documents to be returned to ASIC.

**288 Protection of ASIC members etc.**

- (1) An ASIC member has, in the performance or exercise of any of his or her functions and powers as an ASIC member in relation to a hearing, the same protection and immunity as a Justice of the High Court.
- (2) A delegate of an ASIC member has, in the performance or exercise of any delegated function or power in relation to a hearing, the same protection and immunity as a Justice of the High Court.

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- (3) A lawyer or other person appearing on a person's behalf at a hearing has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.
- (4) Subject to this Act, a person who is required by a summons under section 284 to appear at a hearing, or a witness at a hearing, has the same protection as a witness in proceedings in the High Court.

## **Part 6-6—Offences**

### **Division 1—Introduction**

#### **289 Guide to this Part**

This Part is about offences for non-compliance with requirements of this Chapter, and other offences in relation to requirements made under this Chapter.

Division 2 includes offences for non-compliance with the requirements of this Chapter. It also includes other offences relating to compliance and enforcement, including offences relating to giving false information, obstructing the exercise of powers under this Chapter, and contempt of ASIC.

Division 2 also includes rules in relation to self-incrimination and legal professional privilege.

## **Division 2—Offences**

### **290 Contraventions of requirements made under this Chapter**

- (1) A person must not intentionally or recklessly refuse or fail to comply with a requirement made under:
- (a) section 253; or
  - (b) subsection 255(4); or
  - (c) section 265, 266, 267 or 268; or
  - (d) subsection 271(9); or
  - (e) section 272.

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

- (2) A person must not refuse or fail to comply with a requirement made under subsection 255(1) or 264(2), paragraph 258(2)(a) or subsection 274(4), 284(1), (2) or (4).

Criminal penalty: 10 penalty units, or 3 months imprisonment, or both.

- (3) A person must comply with a requirement made under subsection 257(2).

Criminal penalty: 5 penalty units.

- (4) Subsections (1) and (2) do not apply to the extent that the person has a reasonable excuse.

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

- (5) Paragraph (1)(d) does not apply to the extent that the person has explained the matter to the best of his or her knowledge or belief.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5) (see subsection 13.3(3) of the *Criminal Code*).

- (6) Paragraph (1)(e) does not apply to the extent that the person has stated the matter to the best of his or her knowledge or belief.



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Note: A defendant bears an evidential burden in relation to the matter in subsection (6) (see subsection 13.3(3) of the *Criminal Code*).

**291 False information**

- (1) A person must not:
- (a) in purported compliance with a requirement made under this Chapter; or
  - (b) in the course of an examination of the person; give information, or make a statement, that is false or misleading in a material particular.

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

- (2) A person must not, at a hearing, give evidence that is false or misleading in a material particular.

Criminal penalty: 10 penalty units, or 3 months imprisonment, or both.

- (3) It is a defence to a prosecution for a contravention of subsection (1) or (2) if it is proved that the defendant, when giving the information or evidence or making the statement, believed on reasonable grounds that it was true and not misleading.

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

**292 Obstructing person executing a warrant under this Chapter**

- (1) A person must not engage in conduct that results in the obstruction or hindering of a person who is executing a warrant issued under section 270.

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

- (2) Subsection (1) does not apply to the extent that the person has a reasonable excuse.

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

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- (3) The occupier, or person in charge, of premises that a person enters under a warrant issued under section 270 must not intentionally or recklessly refuse or fail to provide to that person all reasonable facilities and assistance for the effective exercise of his or her powers under the warrant.

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

**293 Disrupting hearings**

- (1) A person must not engage in conduct that results in the disruption of a hearing.

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

- (2) A person must not contravene a direction given under subsection 281(1).

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

- (3) Subsection (2) does not apply to the extent that the person has a reasonable excuse.

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

- (4) Subsection (2) is an offence of strict liability.

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

- (5) An offence constituted by a contravention of subsection (1) or (2) is punishable on summary conviction.

**294 Concealing books relevant to investigation**

- (1) If ASIC is investigating, or is about to investigate, a matter, a person must not:

- (a) in any case—engage in conduct that results in the concealment, destruction, mutilation or alteration of a book relating to that matter; or

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- (b) if a book relating to that matter is in a particular State or Territory—engage in conduct that results in the taking or sending of the book out of that State or Territory or out of Australia.

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

- (2) It is a defence to a prosecution for a contravention of subsection (1) if it is proved that the defendant intended neither to defeat the purposes of the Commonwealth credit legislation, nor to delay or obstruct an investigation, or a proposed investigation, by ASIC.

Note: A defendant bears a legal burden in relation to a matter referred to in subsection (2) ( see section 13.4 of the *Criminal Code*).

**295 Self-incrimination**

- (1) For the purposes of this Chapter, it is not a reasonable excuse for a person to refuse or fail:

- (a) to give information; or
- (b) to sign a record; or
- (c) to produce a book;

in accordance with a requirement made of the person, that the information, signing the record or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty.

- (2) Subsection (3) applies if:

- (a) before:
  - (i) making an oral statement giving information; or
  - (ii) signing a record;

pursuant to a requirement made under this Chapter, a person (other than a body corporate) claims that the statement, or signing the record, as the case may be, might tend to incriminate the person or make the person liable to a penalty; and

- (b) the statement, or signing the record, as the case may be, might in fact tend to incriminate the person or make the person so liable.

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- (3) The statement, or the fact that the person has signed the record, as the case may be, is not admissible in evidence against the person in:
- (a) criminal proceedings; or
  - (b) proceedings for the imposition of a penalty;
- other than proceedings in relation to:
- (c) in the case of the making of a statement—the falsity of the statement; or
  - (d) in the case of the signing of a record—the falsity of any statement contained in the record.

**296 Legal professional privilege**

- (1) This section applies if:
- (a) under this Chapter, a person requires a lawyer:
    - (i) to give information; or
    - (ii) to produce a book; and
  - (b) giving the information would involve disclosing, or the book contains, as the case may be, a privileged communication made by, on behalf of or to the lawyer in his or her capacity as a lawyer.
- (2) The lawyer is entitled to refuse to comply with the requirement unless:
- (a) if the person to whom, or by or on behalf of whom, the communication was made is a body corporate that is being wound up—the liquidator (within the meaning of section 9 of the *Corporations Act 2001*) of the body; or
  - (b) otherwise—the person to whom, or by or on behalf of whom, the communication was made;
- consents to the lawyer complying with the requirement.
- (3) If the lawyer so refuses, he or she must, as soon as practicable, give to the person who made the requirement a written notice setting out:
- (a) if the lawyer knows the name and address of the person to whom, or by or on behalf of whom, the communication was made—that name and address; and

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- (b) if subparagraph (1)(a)(i) applies and the communication was made in writing—sufficient particulars to identify the document containing the communication; and
- (c) if subparagraph (1)(a)(ii) applies—sufficient particulars to identify the book, or the part of the book, containing the communication.

Criminal penalty: 10 penalty units, or 3 months imprisonment, or both.

**297 Powers of court relating to contraventions of this Chapter**

- (1) This section applies if ASIC is satisfied that a person has, without reasonable excuse, refused or failed to comply with a requirement made under this Chapter, other than Part 6-7 (which deals with ASIC's powers in relation to non-compliance with this Chapter).
- (2) ASIC may by writing certify the refusal or failure to the court.
- (3) If ASIC does so, the court may inquire into the case and may order the person to comply with the requirement as specified in the order.

**Chapter 6** Compliance and enforcement

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

**Division 1** Introduction

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

**Division 1—Introduction**

**298 Guide to this Part**

This Part is about powers of ASIC to in relation to non-compliance with this Chapter.

Division 2 is about orders that ASIC may make in relation to credit contracts, mortgages, guarantees and consumer leases.

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

### **299 Application of this Part**

This Part applies if, in ASIC's opinion, information about a credit contract, mortgage, guarantee or consumer lease needs to be found out for the purposes of the exercise of any of ASIC's powers under this Chapter but cannot be found out because a person has refused or failed to comply with a requirement made under this Chapter.

### **300 Orders by ASIC relating to credit contracts, mortgages, guarantees or consumer leases**

- (1) ASIC may make one or more of the following:
  - (a) an order restraining a specified person from assigning any interest in a credit contract, mortgage, guarantee or consumer lease;
  - (b) an order restraining a specified person from acquiring any interest in a credit contract, mortgage, guarantee or consumer lease;
  - (c) an order restraining the exercise of rights under a credit contract, mortgage, guarantee or consumer lease;
  - (d) an order directing a:
    - (i) credit provider under a credit contract; or
    - (ii) mortgagee under a mortgage; or
    - (iii) beneficiary of a guarantee under a guarantee; or
    - (iv) lessor under a consumer lease;in relation to which an order under this section is in force to give written notice of that order to any person whom the credit provider, mortgagee, beneficiary or lessor knows to be entitled to exercise a right in relation to the credit contract, mortgage, guarantee or consumer lease.
- (2) An offence under subsection 301(4) relating to subsection (1) of this section is an offence of strict liability.

**Chapter 6** Compliance and enforcement

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

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

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

- (3) An order made under subsection (1) is not a legislative instrument.

**301 Orders under this Part**

- (1) ASIC may make an order varying or revoking an order in force under this Part.
- (2) An order under this Part must be made by notice published in the Gazette or on ASIC's website.
- (3) If an order is made under this Part (other than subsection (1)), ASIC must cause to be given to the person to whom the order is directed:
- (a) a copy of the order; and
  - (b) a copy of each order varying or revoking it.
- (4) A person must comply with an order in force under this Part.

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



## **Part 6-8—Evidentiary use of certain material**

### **Division 1—Introduction**

#### **302 Guide to this Part**

This Part is about the evidentiary use and value of certain material.

Division 2 includes rules in relation to the evidentiary value of statements made at examinations, copies or extracts made from certain books, and reports of investigations made under Part 6-1.

## Division 2—Evidentiary use of certain material

### 303 Statements made at an examination: proceedings against examinee

- (1) A statement that a person makes at an examination of the person is admissible in evidence against the person in proceedings unless:
  - (a) because of subsection 295(3), the statement is not admissible in evidence against the person in the proceedings; or
  - (b) the statement is not relevant to the proceedings and the person objects to the admission of evidence of the statement; or
  - (c) the statement (the *first statement*) is qualified or explained by some other statement made at the examination, evidence of the other statement is not tendered in the proceedings and the person objects to the admission of evidence of the first statement; or
  - (d) the statement discloses matter in relation to which the person could claim legal professional privilege in the proceedings if this subsection did not apply in relation to the statement, and the person objects to the admission of evidence of the statement.
- (2) Subsection (1) applies in relation to proceedings against a person even if it is heard together with proceedings against another person.
- (3) If a written record of an examination of a person is signed by the person under subsection 258(2) or authenticated in any other manner prescribed by the regulations, the record is, in proceedings, prima facie evidence of the statements it records, but nothing in this Chapter limits or affects the admissibility in the proceedings of other evidence of statements made at the examination.

### 304 Statements made at an examination: other proceedings

If direct evidence by a person (the *absent witness*) of a matter would be admissible in proceedings, a statement that the absent

witness made at an examination of the absent witness and that tends to establish that matter is admissible in the proceedings as evidence of that matter:

- (a) if it appears to the court or tribunal that:
  - (i) the absent witness is dead or is unfit, because of physical or mental incapacity, to attend as a witness; or
  - (ii) the absent witness is outside the State or Territory in which the proceedings is being heard and it is not reasonably practicable to secure his or her attendance; or
  - (iii) all reasonable steps have been taken to find the absent witness but he or she cannot be found; or
- (b) if it does not so appear to the court or tribunal—unless another party to the proceedings requires the party tendering evidence of the statement to call the absent witness as a witness in the proceedings and the tendering party does not so call the absent witness.

### **305 Weight of evidence admitted under section 304**

- (1) This section applies if evidence of a statement made by a person at an examination of the person is admitted under section 304 in proceedings.
- (2) In deciding how much weight (if any) to give to the statement as evidence of a matter, regard is to be had to:
  - (a) how long after the matters to which it related the statement was made; and
  - (b) any reason the person may have had for concealing or misrepresenting a material matter; and
  - (c) any other circumstances from which it is reasonable to draw an inference about how accurate the statement is.
- (3) If the person is not called as a witness in the proceedings:
  - (a) evidence that would, if the person had been so called, have been admissible in the proceedings for the purpose of destroying or supporting his or her credibility is so admissible; and

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- (b) evidence is admissible to show that the statement is inconsistent with another statement that the person has made at any time.
- (4) However, evidence of a matter is not admissible under this section if, had the person been called as a witness in the proceedings and denied the matter in cross-examination, evidence of the matter would not have been admissible if adduced by the cross-examining party.

**306 Objection to admission of statements made at examination**

- (1) A party (the *adducing party*) to proceedings may, not less than 14 days before the first day of the hearing of the proceedings, give to another party to the proceedings written notice that the adducing party:
  - (a) will apply to have admitted in evidence in the proceedings specified statements made at an examination; and
  - (b) for that purpose, will apply to have evidence of those statements admitted in the proceedings.
- (2) A notice under subsection (1) must set out, or be accompanied by writing that sets out, the specified statements.
- (3) Within 14 days after a notice is given under subsection (1), the other party may give to the adducing party a written notice:
  - (a) stating that the other party objects to specified statements being admitted in evidence in the proceedings; and
  - (b) specifies, in relation to each of those statements, the grounds of objection.
- (4) The period prescribed by subsection (3) may be extended by the court or tribunal or by agreement between the parties concerned.
- (5) On receiving a notice given under subsection (3), the adducing party must give to the court or tribunal a copy of:
  - (a) the notice under subsection (1) and any writing that subsection (2) required to accompany that notice; and
  - (b) the notice under subsection (3).
- (6) If subsection (5) is complied with, the court or tribunal may either:

- (a) determine the objections as a preliminary point before the hearing of the proceedings begins; or
  - (b) defer determination of the objections until the hearing.
- (7) If a notice has been given in accordance with subsections (1) and (2), the other party is not entitled to object at the hearing of the proceedings to a statement specified in the notice being admitted in evidence in the proceedings, unless:
- (a) the other party has, in accordance with subsection (3), objected to the statement being so admitted; or
  - (b) the court or tribunal gives the other party leave to object to the statement being so admitted.

### **307 Copies of, or extracts from, certain books**

- (1) A copy of, or an extract from, a book relating to:
- (a) affairs of a licensee, credit representative or other person who engages, or has engaged, in a credit activity; or
  - (b) a matter referred to in paragraph 266(1)(d) or (e);
- is admissible in evidence in proceedings as if the copy were the original book, or the extract were the relevant part of the original book, as the case may be, whether or not the copy or extract was made under section 271.
- (2) A copy of, or an extract from, a book is not admissible in evidence under subsection (1) unless it is proved that the copy or extract is a true copy of the book, or of the relevant part of the book, as the case may be.
- (3) For the purposes of subsection (2), a person who has compared:
- (a) a copy of a book with the book; or
  - (b) an extract from a book with the relevant part of the book;
- may give evidence, either orally or by an affidavit or statutory declaration, that the copy or extract is a true copy of the book or relevant part, as the case may be.

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**308 Report under Part 6-1**

Subject to section 309, if a copy of a report under Part 6-1 purports to be certified by ASIC as a true copy of such a report, the copy is admissible in proceedings (other than criminal proceedings) as prima facie evidence of any facts or matters that the report states ASIC to have found to exist.

**309 Exceptions to admissibility of report**

- (1) This section applies if a party to proceedings tenders a copy of a report as evidence against another party.
- (2) The copy is not admissible under section 308 in the proceedings as evidence against the other party unless the court or tribunal is satisfied that:
  - (a) a copy of the report has been given to the other party; and
  - (b) the other party, and the other party's lawyer, have had a reasonable opportunity to examine that copy and to take its contents into account in preparing the other party's case.
- (3) Before or after the copy referred to in subsection (1) is admitted in evidence, the other party may apply to cross-examine, in relation to the report, a specified person who, or 2 or more specified persons each of whom:
  - (a) was concerned in preparing the report or making a finding about a fact or matter that the report states ASIC to have found to exist; or
  - (b) whether or not pursuant to a requirement made under this Part, gave information, or produced a book, on the basis of which, or on the basis of matters including which, such a finding was made.
- (4) The court or tribunal must grant an application made under subsection (3) unless it considers that, in all the circumstances, it is not appropriate to do so.
- (5) If:
  - (a) the court or tribunal grants an application or applications made under subsection (3); and

- (b) a person to whom the application or any of the applications relate, or 2 or more such persons, is or are unavailable, or does not or do not attend, to be cross-examined in relation to the report; and
- (c) the court or tribunal is of the opinion that to admit the copy under section 308 in the proceedings as evidence against the other party without the other party having the opportunity so to cross-examine the person or persons would unfairly prejudice the other party;

the court or tribunal must refuse so to admit the copy, or must treat the copy as not having been so admitted, as the case requires.

### **310 Material otherwise admissible**

Nothing in this Part renders evidence inadmissible in proceedings in circumstances if it would have been admissible in those proceedings if this Part had not been enacted.

**Chapter 6** Compliance and enforcement

**Part 6-9** Miscellaneous provisions relating to compliance and enforcement

**Division 1** Introduction

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

**Division 1—Introduction**

**311 Guide to this Part**

<p>This Part includes miscellaneous provisions relating to this Chapter.</p>
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## **Division 2—Miscellaneous provisions relating to compliance and enforcement**

### **312 Requirement made of a body corporate**

If a provision of this Chapter empowers a person to make a requirement of a body corporate, the provision also empowers the person to make that requirement of a person who is or has been an officer (within the meaning of section 5 of the ASIC Act) or employee of the body.

### **313 Evidence of authority**

- (1) A person (the *inspector*), other than ASIC, who is about to make, or has made, a requirement of another person under this Chapter (other than Part 6-5) must, if the other person requests evidence of the inspector's authority to make the requirement, produce to the other person:
  - (a) a current identity card that was issued to the inspector by ASIC and incorporates a photograph of the inspector; and
  - (b) if the requirement will be, or was, made under an authorisation by ASIC—a document that was issued by ASIC and sets out the effect of so much of the authorisation as is relevant to making the requirement; and
  - (c) otherwise—such evidence (if any) of the inspector's authority to make the requirement as ASIC determines.
- (2) An identity card under paragraph (1)(a) is not a legislative instrument.

### **314 Giving documents to natural persons**

Section 109X of the *Corporations Act 2001* applies for the purposes of this Chapter as if a reference in subsection (2) of that section to leaving a document at an address were a reference to leaving it at that address with a person whom the person leaving the document believes on reasonable grounds:

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- (a) to live or work at that address; and
- (b) to have attained the age of 16 years.

**315 Place and time for production of books**

A provision of this Chapter that empowers a person to require the production of books at a place and time specified by the person is taken:

- (a) to require the person to specify a place and time that are reasonable in all the circumstances; and
- (b) if it is reasonable in all the circumstances for the person to require the books to be produced forthwith—to empower the person to require the books to be produced forthwith.

**316 Application of Crimes Act and Evidence Act**

- (1) For the purposes of Part III of the *Crimes Act 1914*, an examination or a hearing is a judicial proceeding.
- (2) Part 2.2, sections 69, 70, 71 and 147 and Division 2 of Part 4.6 of the *Evidence Act 1995* apply to an examination in the same way that they apply to proceedings to which that Act applies under section 4 of that Act.

**317 Allowances and expenses**

- (1) A person who, pursuant to a requirement made under section 253, appears for examination is entitled to the allowances and expenses prescribed by the regulations (if any).
- (2) A person who, pursuant to a summons issued under section 284, appears at a hearing is entitled to be paid:
  - (a) if the summons was issued at another person's request—by that other person; or
  - (b) otherwise—by ASIC;allowances and expenses prescribed by the regulations (if any).
- (3) ASIC may pay such amount as it considers reasonable on account of the costs and expenses (if any) that a person incurs in complying with a requirement made under this Chapter.

### **318 Expenses of investigation under Part 6-1**

Subject to section 319, ASIC must pay the expenses of an investigation.

### **319 Recovery of expenses of investigation**

(1) If:

- (a) a person is convicted of an offence against a law of the Commonwealth, or a law of a referring State or a Territory, in a prosecution; or
- (b) a judgment is awarded, or a declaration or other order is made, against a person in proceedings in a court or tribunal of this jurisdiction;

brought as a result of an investigation under Part 6-1, ASIC may make one of the following orders:

- (c) an order that the person pay the whole, or a specified part, of the expenses of the investigation;
  - (d) an order that the person reimburse ASIC to the extent of a specified amount of such of the expenses of the investigation as ASIC has paid;
  - (e) an order that the person pay, or reimburse ASIC in relation to, the whole, or a specified part, of the cost to ASIC of making the investigation, including the remuneration of an ASIC member or ASIC staff member concerned in the investigation.
- (2) An order under this section must be in writing and must specify when and how the payment or reimbursement is to be made.
- (3) A person must comply with an order under this section that is applicable to the person.

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

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

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

**Chapter 6** Compliance and enforcement

**Part 6-9** Miscellaneous provisions relating to compliance and enforcement

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- (5) ASIC may recover in a court of competent jurisdiction as a debt due to ASIC so much of the amount payable under an order made under this section as is not paid in accordance with the order.
- (6) A report under Part 6-1 may include recommendations about the making of orders under this section.
- (7) An order made under this section is not a legislative instrument.

**320 Compliance with this Chapter**

A person is neither liable to proceedings, nor subject to a liability, merely because the person has complied, or proposes to comply, with a requirement made, or purporting to have been made, under this Chapter.

**321 Effect of this Chapter**

- (1) Except as expressly provided, nothing in this Chapter limits the generality of anything else in this Chapter.
- (2) The functions and powers that this Chapter confers are in addition to, and do not derogate from, any other function or power conferred by a law of the Commonwealth, a State or a Territory.

**322 Enforcement of undertakings**

- (1) ASIC may accept a written undertaking given by a person in connection with a matter in relation to which ASIC has a function or power under the Commonwealth credit legislation.
- (2) The person may withdraw or vary the undertaking at any time, but only with ASIC's consent.
- (3) If ASIC considers that the person who gave the undertaking has breached any of its terms, ASIC may apply to the court for an order under subsection (4).
- (4) If the court is satisfied that the person has breached a term of the undertaking, the court may make all or any of the following orders:
  - (a) an order directing the person to comply with that term of the undertaking;

- (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
- (c) any order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
- (d) any other order that the court considers appropriate.

## **Chapter 7—Miscellaneous**

### **Part 7-1—Miscellaneous**

#### **Division 1—Introduction**

##### **323 Guide to this Part**

This Part deals with miscellaneous matters.

Division 2 deals with when a person will be liable for the conduct of others (usually the person's employee or agent).

Division 3 provides for AAT review of ASIC's decisions.

Division 4 provides for regulations to be made.

Division 5 has other miscellaneous provisions (such as Ministerial delegations).

## **Division 2—Liability of persons for conduct of their agents etc.**

### **324 Liability for bodies corporate for conduct of their agents, employees etc.**

#### *Liability of bodies corporate*

- (1) Any conduct engaged in on behalf of a body corporate:
- (a) by a director, employee or agent (an **official**) of the body within the scope of the person's actual or apparent authority; or
  - (b) by any other person at the direction or with the consent or agreement (whether express or implied) of an official of the body, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official;

is taken, for the purposes of this Act (other than the National Credit Code), to have been engaged in also by the body.

- (2) Any conduct engaged in by a person (for example, the giving of money) in relation to:
- (a) an official of the body acting within the scope of his or her actual or apparent authority; or
  - (b) any other person acting at the direction or with the consent or agreement (whether express or implied) of an official of the body, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official;

is taken, for the purposes of this Act (other than the National Credit Code), to have been engaged in also in relation to the body.

#### *State of mind of a body corporate*

- (3) If, for the purposes of this Act (other than the National Credit Code), it is necessary to establish the state of mind of the body corporate in relation to particular conduct, it is enough to show:

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- (a) that the conduct was engaged in by a person referred to in paragraph (1)(a) or (b); and
- (b) that the person had that state of mind.

*Disapplication of Part 2.5 of the Criminal Code*

- (4) Part 2.5 of the *Criminal Code* does not apply to an offence against this Act.

Note: Part 2.5 of the *Criminal Code* deals with corporate criminal responsibility, but this section instead deals with that for the purposes of this Act (other than the National Credit Code), and section 199 of the National Credit Code deals with that for the purpose of that Code.

**325 Liability of persons (other than bodies corporate) for the conduct of their agents, employees etc.**

*Liability of principals*

- (1) Any conduct engaged in on behalf of a person (the *principal*) who is not a body corporate:
  - (a) by any of the following persons (an *official*) within the scope of the person's actual or apparent authority:
    - (i) an employee or agent of the principal;
    - (ii) if the principal is a partnership—a partner;
    - (iii) if the principal is the trustees of a trust—a trustee; or
  - (b) by any other person at the direction or with the consent or agreement (whether express or implied) of an official of the principal, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official;

is taken, for the purposes of this Act (other than the National Credit Code), to have been engaged in also by the principal.
- (2) Any conduct engaged in by a person (for example, the giving of money) in relation to:
  - (a) an official of the principal acting within the scope of his or her actual or apparent authority; or
  - (b) any other person acting at the direction or with the consent or agreement (whether express or implied) of an official of the



principal, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official;

is taken, for the purposes of this Act (other than the National Credit Code), to have been engaged in also in relation to the principal.

*State of mind of the principal*

- (3) If, for the purposes of this Act (other than the National Credit Code), it is necessary to establish the state of mind of the principal in relation to particular conduct, it is enough to show:
- (a) that the conduct was engaged in by a person referred to in paragraph (1)(a) or (b); and
  - (b) that the person had that state of mind.

### **326 Regulations for the purposes of this Division**

The regulations may modify this Division for the purposes prescribed in the regulations.

## Division 3—Review of ASIC's decisions

### 327 Review by Administrative Appeals Tribunal of decisions by ASIC under this Act

- (1) An application may be made to the Administrative Appeals Tribunal for review of a decision (within the meaning of the *Administrative Appeals Tribunal Act 1975*) made by ASIC under this Act other than:
  - (a) a decision of ASIC under subsection 109(3) (which deals with certain exemptions from, and modifications of, Chapter 2); or
  - (b) a decision of ASIC under subsection 163(3) (which deals with certain exemptions from, and modifications of, Chapter 3); or
  - (c) a decision of ASIC under section 241 (which deals with approved codes of conduct); or
  - (d) a decision of ASIC under Chapter 6 (which deals with compliance and enforcement), except for a decision of ASIC:
    - (i) to make an order under subsection 300(1) (which deals with orders relating to credit contracts, mortgages, guarantees or consumer leases); or
    - (ii) to make, or refuse to make, an order under subsection 301(1) (which deals with orders varying or revoking orders made under section 300); or
  - (e) a decision of ASIC to make a determination under subsection 328(3) (which deals with determinations in relation to notice of reviewable decisions etc.); or
  - (f) a decision of ASIC under subsection 6(17) of the National Credit Code (which deals with the exclusion of provisions of credit from the application of the National Credit Code); or
  - (g) a decision of ASIC under subsection 171(6) of the National Credit Code (which deals with the exclusion of consumer leases from the application of the National Credit Code); or

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- (h) a decision of ASIC under subsection 203A(3) of the National Credit Code (which deals with certain exemptions from the National Credit Code); or
  - (i) a decision of ASIC under the regulations, unless the regulations specify that an application may be made to the Administrative Appeals Tribunal for review of the decision.
- (2) Section 27A of the *Administrative Appeals Tribunal Act 1975* does not apply to the decision.

**328 Notice of reviewable decision and review rights**

- (1) This section applies if ASIC makes a decision to which section 327 applies.
- (2) Subject to subsection (3), ASIC must take such steps as are reasonable in the circumstances to give to each person whose interests are affected by the decision notice, in writing or otherwise:
  - (a) of the making of the decision; and
  - (b) of the person's right to have the decision reviewed by the Administrative Appeals Tribunal.
- (3) Subsection (2) does not require ASIC to give notice to a person affected by the decision or to the persons in a class of persons affected by the decision, if ASIC determines that giving notice to the person or persons is not warranted, having regard to:
  - (a) the cost of giving notice to the person or persons; and
  - (b) the way in which the interests of the person or persons are affected by the decision.
- (4) A determination made under subsection (3) is not a legislative instrument.
- (5) A failure to comply with this section does not affect the validity of the decision.

## Division 4—Regulations

### 329 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

### 330 Regulations—where proceedings may be brought

The regulations may prescribe the location for where court proceedings in relation to the following must be brought:

- (a) matters arising under this Act;
- (b) credit contracts;
- (c) mortgages;
- (d) guarantees;
- (e) consumer leases.

### 331 Regulations—infringement notices

#### *Infringement notices for civil penalties*

- (1) The regulations may provide for a person who is alleged to have contravened a civil penalty provision to pay a penalty to the Commonwealth as an alternative to civil proceedings.
- (2) The penalty must not exceed one-fourtieth of the maximum penalty that a court could impose on the person for contravention of that provision.

#### *Infringement notices for offences*

- (3) The regulations may provide for a person who is alleged to have committed an offence against this Act that is stated to be an offence of strict liability to pay a penalty to the Commonwealth as an alternative to prosecution.

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- (4) The penalty must not exceed one-fifth of the maximum penalty that a court could impose on the person for that offence.

## **Division 5—Other miscellaneous provisions**

### **332 Civil penalty provisions contravened or offences committed partly in and partly out of this jurisdiction**

If:

- (a) a person does or omits to do an act outside this jurisdiction;  
and
- (b) if that person had done or omitted to do that act in this jurisdiction, the person would, by reason of also having done or omitted to do an act in this jurisdiction, have contravened a civil penalty provision or committed an offence against this Act;

the person contravenes that provision or commits that offence.

### **333 Contravention of Act does not generally affect validity of transactions etc.**

- (1) A failure to comply with any requirement of this Act does not affect the validity or enforceability of any transaction, contract, instrument or other arrangement.
- (2) Subsection (1) has effect subject to any express provision to the contrary in:
  - (a) this Act (including regulations made under this Act); or
  - (b) regulations referred to in subsection (3).
- (3) Regulations may provide that a failure to comply with a specified requirement referred to in subsection (1) has a specified effect on the validity or enforceability of a transaction, contract, instrument or arrangement.

### **334 Contracting out etc.**

- (1) A provision of a contract or other instrument by which a person seeks to avoid or modify the effect of this Act (other than the National Credit Code) is void.

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Note: A similar rule applies for the purposes of the National Credit Code (see section 191 of that Code).

- (2) A provision of a contract or other instrument by which a person seeks to have:

- (a) a debtor indemnify a credit provider; or
- (b) a mortgagor indemnify a mortgagee; or
- (c) a guarantor indemnify a beneficiary of a guarantee; or
- (d) a lessee indemnify a lessor;

for any loss or liability arising under this Act (other than the National Credit Code) is void.

Note: A similar rule applies for the purposes of the National Credit Code (see section 191 of that Code).

- (3) A person commits an offence if:

- (a) the person is a credit provider, mortgagee, beneficiary of a guarantee or lessor; and
- (b) the person is a party to a contract or other instrument; and
- (c) the contract or other instrument is void under subsection (1) or (2).

Criminal penalty: 100 penalty units.

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

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

- (5) Subsection (2) does not affect the operation of subsection 60(2) of the National Credit Code.

### 335 Indemnities

- (1) An indemnity for any liability under this Act (other than the National Credit Code) is not void, and cannot be declared void, on the grounds of public policy, despite any rule of law to the contrary.

Note: A similar rule applies for the purposes of the National Credit Code (see section 192 of that Code).

- (2) The liabilities to which this section applies include the following:

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- (a) a liability for any criminal or civil penalty incurred by any person under this Act (other than the National Credit Code);
  - (b) a payment in settlement of a liability or alleged liability under this Act (other than the National Credit Code);
  - (c) a liability under another indemnity for any liability under this Act (other than the National Credit Code).
- (3) This section is subject to subsection 334(2).
- (4) This section does not derogate from any other rights and remedies that exist apart from this section.

**336 Acquisition of property**

- (1) A provision of this Act does not apply, and is taken never to have applied, to the extent that the operation of the provision would result in an acquisition of property from a person otherwise than on just terms.
- (2) In subsection (1), *acquisition of property* and *just terms* have the same meanings as in paragraph 51(xxxi) of the Constitution.

**337 Minister may delegate prescribed functions and powers under this Act**

- (1) The Minister may, by signed instrument, delegate to:
- (a) an ASIC member; or
  - (b) an ASIC staff member;
- such of the Minister's functions and powers under this Act as are prescribed.
- (2) In performing functions or exercising powers under a delegation, the delegate must comply with any directions of the Minister.



## Schedule 1—National Credit Code

Note: See section 3 of the National Credit Act.

### Part 1—Preliminary

#### 1 Short title

This Code may be cited as the *National Credit Code*.

#### 2 Interpretation generally

- (1) Part 13 contains the principal definitions of words and expressions used in this Code.
- (2) Part 14 contains other miscellaneous provisions relating to the interpretation of this Code.

#### 3 Meaning of *credit* and *amount of credit*

- (1) For the purposes of this Code, *credit* is provided if under a contract:
  - (a) payment of a debt owed by one person (the *debtor*) to another (the *credit provider*) is deferred; or
  - (b) one person (the *debtor*) incurs a deferred debt to another (the *credit provider*).
- (2) For the purposes of this Code, the *amount of credit* is the amount of the debt actually deferred. The *amount of credit* does not include:
  - (a) any interest charge under the contract; or
  - (b) any fee or charge:
    - (i) that is to be or may be debited after credit is first provided under the contract; and
    - (ii) that is not payable in connection with the making of the contract or the making of a mortgage or guarantee related to the contract.

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**4 Meaning of *credit contract***

For the purposes of this Code, a *credit contract* is a contract under which credit is or may be provided, being the provision of credit to which this Code applies.

**5 Provision of credit to which this Code applies**

- (1) This Code applies to the provision of credit (and to the credit contract and related matters) if when the credit contract is entered into or (in the case of precontractual obligations) is proposed to be entered into:
    - (a) the debtor is a natural person or a strata corporation; and
    - (b) the credit is provided or intended to be provided wholly or predominantly:
      - (i) for personal, domestic or household purposes; or
      - (ii) to purchase, renovate or improve residential property for investment purposes; or
      - (iii) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes; and
    - (c) a charge is or may be made for providing the credit; and
    - (d) the credit provider provides the credit in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.
  - (2) If this Code applies to the provision of credit (and to the credit contract and related matters):
    - (a) this Code applies in relation to all transactions or acts under the contract whether or not they take place in this jurisdiction; and
    - (b) this Code continues to apply even though the credit provider ceases to carry on a business in this jurisdiction.
  - (3) For the purposes of this section, investment by the debtor is not a personal, domestic or household purpose.
  - (4) For the purposes of this section, the predominant purpose for which credit is provided is:
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- (a) the purpose for which more than half of the credit is intended to be used; or
- (b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.

**6 Provision of credit to which this Code does not apply**

*Short term credit*

- (1) This Code does not apply to the provision of credit if, under the contract:
  - (a) the provision of credit is limited to a total period that does not exceed 62 days; and
  - (b) the maximum amount of credit fees and charges that may be imposed or provided for does not exceed 5% of the amount of credit; and
  - (c) the maximum amount of interest charges that may be imposed or provided for does not exceed an amount (calculated as if the Code applied to the contract) equal to the amount payable if the annual percentage rate were 24% per annum.
- (2) For the purposes of paragraph (1)(b), credit fees and charges imposed or provided for under the contract are taken to include the following, whether or not payable under the contract:
  - (a) a fee or charge payable by the debtor to any person for an introduction to the credit provider;
  - (b) a fee or charge payable by the debtor to any person for any service if the person has been introduced to the debtor by the credit provider;
  - (c) a fee or charge payable by the debtor to the credit provider for any service related to the provision of credit, other than a service mentioned in paragraph (b).
- (3) For the purposes of paragraphs (2)(a) and (b), it does not matter whether or not there is an association between the person and the credit provider.

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*Credit without express prior agreement*

- (4) This Code does not apply to the provision of credit if, before the credit was provided, there was no express agreement between the credit provider and the debtor for the provision of credit. For example, when a cheque account becomes overdrawn but there is no expressly agreed overdraft facility or when a savings account falls into debit.

*Credit for which only account charge payable*

- (5) This Code does not apply to the provision of credit under a continuing credit contract if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided. However, this Code applies if the charge is of a nature prescribed by the regulations for the purposes of this subsection or if the charge exceeds the maximum charge (if any) so prescribed.

*Joint credit and debit facilities*

- (6) This Code does not apply to any part of a credit contract under which both credit and debit facilities are available to the extent that the contract or any amount payable or other matter arising out of it relates only to the debit facility.

*Bill facilities*

- (7) This Code applies to the provision of credit arising out of a bill facility, that is, a facility under which the credit provider provides credit by accepting, drawing, discounting or endorsing a bill of exchange or promissory note. However, it does not apply if:
- (a) the credit is provided by an authorised deposit-taking institution (within the meaning of subsection 5(1) of the *Banking Act 1959*); or
  - (b) the regulations provide that the Code does not apply to the provision of all or any credit arising out of such a facility.

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*Insurance premiums by instalments*

- (8) This Code does not apply to the provision of credit by an insurer for the purpose of the payment to the insurer of an insurance premium by instalments, even though the instalments exceed the total of the premium that would be payable if the premium were paid in a lump sum, if on cancellation the insured would have no liability to make further payments under the contract.

*Pawnbrokers*

- (9) This Code does not apply to the provision of credit on the security of pawned or pledged goods by a pawnbroker in the ordinary course of a pawnbroker's business (being a business which is being lawfully conducted by the pawnbroker) as long as it is the case that, if the debtor is in default, the pawnbroker's only recourse is against the goods provided as security for the provision of the credit. However, sections 76 to 81 (Court may reopen unjust transactions) apply to any such provision of credit.

*Trustees of estates*

- (10) This Code does not apply to the provision of credit by the trustee of the estate of a deceased person by way of an advance to a beneficiary or prospective beneficiary of the estate. However, sections 76 to 81 (Court may reopen unjust transactions) apply to any such provision of credit.

*Employee loans*

- (11) This Code (other than this Part, Part 4, Division 3 of Part 5, Divisions 4 and 5 of Part 7 and Parts 12, 13 and 14) does not apply to the provision of credit by an employer, or a related body corporate within the meaning of the *Corporations Act 2001* of an employer, to an employee or former employee (whether or not it is provided to the employee or former employee with another person). However, for a credit provider that provides credit to which this Code applies in the course of a business of providing credit to which this Code applies to employees or former employees and to others, this subsection applies only to the provision of credit on terms that are more favourable to the debtor

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than the terms on which the credit provider provides credit to persons who are not employees or former employees of the credit provider or a related body corporate.

*Margin loans*

- (12) This Code does not apply to the provision of credit by way of a margin loan (within the meaning of subsection 761EA(1) of the *Corporations Act 2001*).

*Regulations may exclude credit*

- (13) The regulations may exclude, from the application of this Code, the provision of credit of a class specified in the regulations. In particular (but without limiting the generality of the foregoing), the regulations may so exclude the provision of credit if the amount of the credit exceeds or may exceed a specified amount or if the credit is provided by a credit provider of a specified class.

*ASIC may exclude credit*

- (14) ASIC may exclude, from the application of this Code, a provision of credit specified by ASIC.
- (15) Without limiting subsection (14), ASIC may exclude a provision of credit if:
- (a) the amount of the credit exceeds, or may exceed, a specified amount; or
  - (b) the credit is provided by a specified credit provider.
- (16) An exemption under subsection (14) is not a legislative instrument.
- (17) ASIC may, by legislative instrument, exclude from the application of this Code, the provision of credit of a class specified in the instrument.
- (18) Without limiting subsection (17), ASIC may exclude a provision of credit if:
- (a) the amount of the credit exceeds, or may exceed, a specified amount; or

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- (b) the credit is provided by a specified credit provider, or a class of credit providers.

*Definitions*

- (19) In this section:

*fee or charge* does not include a government fee, charge or duty of any kind.

*security*, of pawned or pledged goods, means security by way of bailment of the goods under which the title to the goods does not pass, conditionally or unconditionally, to the bailee.

## **7 Mortgages to which this Code applies**

- (1) This Code applies to a mortgage if:
  - (a) it secures obligations under a credit contract or a related guarantee; and
  - (b) the mortgagor is a natural person or a strata corporation.
- (2) If any such mortgage also secures other obligations, this Code applies to the mortgage to the extent only that it secures obligations under the credit contract or related guarantee.
- (3) The regulations may exclude, from the application of all or any provisions of this Code, a mortgage of a class specified in the regulations.

## **8 Guarantees to which this Code applies**

- (1) This Code applies to a guarantee if:
  - (a) it guarantees obligations under a credit contract; and
  - (b) the guarantor is a natural person or a strata corporation.
- (2) If any such guarantee also guarantees other obligations, this Code applies to the guarantee to the extent only that it guarantees obligations under the credit contract.

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- (3) The regulations may exclude, from the application of all or any provisions of this Code, a guarantee of a class specified in the regulations.

### **9 Goods leases with option to purchase to be regarded as sale by instalments**

- (1) For the purposes of this Code, a contract for the hire of goods under which the hirer has a right or obligation to purchase the goods, is to be regarded as a sale of the goods by instalments if the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so) exceeds the cash price of the goods.

Note: A contract includes a series of contracts, or contracts and arrangements (see Part 13).

- (2) A debt is to be regarded as having been incurred, and credit provided, in such circumstances.
- (3) Accordingly, if because of subsection 5(1) the contract is a credit contract, this Code (including Part 6) applies as if the contract had always been a sale of goods by instalments, and for that purpose:
- (a) the amounts payable under the contract are the instalments; and
  - (b) the credit provider is the person who is to receive those payments; and
  - (c) the debtor is the person who is to make those payments; and
  - (d) the property of the supplier in the goods passes under the contract to the person to whom the goods are hired on delivery of the goods or the making of the contract, whichever occurs last; and
  - (e) the charge for providing the credit is the amount by which the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so), exceeds the cash price of the goods; and
  - (f) a mortgage containing the terms and conditions set out in the regulations is taken to have been entered into in writing



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between the person to whom the goods are hired under the contract and the supplier as security for payment to the supplier of the amount payable to the supplier by the person to whom the goods are hired under the contract; and

- (g) any provision in the contract for hiring by virtue of which the supplier is empowered to take possession, or dispose, of the goods to which the contract relates is void.
- (4) For the purposes of this section, the amount payable under the contract includes any agreed or residual value of the goods at the end of the hire period or on termination of the contract, but does not include the following amounts:
- (a) any amount payable in respect of services that are incidental to the hire of goods under the contract;
  - (b) any amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the hirer at the earliest opportunity.

Note: Part 11 (Consumer leases) applies to the contracts specified in that Part for the hire of goods under which the hirer does not have a right or obligation to purchase the goods.

## **10 Deciding application of Code to particular contracts for the sale of land by instalments**

- (1) This section applies to an executory contract for the sale of land if:
- (a) under the contract, the purchaser:
    - (i) is entitled to enter into possession of the land before becoming entitled to receive a conveyance or transfer of the land; and
    - (ii) is bound to make a payment or payments (other than a deposit or rent payment) to, or in accordance with the instructions of, the vendor without becoming entitled to receive a conveyance or transfer of the land in exchange for the payment or payments; and
  - (b) the amount payable to purchase the land under the contract exceeds the cash price of the land.

Note: **Cash price** is defined in Part 13 in terms of goods or services. **Services** is defined in Part 13 to include rights in relation to, and interests in, real property.

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- (2) For the purpose of deciding whether the contract is a credit contract and, if it is a credit contract, of applying this Code (including Part 6) to it:
- (a) a debt is to be regarded as having been incurred, and credit provided, in the circumstances mentioned in subsection (1); and
  - (b) the debtor is the purchaser under the contract; and
  - (c) the credit provider is the vendor under the contract; and
  - (d) the charge for providing the credit is the amount by which the amount payable to purchase the land, together with any other amount payable under the contract other than outgoings for the land, exceeds the cash price of the land.

- (3) This section does not affect the application of this Code to a contract that is, apart from this section, a credit contract.

- (4) In this section:

***deposit***, in relation to a contract, means an amount:

- (a) not exceeding 10% of the amount payable to purchase the land under the contract; and
- (b) paid or payable in one or more amounts; and
- (c) liable to be forfeited and retained by the vendor in the event of a breach of contract by the purchaser.

***outgoings*** includes rates, water charges and house and contents insurance.

***rent payment***, under a contract, means a payment:

- (a) made by the purchaser to the vendor in exchange for possession of the land before becoming entitled to receive a conveyance or transfer of the land; and
- (b) that is not deductible from the amount payable to purchase the land.

**11 Deciding application of Code to particular contracts for the sale of goods by instalments**

- (1) This section applies to a contract for the sale of goods if the amount payable to purchase the goods under the contract:
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- (a) is payable by instalments; and
  - (b) exceeds the cash price of the goods.
- (2) This section does not apply to a contract for the hire of goods even if the hirer has a right or obligation to purchase the goods.
- (3) For the purpose of deciding whether the contract is a credit contract and, if it is a credit contract, of applying this Code (including Part 6) to it:
- (a) a debt is to be regarded as having been incurred, and credit provided, in the circumstances mentioned in subsection (1); and
  - (b) the debtor is the person who is to make the payments; and
  - (c) the credit provider is the person who is to receive the payments; and
  - (d) the charge for providing the credit is the amount by which the amount payable to purchase the goods, together with any other amount payable under the contract, exceeds the cash price of the goods.
- (4) This section does not affect the application of this Code to a contract that is, apart from this section, a credit contract.

**12 Deciding application of Code to particular contracts for the sale of goods by instalments under related contracts**

- (1) For the purpose of this section, a contract is a *related contract* to a contract for the sale of goods (the *goods contract*) if:
- (a) the sale of goods is financed, wholly or partly, by the provision of credit under the contract; and
  - (b) the credit provider under the contract is:
    - (i) the supplier of goods under the goods contract; or
    - (ii) a related body corporate within the meaning of the *Corporations Act 2001* of the supplier of the goods under the goods contract; and
  - (c) the amount payable under the contract is payable by instalments.

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- (2) For the purpose of deciding whether a related contract to a goods contract is a credit contract and, if it is a credit contract, of applying this Code (including Part 6) to it, the charge for providing the credit is the amount by which the amount payable to purchase the goods, together with any other amount payable under the related contract, exceeds the cash price of the goods.
- (3) This section does not affect the application of this Code to a contract that is, apart from this section, a credit contract.

### 13 Presumptions relating to application of Code

- (1) In any proceedings (whether brought under this Code or not) in which a party claims that a credit contract, mortgage or guarantee is one to which this Code applies, it is presumed to be such unless the contrary is established.
- (2) It is presumed for the purposes of this Code that credit is not provided or intended to be provided under a contract wholly or predominantly for any or all of the following purposes (a *Code purpose*):
  - (a) for personal, domestic or household purposes;
  - (b) to purchase, renovate or improve residential property for investment purposes;
  - (c) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes;if the debtor declares, before entering the contract, that the credit is to be applied wholly or predominantly for a purpose that is not a Code purpose, unless the contrary is established.
- (3) However, the declaration is ineffective if, when the declaration was made, the credit provider or a person (the *prescribed person*) of a kind prescribed by the regulations:
  - (a) knew, or had reason to believe; or
  - (b) would have known, or had reason to believe, if the credit provider or prescribed person had made reasonable inquiries about the purpose for which the credit was provided, or intended to be provided, under the contract;

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that the credit was in fact to be applied wholly or predominantly for a Code purpose.

- (4) If the declaration is ineffective under subsection (3), paragraph 5(1)(b) is taken to be satisfied in relation to the contract.
- (5) A declaration under this section is to be substantially in the form (if any) required by the regulations and is ineffective for the purposes of this section if it is not.
- (6) A person commits an offence if:
  - (a) the person engages in conduct; and
  - (b) the conduct induces a debtor to make a declaration under this section that is false or misleading in a material particular; and
  - (c) the declaration is false or misleading in a material particular.

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

- (7) Strict liability applies to paragraph (6)(c).

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

## **Part 2—Credit contracts**

### **Division 1—Negotiating and making credit contracts**

#### **14 Credit contract to be in form of written contract document**

- (1) A credit contract must be in the form of:
  - (a) a written contract document signed by the debtor and the credit provider; or
  - (b) a written contract document signed by the credit provider and constituting an offer to the debtor that is accepted by the debtor in accordance with the terms of the offer.
- (2) An offer may be accepted by the debtor for the purposes of paragraph (1)(b):
  - (a) by the debtor or a person authorised by the debtor accessing or drawing down credit to incur a liability; or
  - (b) by any other act of the debtor or of any such authorised person that satisfies the conditions of the offer and constitutes an acceptance of the offer at law.
- (3) The credit provider, or a person associated with the credit provider, may not be authorised by the debtor for the purposes of subsection (2). However, this subsection does not prevent the debtor authorising the credit provider to debit the debtor's account.
- (4) In the case of a contract document consisting of more than one document, it is sufficient compliance with this section if one of the documents is duly signed and the other documents are referred to in the signed document.

#### **15 Other forms of contract**

- (1) The regulations may authorise other ways of making a credit contract that do not involve a written document.
- (2) In that case, the provisions of this Division apply with such modifications as are prescribed by the regulations.

## **16 Precontractual disclosure**

- (1) A credit provider must not enter into a credit contract unless the credit provider has given the debtor:
  - (a) a precontractual statement setting out the matters required by section 17 to be included in the contract document; and
  - (b) an information statement in the form required by the regulations of the debtor's statutory rights and statutory obligations.
- (2) Those statements must be given:
  - (a) before the contract is entered into; or
  - (b) before the debtor makes an offer to enter into the contract;whichever first occurs.
- (3) Before entering into a credit contract, the credit provider may inform the debtor of the comparison rate. If the credit provider does so, the comparison rate must be calculated as prescribed by the regulations and be accompanied by the warnings set out in the regulations.
- (4) The precontractual statement must contain the financial information specified by the regulations in the form prescribed by the regulations.
- (5) The precontractual statement may be the proposed contract document or be a separate document or documents.
- (6) A document forming part of a precontractual statement consisting of more than one document when the precontractual statement is first given must indicate that it does not contain all of the required precontractual information.
- (7) A precontractual statement may be varied, within the time referred to in subsection (2), by written notice containing particulars of the variation given to the debtor.

## **17 Matters that must be in contract document**

- (1) The contract document must contain the following matters.
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*Credit provider's name*

- (2) The contract document must contain the credit provider's name.

*Amount of credit*

- (3) The contract document must contain:
- (a) if the amount of credit to be provided is ascertainable:
    - (i) that amount; and
    - (ii) the persons, bodies or agents (including the credit provider) to whom it is to be paid and the amounts payable to each of them, but only if both the person, body or agent and the amount are ascertainable; and
  - (b) if the amount of the credit to be provided is not ascertainable—the maximum amount of credit agreed to be provided, or the credit limit under the contract, if any; and
  - (c) if the credit is provided by the supplier for a sale of land or goods by instalments—a description of the land and its cash price or of the goods and their cash price.

The requirement under paragraph (c) is in addition to, and does not limit, the requirement under paragraph (a) or (b).

Note: A penalty may be imposed for contravention of a key requirement in this subsection: see Part 6.

*Annual percentage rate or rates*

- (4) The contract document must contain:
- (a) the annual percentage rate or rates under the contract; and
  - (b) if there is more than one rate, how each rate applies; and
  - (c) if an annual percentage rate under the contract is determined by referring to a reference rate:
    - (i) the name of the rate or a description of it; and
    - (ii) the margin or margins (if any) above or below the reference rate to be applied to determine the annual percentage rate or rates; and
    - (iii) where and when the reference rate is published or, if it is not published, how the debtor may ascertain the rate; and
  - (iv) the current annual percentage rate or rates.



Note: A penalty may be imposed for contravention of a key requirement in this subsection: see Part 6.

*Calculation of interest charges*

- (5) The contract document must contain the method of calculation of the interest charges payable under the contract and the frequency with which interest charges are to be debited under the contract.

Note: A penalty may be imposed for contravention of a key requirement in this subsection: see Part 6.

*Total amount of interest charges payable*

- (6) The contract document must contain the total amount of interest charges payable under the contract, if ascertainable (but only if the contract would, on the assumptions under sections 180 and 182, be paid out within 7 years of the date on which credit is first provided under the contract).

Note: A penalty may be imposed for contravention of a key requirement in this subsection: see Part 6.

*Repayments*

- (7) The contract document must contain:
- (a) if more than one repayment is to be made:
    - (i) the amount of the repayments or the method of calculating the amount; and
    - (ii) if ascertainable, the number of the repayments; and
    - (iii) if ascertainable, the total amount of the repayments, but only if the contract would, on the assumptions under sections 180 and 182, be paid out within 7 years of the date on which credit is first provided under the contract; and
    - (iv) when the first repayment is to be paid, if ascertainable, and the frequency of payment of repayments; and
  - (b) if the contract provides for a minimum repayment, the amount of that repayment, if ascertainable, but, if not, the method of calculation of the minimum repayment.

Paragraph (a) does not apply to minimum repayments under a continuing credit contract.

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*Credit fees and charges*

- (8) The contract document must contain:
- (a) a statement of the credit fees and charges that are, or may become, payable under the contract, and when each such fee or charge is payable, if ascertainable; and
  - (b) the amount of any such fee or charge if ascertainable, but, if not, the method of calculation of the fee or charge, if ascertainable; and
  - (c) the total amount of credit fees and charges payable under the contract to the extent that it is ascertainable.

Note: A penalty may be imposed for contravention of a key requirement in paragraph (a) or (b), but only in respect of retained credit fees and charges: see Part 6.

*Changes affecting interest and credit fees and charges*

- (9) If the annual percentage rate or rates or the amount or frequency of payment of a credit fee or charge or instalment payable under the contract may be changed, or a new credit fee or charge may be imposed, the contract document must contain a statement or statements to that effect and of the means by which the debtor will be informed of the change or the new fee or charge.

Note: A penalty may be imposed for contravention of a key requirement in this subsection: see Part 6.

*Statements of account*

- (10) The contract document must contain the frequency with which statements of account are to be provided to the debtor (except in the case of a credit contract for which the annual percentage rate is fixed for the whole term of the contract and under which there is no provision for varying the rate).

*Default rate*

- (11) The contract document must contain:
- (a) if the contract is a contract under which a default rate of interest may be charged when payments are in default—a statement to that effect and the default rate and how it is to be applied; and

- (b) if the default rate under the contract is determined by referring to a reference rate:
- (i) the name of the rate or a description of it; and
  - (ii) the margin or margins (if any) above or below the reference rate to be applied to determine the default rate; and
  - (iii) when and where the reference rate is published or, if it is not published, how the debtor may ascertain the rate; and
  - (iv) the current default rate.

Note: A penalty may be imposed for contravention of a key requirement in this subsection: see Part 6.

*Enforcement expenses*

- (12) The contract document must contain a statement that enforcement expenses may become payable under the credit contract or mortgage (if any) in the event of a breach.

*Mortgage or guarantee*

- (13) The contract document must contain:
- (a) if any mortgage or guarantee is to be or has been taken by the credit provider—a statement to that effect; and
  - (b) in the case of a mortgage—a description of the property subject to, or proposed to be subject to, the mortgage, to the extent to which it is ascertainable.

*Commission*

- (14) If a commission is to be paid by or to the credit provider for the introduction of credit business or business financed by the contract, the contract document must contain:
- (a) a statement of that fact; and
  - (b) the person by whom the commission is payable; and
  - (c) the person to whom the commission is payable; and
  - (d) the amount if ascertainable.

**Commission** does not include fees payable by a supplier under a merchant service agreement with a credit provider, an amount

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payable in connection with a credit-related insurance contract or commission paid to employees of the credit provider.

*Insurance financed by contract*

- (15) If the credit provider knows that the debtor is to enter into a credit-related insurance contract and that the insurance is to be financed under the credit contract, the contract document must contain:
- (a) the name of the insurer; and
  - (b) the amount payable to the insurer or, if it is not ascertainable, how it is calculated; and
  - (c) the kind of insurance and any other particulars that may be prescribed by the regulations; and
  - (d) if the credit provider knows of any commission to be paid by the insurer for the introduction of the insurance business—a statement that it is to be paid and, if ascertainable, the amount of the commission expressed either as a monetary amount or as a proportion of the premium.

In the case of consumer credit insurance that includes a contract of general insurance within the meaning of the *Insurance Contracts Act 1984*:

- (e) it is sufficient compliance with paragraphs (a) and (b) if the contract document contains the name of the general insurer and the total amount payable to the insurers (or, if it is not ascertainable, how it is calculated); and
- (f) it is sufficient compliance with paragraph (d) relating to the amount of commission if the contract document contains the total amount of commission (expressed as a monetary amount or as a proportion of the premium) to be paid by the insurers.

Note: A penalty may be imposed for contravention of a key requirement in paragraph (a) or (b): see Part 6.

*Other information*

- (16) The contract document must contain any information or warning required by the regulations.

Note: Sections 180 to 182 set out the tolerances and assumptions applicable to matters required to be disclosed.

## **18 Form and expression of contract document**

The contract document must conform to the requirements of the regulations as to its form and the way it is expressed and, subject to any such requirements, may consist of one or more separate documents.

## **19 Alteration of contract document**

- (1) An alteration of (including an addition to) a contract document by the credit provider after it is signed by the debtor is ineffective unless the debtor has agreed in writing to the alteration.
- (2) This section does not apply to an alteration having the effect of reducing the debtor's liabilities under the credit contract.

## **20 Copy of contract for debtor**

- (1) If a contract document is to be signed by the debtor and returned to the credit provider, the credit provider must give the debtor a copy to keep.
- (2) A credit provider must, not later than 14 days after a credit contract is made, give a copy of the contract in the form in which it was made to the debtor.
- (3) Subsection (2) does not apply if the credit provider has previously given the debtor a copy of the contract document to keep.

## **21 When debtor may terminate contract**

- (1) Although a credit contract has been made, the debtor may nevertheless, by written notice to the credit provider, terminate the contract unless:
  - (a) any credit has been obtained under the contract; or
  - (b) a card or other means of obtaining credit provided to the debtor by the credit provider has been used to acquire goods

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or services for which credit is to be advanced under the contract.

- (2) Nothing in this section prevents the credit provider from retaining or requiring payment of fees or charges incurred before the termination and which would have been payable under the credit contract.

**22 Offence for noncompliance**

- (1) A credit provider must not:
- (a) enter into a credit contract that contravenes a requirement of this Division; or
  - (b) otherwise contravene a requirement of this Division.

Criminal penalty: 100 penalty units.

- (2) Subsection (1) is an offence of strict liability.

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

## **Division 2—Debtor's monetary obligations**

### **23 Prohibited monetary obligations**

- (1) A credit contract must not impose a monetary liability on the debtor:
  - (a) in respect of a credit fee or charge prohibited by this Code; or
  - (b) in respect of an amount of a fee or charge exceeding the amount that may be charged consistently with this Code; or
  - (c) in respect of an interest charge under the contract exceeding the amount that may be charged consistently with this Code.

Note: A penalty may be imposed for contravention of a key requirement in this subsection, but only at the time the credit contract is entered into: see Part 6.

#### *Civil effect*

- (2) Any provision of a credit contract that imposes a monetary liability prohibited by subsection (1) is void to the extent that it does so. If an amount that is prohibited by subsection (1) is paid, it may be recovered.
- (3) A credit fee or charge cannot be charged in respect of a credit contract unless the contract authorises it to be charged.

#### *Civil effect*

- (4) If an amount that is prohibited by subsection (3) is paid, it may be recovered.

### **24 Offences related to prohibited monetary obligations**

- (1) A credit provider must not:
  - (a) enter into a credit contract on terms imposing a monetary liability prohibited by subsection 23(1); or
  - (b) require or accept payment of an amount in respect of a monetary liability that cannot be imposed consistently with this Code.

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Criminal penalty: 100 penalty units.

- (2) Subsection (1) is an offence of strict liability.

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

## 25 Loan to be in money or equivalent

- (1) A credit provider must not under a credit contract pay an amount to or in accordance with the instructions of the debtor unless the payment is in cash or money's worth and is made in full without deducting an amount for interest charges under the contract.

Criminal penalty: 100 penalty units.

- (2) Subsection (1) is an offence of strict liability.

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

- (3) The regulations may provide that subsection (1) does not apply to the deduction of an amount for the first payment of interest charges under the contract.

## 26 Early payments and crediting of payments

- (1) A credit provider must accept any payment under a credit contract that is made before it is payable under the contract unless the contract prohibits its early payment.

Criminal penalty: 100 penalty units.

- (2) A credit provider must credit each payment made under a credit contract to the debtor as soon as practicable after receipt of the payment.

Criminal penalty: 100 penalty units.

- (3) Subsections (1) and (2) are offences of strict liability.

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

- (4) Despite subsection (2), a credit provider is not required to credit a payment under a credit contract before it is payable under the contract if the contract prohibits its early payment and:



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- (a) the credit provider informs the debtor, as soon as practicable after the credit provider becomes aware of the payment, that it will not be credited to the debtor (or that any credit will be reversed) until it becomes payable under the contract, and the debtor elects to leave the payment with the credit provider; or
  - (b) the credit provider informs the debtor, before accepting the payment, that it will not be credited to the debtor until it becomes payable under the contract; or
  - (c) the credit provider refunds the payment to the debtor.
- (5) A credit contract may not, under this section, prohibit the paying out of the contract at any time under section 82.

**26A Regulations about residential investment property**

The regulations may provide that section 25 or 26 applies in relation to a provision of credit covered by subparagraph 5(1)(b)(ii) or (iii) as if specified provisions were omitted, modified or varied as specified in the regulations.

## Division 3—Interest charges

### 27 Definitions relating to interest

- (1) In this Code:

*annual percentage rate* under a credit contract means a rate specified in the contract as an annual percentage rate.

*daily percentage rate* means the rate determined by dividing the annual percentage rate by 365.

*default rate* means a higher annual percentage rate permitted by section 30.

*unpaid balance* under a credit contract at any time means the difference between all amounts credited and all amounts debited to the debtor under the contract at that time.

*unpaid daily balance* for a day under a credit contract means the unpaid balance under the contract at the end of that day.

- (2) A credit contract may specify, for the purposes of payments or any other purposes under the contract, when a day ends. Different times of the day may be specified for different purposes.

### 28 Limit on interest charges

- (1) The maximum amount of an interest charge that may be imposed or provided for under a credit contract is:
- (a) where only one annual percentage rate applies to the unpaid balances under the contract—the amount determined by applying the daily percentage rate to the unpaid daily balances; or
  - (b) in any other case—the sum of each of the amounts determined by applying each daily percentage rate to that part of the unpaid daily balances to which it applies under the contract.

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- (2) However, an interest charge under a credit contract for a month, a quarter or half a year may be determined by applying the annual percentage rate or rates, divided by 12 (for a month), by 4 (for a quarter) or by 2 (for half a year), to the whole or that part of the average unpaid daily balances to which it applies. The regulations may provide for the calculation of unpaid daily balances in these circumstances.
- (3) This section does not prevent the imposition of a default rate of interest permitted by section 30.

### **29 Early debit or payment of interest charges prohibited**

- (1) A credit provider must not, at any time before the end of a day to which an interest charge applies, require payment of or debit the interest charge.
- (2) A credit contract may provide for an interest charge to become payable or be debited at any time after the day to which it applies.
- (3) The regulations may provide that subsection (1) does not apply to the first payment of interest charges under a credit contract.
- (4) This section does not apply to the debit of an interest charge under a credit contract before the end of the period to which the charge applies if:
  - (a) the charge is debited on the last day of the period; and
  - (b) the amount debited is not treated by the credit provider as part of the unpaid daily balance for that day for the purpose of calculating interest charges under the contract.

### **30 Default interest**

- (1) A credit contract may not provide that an annual percentage rate applicable under a credit contract to any part of the unpaid balance will differ according to whether the debtor is in default under the contract.
- (2) However, a credit contract may provide for such a differential rate if the higher rate is imposed only in the event of default in

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payment, in respect of the amount in default and while the default continues.

**30A Regulations about residential investment property**

The regulations may provide that this Division applies in relation to a provision of credit covered by subparagraph 5(1)(b)(ii) or (iii) as if specified provisions were omitted, modified or varied as specified in the regulations.

## **Division 4—Fees and charges**

### **31 Prohibited credit fees or charges**

The regulations may specify credit fees or charges or classes of credit fees or charges that are prohibited for the purposes of this Code.

### **32 Fees or charges passed on to other parties**

- (1) A fee or charge payable by a debtor for an amount payable or to reimburse an amount paid by the credit provider to another person, body or agency is not to exceed the actual amount payable or paid by the credit provider if that amount is ascertainable when the fee or charge is paid by the debtor. The actual amount payable is to be determined after taking into account any discount or other rebate or other applicable allowance received or receivable by the credit provider or a related body corporate within the meaning of the *Corporations Act 2001*.
- (2) If the actual amount paid by the credit provider to another person was not ascertainable when the debtor paid an amount to the credit provider for the fee or charge and is less than the amount paid by the debtor, the credit provider must refund or credit the difference to the debtor.
- (3) Nothing in this section requires a rebate on tax payable by the credit provider or a related body corporate to be taken into account in determining the actual amount payable or paid by a credit provider.

## **Division 5—Credit provider's obligation to account**

### **33 Statements of account**

- (1) A credit provider that provides credit must give to the debtor, or arrange for the debtor to be given, periodic statements of account in accordance with this Division.

Criminal penalty: 100 penalty units.

- (2) The maximum period for a statement of account is:
- (a) in the case of a continuing credit contract under which credit is ordinarily obtained only by the use of a card—40 days; or
  - (b) in the case of any other continuing credit contract—40 days or such longer period, not exceeding 3 months, as is agreed by the credit provider and the debtor; or
  - (c) in any other case—6 months.
- (3) A statement of account need not be given if:
- (a) the credit is provided under a credit contract for which the annual percentage rate is fixed for the whole term of the contract and under which there is no provision for varying the rate; or
  - (b) no amount has been debited or credited to the account during the statement period (other than debits for government charges, or duties, on receipts or withdrawals) and the amount outstanding is zero or below a level fixed by the regulations; or
  - (c) the credit provider wrote off the debt of the debtor under the credit contract during the statement period and no further amount has been debited or credited to the account during the statement period; or
  - (d) the debtor was in default under the credit contract (not being a continuing credit contract) during the statement period and the credit provider has commenced enforcement proceedings; or

- (e) the debtor was in default under a continuing credit contract during the preceding 120 days, or during the statement period and the 2 immediately preceding statement periods, whichever is the shorter time, and the credit provider has, before the commencement of the statement period, exercised a right not to provide further credit under the contract and has not provided further credit during the period; or
  - (f) the debtor has died or is insolvent and the debtor's personal representative or trustee in bankruptcy has not requested a statement of account.
- (4) A separate statement of account may, but need not, be given in respect of each or any number of the credit facilities provided under a credit contract.
- (5) Subsection (1) is an offence of strict liability.

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

### **34 Information to be contained in statements of account**

- (1) A statement of account must contain the following matters.

*Statement period*

- (2) A statement of account must contain the dates on which the statement period begins and ends.

*Balances*

- (3) A statement of account must contain the opening and closing balances (indicating the amount owed by the debtor at the beginning and at the end of the statement period).

*Credit provided*

- (4) A statement of account must contain particulars of each amount of credit provided by the credit provider to the debtor during the statement period.

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*Identity of supplier*

- (5) In the case of a continuing credit contract under which credit is ordinarily obtained only by the use of a card, a statement of account must contain the identity of the supplier if the credit was provided for any cash, goods or services supplied by another person.

*Interest charges*

- (6) A statement of account must contain:
- (a) the amount of the interest charge debited to the debtor's account during the statement period and when the interest was debited; and
  - (b) the annual percentage rate or rates and, if required by Part 4, details of any change since the last statement period.

Note: A penalty may be imposed for contravention of a key requirement in this subsection: see Part 6.

*Fees and charges*

- (7) A statement of account must contain particulars of any fees and charges debited to the debtor's account during the statement period.

*Payments to or from account*

- (8) A statement of account must contain:
- (a) particulars of each amount paid by the debtor to the credit provider, or credited to the debtor, during the statement period; and
  - (b) particulars of any amount transferred to or from the account to which the statement relates or to or from any other account maintained under or for the purposes of the credit contract.

*Amounts payable by debtor*

- (9) If a minimum amount is payable by the debtor under a continuing credit contract, a statement of account must contain a statement of the amount and the date by which it is due.



*Insurance payments*

- (10) If payment to an insurer is made during the statement period under a credit-related insurance contract that is agreed to be financed under the credit contract, a statement of account must contain:

- (a) the name of the insurer, the amount paid to the insurer and the kind of insurance; and
- (b) if the credit provider is aware of any commission to be paid by the insurer in relation to the insurance contract—the amount of the commission expressed either as a monetary amount or as a proportion of the premium, if ascertainable when the statement is given;

(if not previously disclosed in accordance with this Code).

In the case of consumer credit insurance that includes a contract of general insurance within the meaning of the *Insurance Contracts Act 1984*:

- (c) it is sufficient compliance with paragraph (a) if the statement of account contains the name of the general insurer, the total amount payable to the insurers and the kind of insurance; and
- (d) it is sufficient compliance with paragraph (b) if the statement of account contains the total amount of commission (expressed as a monetary amount or as a proportion of the premium) to be paid by the insurers.

*Alterations*

- (11) A statement of account must contain any correction of information in a previous statement of account.

*Other*

- (12) A statement of account must contain any other information required by the regulations.

Note: Sections 180 to 182 set out the tolerances and assumptions applicable to matters required to be included in statements of accounts.

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**35 Opening balance must not exceed closing balance of previous statement**

- (1) The opening balance shown in each successive statement of account must not exceed the closing balance shown in the last statement of account.

Note: A penalty may be imposed for contravention of a key requirement in this section: see Part 6.

- (2) However, if no statement of account was given for the previous period, the next statement of account required to be given by this Code may have an opening balance that exceeds the closing balance for the previous statement and must provide the particulars referred to in subsections 34(4) to (12) in relation to any immediately preceding periods for which statements were not given.

**36 Statement of amount owing and other matters**

- (1) A credit provider must, at the request of a debtor or guarantor and within the time specified by this section, provide a statement of all or any of the following:
- (a) the current balance of the debtor's account;
  - (b) any amounts credited or debited during a period specified in the request;
  - (c) any amounts currently overdue and when each such amount became due;
  - (d) any amount currently payable and the date it became due.

Criminal penalty: 100 penalty units.

- (2) The statement must be given:
- (a) within 14 days, if all information requested relates to a period 1 year or less before the request is given; or
  - (b) within 30 days, if any information requested relates to a period more than 1 year before the request is given.
- (3) A statement under this section may be given orally but if the request for the statement is made in writing the statement must be given in writing.

- (4) In the case of joint debtors or guarantors, the statement under this section need only be given to a debtor or guarantor who requests the statement and not, despite section 194, to each joint debtor or guarantor.
- (5) A credit provider is not required to provide a further written statement under this section if it has, within the 3 months before the request is given, given such a statement to the person requesting it.
- (6) Except where otherwise ordered by the court on the application of the debtor or guarantor, a credit provider is not required to provide information in a statement under this section about amounts credited or debited, or which were overdue or payable, more than 7 years before the request is given unless those amounts are currently overdue and payable.
- (7) Subsection (1) is an offence of strict liability.

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

### **37 Court may order statement to be provided**

If a statement is not provided within the time required by this Division, the court may, on the application of the debtor or guarantor, order the credit provider to provide the statement or itself determine the amounts in relation to which the statement was sought.

### **38 Disputed accounts**

- (1) If a debtor, by written notice to a credit provider, disputes a particular liability entered against the debtor under a credit contract, the credit provider must give the debtor a written notice explaining in reasonable detail how the liability arises.
- (2) A written notice need not be given if the credit provider agrees with the debtor as to the disputed amount and gives the debtor a written notice advising of the agreed liability.
- (3) If in the case of a continuing credit contract the disputed entry appears in a statement of account in which a date for payment of

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the amount of the account, or part of that amount, is shown, the notice of dispute must be given to the credit provider on or before that date.

- (4) In the case of any other credit contract for which a statement of account is given, the notice of dispute must be given to the credit provider within 30 days of receiving the statement of account in which the amount, or part of that amount, was first shown.
- (5) In the case of a credit contract in respect of which a statement of account need not be and is not given for the period to which the disputed liability relates, the notice of dispute must be given to the credit provider not later than 3 months after the end of the contract.
- (6) The credit provider must not begin enforcement proceedings on the basis of a default arising from the disputed liability until at least 30 days have elapsed from the time the written explanation or advice as to agreement was given.
- (7) A debtor or credit provider may apply to the court to have the court determine a disputed liability and, if satisfied that a liability is genuinely disputed, the court may determine the matters in dispute and make such consequential orders as it thinks just.
- (8) If an application is made to the court under this section within 30 days after the explanation is given, the credit provider must not, without leave of the court, begin enforcement proceedings on the basis of a default arising from the disputed liability.

Criminal penalty: 50 penalty units.

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

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

- (10) This section does not affect a dispute not dealt with, or not arising, under this section.

**39 Dating and adjustment of debits and credits in accounts**

- (1) For the purposes of this Code and the credit contract, a debit or a credit made by a credit provider to a debtor's account is taken to

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have been made, and has effect, on the date assigned to the debit or credit, not on the date on which it is processed.

- (2) A credit provider may subsequently adjust debits or credits to a debtor's account, and the account balances, so as to accurately reflect the legal obligations of the debtor and the credit provider.
- (3) However, subsections (1) and (2) do not permit a debit or a credit to be assigned a date other than the date on which it is processed, or the subsequent adjustment of a debit or a credit or account balance, if:
  - (a) the assignment or adjustment is not consistent with the credit contract; or
  - (b) the adjustment results in an interest charge that is more than the maximum amount permitted by the Code, as calculated on the basis of debits or credits to a debtor's account consistent with the credit contract; or
  - (c) the assignment or adjustment results in a contravention of section 26; or
  - (d) the assignment of the date on which an interest charge is taken to be debited results in a debit being taken to be done before a time permitted under this Code.
- (4) An adjustment by a credit provider under subsection (2) does not affect any liability of a credit provider under Part 6.

## **Division 6—Certain transactions not to be treated as contracts**

### **40 Deferrals, waivers and changes under contracts**

- (1) The provision of credit as a result of a change to an existing credit contract, or a deferral or waiver of an amount under an existing credit contract or a postponement relating to an existing credit contract, is not to be treated as creating a new credit contract for the purposes of this Code, if the change, deferral, waiver or postponement is made in accordance with this Code or the existing credit contract.
- (2) In this section:  
*existing credit contract* includes existing consumer lease.

## **Part 3—Related mortgages and guarantees**

### **Division 1—Mortgages**

#### **41 Application of Division**

This Division applies to a mortgage (under which the mortgagor is a natural person or a strata corporation) which secures obligations under a credit contract or related guarantee, whether or not it also secures other obligations (see section 7).

#### **42 Form of mortgage**

- (1) A mortgage must be in the form of a written mortgage document that is signed by the mortgagor.
- (2) It is sufficient compliance with subsection (1) if:
  - (a) the mortgage is contained in a credit contract signed by the mortgagor; or
  - (b) one of the documents comprising the mortgage document is signed by the mortgagor (and the other documents are referred to in the signed document).
- (3) However, a goods mortgage need not be in the form of a written mortgage document if the credit provider lawfully had possession of the goods that are subject to the mortgage before the mortgage was entered into, otherwise than because the credit provider supplied the goods (for example, the goods were held by way of security).
- (4) A mortgage is not enforceable unless it complies with this section.

#### **43 Copy of mortgage for mortgagor**

- (1) If a mortgage is in the form of a written mortgage document and is not part of a credit contract, the credit provider must give the mortgagor a copy to keep, in the form in which it was made, within 14 days after it is made.

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- (2) This section does not apply if the credit provider has previously given the mortgagor a copy of the mortgage document to keep.

### **44 Mortgages over all property void**

- (1) A mortgage that does not describe or identify the property which is subject to the mortgage is void.
- (2) Without limiting subsection (1), a provision in a mortgage that charges all the property of the mortgagor is void.

### **45 Restriction on mortgage of future property**

- (1) A provision in a mortgage to the effect that the mortgagor creates or agrees to create a mortgage over or in respect of property or a class of property that is to be, or may be, acquired by the mortgagor after the mortgage is entered into is void.
- (2) However, this section does not apply:
- (a) to a provision in a mortgage of property that is to be acquired wholly or partly with the credit provided under the credit contract secured by the mortgage; or
  - (b) to a provision in a mortgage relating to property or a class of property (whether or not ascertained) described or identified in the mortgage; or
  - (c) to a provision in a mortgage relating to goods acquired in replacement for, or as additions or accessories to, other goods subject to the mortgage; or
  - (d) to any other provision specified by the regulations.

### **46 Mortgages and continuing credit contracts**

- (1) A provision in a mortgage to the effect that goods supplied from time to time under a continuing credit contract are subject to the mortgage is void.
- (2) However, this section does not apply to a provision in a mortgage relating to specified goods securing payment of a debt under a continuing credit contract.



#### **47 All accounts mortgages**

- (1) In addition to securing credit provided by the credit contract or proposed credit contract, or securing obligations under a related guarantee or proposed related guarantee, to which a mortgage initially applies, the mortgage may contain a provision that secures credit provided under another future credit contract or future related guarantee.
- (2) Any such mortgage is unenforceable in relation to such a future credit contract or future related guarantee unless the credit provider has:
  - (a) given the mortgagor a copy of the contract document of the credit contract or proposed credit contract or a copy of the guarantee or proposed guarantee to which the mortgage is to relate; and
  - (b) subsequently obtained from the mortgagor a written acceptance of the extension of the mortgage or obtained acceptance in some other form provided for by the regulations.
- (3) Section 42 (Form of mortgage) does not apply to an extension of a mortgage under this section.

#### **48 Third party mortgages prohibited**

- (1) A credit provider must not enter into a mortgage to secure obligations under a credit contract unless each mortgagor is a debtor under the contract or a guarantor under a related guarantee.
- (2) A credit provider must not enter into a mortgage to secure obligations under a guarantee unless each mortgagor is a guarantor under the guarantee or a debtor under the related credit contract.
- (3) A mortgage which does not comply with this section is unenforceable.
- (4) The court may, on the application of a party to a mortgage that is unenforceable because of this section, order that the credit provider takes such steps as are necessary to discharge the mortgage.

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- (5) In this section, a reference to a credit contract or guarantee includes a reference to a proposed credit contract or proposed guarantee.

**49 Maximum amount which may be secured**

- (1) A mortgage is void to the extent that it secures an amount, in relation to any credit contract which it secures, that exceeds the sum of the amount of the liabilities of the debtor under the credit contract and the reasonable enforcement expenses of enforcing the mortgage.
- (2) A mortgage is void to the extent that it secures an amount, in relation to any guarantee which it secures, that exceeds the limit of the guarantor's liability under the guarantee and the reasonable enforcement expenses of enforcing the mortgage.
- (3) This section does not affect a provision of a mortgage permitted by section 47.

**50 Prohibited securities**

- (1) A mortgage cannot be created over employees' remuneration or employment benefits or benefits under a superannuation scheme unless the regulations permit it to do so.
- (2) A mortgage cannot be created over goods that are essential household property unless:
- (a) the mortgagee supplied the goods to the mortgagor as part of a business carried on by the mortgagee of supplying goods and the mortgagor has not, as a previous owner of the goods, sold them to the mortgagee for the purposes of the supply; or
  - (b) the mortgagee is a linked credit provider of the person who supplied the goods to the mortgagor.
- (3) For the purposes of subsection (2), essential household property includes goods of a type prescribed under the regulations.
- (4) A type of goods may be prescribed under subsection (3) only if the type is similar to a type of household property mentioned in regulations made under subparagraph 116(2)(b)(i) of the *Bankruptcy Act 1966*.

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- (5) A mortgage cannot be created over goods that are property used by the mortgagor in earning income by personal exertion if the goods do not have a total value greater than the relevant limit.
- (6) An obligation under a credit contract cannot be secured by a cheque, or bill of exchange or promissory note, endorsed or issued by the debtor or guarantor.
- (7) A mortgage or security is void to the extent that it contravenes this section.
- (8) In this section:

*antique item* means an item of household property the market value of which is substantially attributable to its age or historical significance.

*essential household property* means household property as prescribed under regulations made under subparagraph 116(2)(b)(i) of the *Bankruptcy Act 1966*.

*goods* does not include antique items.

*relevant limit*, in relation to goods, means the limit prescribed from time to time under the *Bankruptcy Regulations 1966* for the purposes of subparagraph 116(2)(c)(i) of the *Bankruptcy Act 1966* for goods of that type.

### **51 Assignment or disposal of mortgaged property by mortgagor**

- (1) A mortgagor must not assign or dispose of property that is subject to a mortgage without the credit provider's consent or the authority of the court under subsection (3).

Criminal penalty: 50 penalty units.

- (2) The credit provider must not unreasonably withhold consent or attach unreasonable conditions to the consent (but a condition requiring security over property of an equivalent kind and value is not to be regarded as unreasonable).

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- (3) The court may, on application by a mortgagor, authorise the mortgagor to dispose of mortgaged property on conditions determined by the court if:
- (a) the credit provider fails within a reasonable time to reply to a request for consent to do so by the mortgagor; or
  - (b) consent is unreasonably withheld, or unreasonable conditions are attached to the consent.
- (4) Subsection (1) is an offence of strict liability.

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

**52 Conditions on consent to assignment or disposal of property subject to mortgage**

- (1) As a condition of granting consent to an assignment or disposal of property subject to a mortgage, the credit provider may make any or all of the requirements set out in this section. This section does not limit any other requirements that may be made by the credit provider.
- (2) The credit provider may require any breaches of the credit contract to which the mortgage relates and of the mortgage to be remedied.
- (3) The credit provider may require the mortgagor and the assignee or person to whom the property is disposed to execute and deliver to the credit provider an agreement relating to the assignment or disposal in a form approved by the credit provider under which, without prejudicing or affecting the liability of the mortgagor, the assignee or person to whom the property is disposed agrees with the credit provider:
- (a) to be personally liable to pay the amounts due or that become due under the mortgage; and
  - (b) to perform and observe all other requirements and conditions of the mortgage.
- (4) The credit provider may require the mortgagor and the assignee or person to whom the property is disposed to pay the reasonable costs (if any) incurred by the credit provider for:
- (a) stamp duty in respect of the assignment or disposal agreement, or any other document the credit provider

reasonably requires to be executed in connection with the assignment or disposal; and

(b) fees payable to a duly qualified lawyer.

### **53 Offence for noncompliance**

- (1) A credit provider must not:
- (a) enter into a mortgage that contravenes a requirement of this Division; or
  - (b) otherwise contravene a requirement of this Division.

Criminal penalty: 50 penalty units.

- (2) A credit provider must not enter into a mortgage that is void or unenforceable, or that includes a provision that is void or unenforceable, because of this Division.

Criminal penalty: 50 penalty units.

- (3) Subsections (1) and (2) are offences of strict liability.

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

## **Division 2—Guarantees**

### **54 Application of Division**

This Division applies to a guarantee (under which the guarantor is a natural person or a strata corporation) to the extent to which it guarantees obligations under a credit contract, whether or not it also guarantees other obligations (see section 8).

### **55 Form of guarantee**

- (1) A guarantee must be in writing signed by the guarantor.
- (2) It is sufficient compliance with subsection (1) if the guarantee is contained in a mortgage signed by the guarantor.
- (3) The regulations may make provision for or with respect to the content of guarantees and the way they are expressed.
- (4) A guarantee is not enforceable unless it complies with this section and regulations made under this section.

### **56 Disclosure**

- (1) Before a guarantee is signed by the guarantor, the credit provider must give to the prospective guarantor:
  - (a) a copy of the contract document of the credit contract or proposed credit contract; and
  - (b) a document in the form prescribed by the regulations explaining the rights and obligations of a guarantor.
- (2) A guarantee is not enforceable unless paragraph (1)(a) is complied with.

### **57 Copies of documents for guarantor**

- (1) A credit provider must, not later than 14 days after a guarantee is signed and given to the credit provider, give the guarantor:
  - (a) a copy of the guarantee signed by the guarantor; and

- (b) a copy of the credit contract or proposed credit contract.
- (2) Paragraph (1)(a) does not apply if the credit provider has previously given the guarantor a copy of the guarantee document to keep and paragraph (1)(b) does not apply if the credit provider has previously given the guarantor a copy of the credit contract or proposed credit contract to keep.

### **58 Guarantor may withdraw before credit is provided**

- (1) Although a guarantee has been made, the guarantor may nevertheless, by written notice to the credit provider:
  - (a) withdraw from the guarantee at any time before credit is first provided under the credit contract; or
  - (b) withdraw from the guarantee after credit is first provided under the contract if the credit contract made differs in some material respect from the proposed credit contract given to the guarantor before the guarantee is signed.
- (2) The guarantor may withdraw from a guarantee under this section to the extent only that it guarantees obligations under the credit contract.
- (3) This section is subject to section 61.

### **59 Extension of guarantee**

- (1) In addition to guaranteeing obligations under a credit contract or proposed credit contract to which a guarantee initially applies, a guarantee may contain a provision that makes credit provided under another future credit contract subject to the guarantee.
- (2) Any such guarantee is unenforceable in relation to such a future credit contract unless the credit provider has:
  - (a) given the guarantor a copy of the contract document of that future credit contract; and
  - (b) subsequently obtained from the guarantor a written acceptance of the extension of the guarantee or obtained acceptance in some other form provided for by the regulations.

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- (3) Section 55 (Form of guarantee) and section 56 (Disclosure) do not apply to an extension of a guarantee under this section.

**60 Limitation of guarantor's liability**

*Total amount for which guarantor can be liable*

- (1) A guarantee is void to the extent that it secures an amount, in relation to a credit contract to which this Code applies, that exceeds the sum of the amount of the liabilities of the debtor under the credit contract and the reasonable expenses of enforcing the guarantee, or any lesser amount agreed between the credit provider and the guarantor.

*Unenforceable contracts*

- (2) Nothing in subsection (1) prevents a credit provider from enforcing a guarantee relating to liabilities under a credit contract that is unenforceable solely because of the debtor's death, insolvency or incapacity.

*Debtors under 18 years of age*

- (3) A guarantee which guarantees the liability of a debtor who was under 18 years of age when the liability was incurred cannot be enforced against the guarantor unless it contains a prominent statement to the effect that the guarantor may not be entitled to an indemnity against the debtor.

*Guarantor may limit liabilities under continuing credit contract*

- (4) In the case of a continuing credit contract, a guarantor may, by notice to the credit provider, limit the guarantee so that it applies only to liabilities related to credit previously provided to the debtor under the credit contract (including any liabilities not yet debited to the debtor's account) and such further amount (if any) as the guarantor agrees to guarantee.



*Guarantee must not limit indemnity*

- (5) A guarantee is void to the extent that it limits the guarantor's right to indemnity from the person whose liability the guarantor has guaranteed or it postpones or otherwise purports to limit the guarantor's right to enforce the indemnity against the person.

*Effect of section*

- (6) This section does not affect a provision of a guarantee permitted by section 59.

**61 Increase in guarantor's liabilities**

- (1) If the terms of a credit contract are changed to increase or allow for an increase in liabilities, the liabilities of a guarantor under a guarantee that secures those liabilities are not increased unless:
- (a) the credit provider gives to the guarantor a written notice setting out particulars of the change in the terms of the credit contract; and
  - (b) the credit provider has subsequently obtained from the guarantor a written acceptance of the extension of the guarantee to those increased liabilities or obtained acceptance in some other form provided for by the regulations.
- (2) This section does not apply to an increase in liabilities resulting from:
- (a) a change of a kind referred to in paragraph 63(2)(a) or (b); or
  - (b) a change of which notice is required to be given under Division 1 of Part 4 (not being a change referred to in subsection 67(4) or section 68); or
  - (c) a change under subsection 74(2) or a postponement under subsection 96(2); or
  - (d) a deferral or waiver of a debtor's obligations for a period not exceeding 90 days.

**62 Offence for noncompliance**

- (1) A credit provider must not:

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- (a) enter into a guarantee that contravenes a requirement of this Division; or
  - (b) otherwise contravene a requirement of this Division.
- (2) A credit provider must not enter into a guarantee that is void or unenforceable, or that contains a provision that is void or unenforceable, because of this Division.

Criminal penalty: 50 penalty units.

- (3) Subsections (1) and (2) are offences of strict liability.

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

## **Part 4—Changes to obligations under credit contracts, mortgages and guarantees**

### **Division 1—Unilateral changes by credit provider**

#### **63 Application of Division**

- (1) This Division applies only to changes made unilaterally by a credit provider under a credit contract, mortgage or guarantee.
- (2) This Division does not apply to the following changes under a credit contract:
  - (a) a change to a new annual percentage rate payable under the contract (not being a rate determined by referring to a reference rate), if both the new rate and when it takes effect are ascertainable from the contract;
  - (b) an increase in the amount of repayments, if the increase occurs automatically, as specified by the contract, and both the amount of the increase and when it takes effect are ascertainable from the contract;
  - (c) an increase in the term of a credit contract, if the increase occurs only because of an increase in the annual percentage rate or rates payable under the contract;
  - (d) a change made under Division 3.
- (3) Nothing in this Division confers on a credit provider or a debtor any power or right to change the credit contract or its terms in addition to those conferred by the contract.

#### **64 Interest rate changes**

##### *Notification of interest rate changes*

- (1) A credit provider must, not later than the day on which a change in the annual percentage rate or rates payable under a credit contract takes effect, give to the debtor written notice setting out:

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- (a) the new rate or rates or, if a rate is determined by referring to a reference rate, the new reference rate; and
- (b) any information required by the regulations.

Criminal penalty: 100 penalty units.

*Notification by publication*

- (2) Notice under subsection (1) may be given by publishing the notice in a newspaper circulating throughout each State and Territory. A credit provider that gives notice in accordance with this subsection must give to the debtor particulars of the change before or when the next statement of account is sent to the debtor after the change takes effect.

Criminal penalty: 100 penalty units.

*Changes in reference rates*

- (3) Subsection (1) does not apply to a change in a rate that is determined by referring to a reference rate if the changed reference rate is notified (whether or not by the credit provider) in a newspaper circulating throughout each State and Territory not later than the date the change takes effect.

*Notification of other interest changes*

- (4) A credit provider must, not later than 20 days before a change in the manner in which interest is calculated or applied under a credit contract (including a change in or abolition of any interest free period under the contract) takes effect, give to the debtor written notice setting out:
  - (a) particulars of the change; and
  - (b) any information required by the regulations.

Criminal penalty: 100 penalty units.

*Interest rate reductions*

- (5) Subsections (1) and (4) do not apply to a change that reduces the obligations of the debtor under the credit contract.

*Strict liability offences*

- (6) Subsections (1), (2) and (4) are offences of strict liability.

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

*Application*

- (7) This section applies whether or not the change is a change to the terms of the contract.

## **65 Repayment changes**

*Notification of repayment changes*

- (1) A credit provider must, not later than 20 days before a change in the amount or frequency or time for payment of, or a change in the method of calculation of, instalments or minimum repayments, under a credit contract takes effect, give to the debtor written notice setting out:
- (a) particulars of the change; and
  - (b) any information required by the regulations.

Criminal penalty: 100 penalty units.

*Repayment reductions*

- (2) Subsection (1) does not apply to a change that reduces the obligations of the debtor, or extends the time for payment, under the credit contract. The credit provider must, however, give particulars of any such change before or when the next statement of account is sent to the debtor after the change takes effect.

Criminal penalty: 100 penalty units.

- (3) If the amount or frequency or time for payment of instalments or minimum repayments is not specified in the credit contract but is determined by a method of calculation so specified, this section requires the credit provider to give particulars only of any change in that method of calculation.

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*Strict liability offences*

- (4) Subsections (1) and (2) are offences of strict liability.

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

*Application*

- (5) This section does not apply to a change that occurs while the credit contract does not require any repayment of the amount of credit provided.
- (6) This section applies whether or not the change is a change to the terms of the contract.

**66 Credit fees and charges changes**

*Notification of credit fees and charges changes*

- (1) A credit provider must, not later than 20 days before a change in the amount of a credit fee or charge (including a new credit fee or charge), or a change in the frequency or time for payment of a credit fee or charge, under a credit contract takes effect, give to the debtor written notice setting out:
- (a) particulars of the change; and
  - (b) any information required by the regulations.

Criminal penalty: 100 penalty units.

*Notification by publication*

- (2) Notice relating to a change in the amount of a credit fee or charge (including a new credit fee or charge) may be given by publishing the notice in a newspaper circulating throughout each State and Territory. A credit provider that gives notice in accordance with this subsection must give particulars of the change before or when the next statement of account is sent to the debtor after the change takes effect.

Criminal penalty: 100 penalty units.

*Credit fee or charge reductions*

- (3) Subsection (1) does not apply to a change that reduces the obligations of the debtor, or extends the time for payment, under the credit contract. The credit provider must, however, give particulars of any such change before or when the next statement of account is sent to the debtor after the change takes effect.

Criminal penalty: 100 penalty units.

*Strict liability offences*

- (4) Subsections (1), (2) and (3) are offences of strict liability.

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

*Application*

- (5) This section applies whether or not the change is a change to the terms of the contract.

**67 Changes to credit limits etc. in continuing credit contracts**

- (1) If a credit provider decides not to provide any further credit under a continuing credit contract, the credit contract continues in force in relation to any credit previously provided under the contract. However, this subsection does not prevent the termination of the contract if otherwise permitted by this Code or the contract.
- (2) A credit provider must, unless the debtor is in default under the contract, as soon as practicable after deciding not to provide any further credit or to reduce the credit limit, give to the debtor a written notice to that effect if such notice has not previously been given.

Criminal penalty: 100 penalty units.

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

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

- (4) A credit provider may increase the credit limit under a continuing credit contract only at the request of the debtor or with the written consent of the debtor.

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**68 Other unilateral changes by credit provider**

- (1) A credit provider must not exercise a power under a credit contract, mortgage or guarantee to unilaterally change its terms without giving to the other party, not less than 20 days before the change takes effect, written notice setting out:
- (a) particulars of the change in the terms of the credit contract, mortgage or guarantee; and
  - (b) any information required by the regulations.

Criminal penalty: 100 penalty units.

- (2) Subsection (1) does not apply to a change that reduces the obligations of the debtor, or extends the time for payment, under the credit contract. The credit provider must, however, give particulars of any such change before or when the next statement of account is sent to the debtor after the change takes effect.

Criminal penalty: 100 penalty units.

- (3) Subsections (1) and (2) are offences of strict liability.

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

- (4) This section does not apply to a change of which notice is required to be given under section 64, 65, 66 or 67 (or which would be required to be so given but for an exception provided in any such section) or which is referred to in subsection 67(4).

**69 Particulars of matters as changed only required to be given under this Division in certain cases**

The credit provider may, under section 64, 65, 66 or 68, give a person particulars only of a matter as changed instead of particulars of the change, but only if the credit provider:

- (a) makes it clear to the person that the matter has changed; or
- (b) issues to the person a new set of terms and conditions relating to the credit contract, mortgage or guarantee.



## **70 Prohibited increases in liabilities**

- (1) If the annual percentage rate under a credit contract is currently fixed for a specified term (including the whole term) of the contract, the contract cannot be changed unilaterally by a credit provider so as to increase, or change the method of calculation of a fee or charge so as to increase, a fee or charge:
  - (a) payable by the debtor on early termination of the credit contract; or
  - (b) payable on prepayment of an amount under the credit contract.
- (2) The regulations may prescribe circumstances in which such a change is permitted.

## Division 2—Changes by agreement of parties

### 71 Changes by agreement

- (1) If the parties under a credit contract, mortgage or guarantee agree to change its terms, the credit provider must, not later than 30 days after the date of the agreement, give to the other party under the agreement a written notice setting out:
- (a) particulars of the change in the terms of the credit contract, mortgage or guarantee; and
  - (b) any information required by the regulations.

Criminal penalty: 100 penalty units.

- (2) Subsection (1) does not apply to a change which defers or otherwise reduces the obligations of the debtor for a period not exceeding 90 days or to an agreement to increase the amount of credit under a credit contract.
- (3) If the parties under a credit contract (other than a continuing credit contract) propose to increase the amount of credit under the contract by agreement, the credit provider must also, before the agreement is made, give to the debtor a written notice containing the information required by the regulations.

Criminal penalty: 100 penalty units.

- (4) This section does not apply to a change made under Division 3.
- (5) The credit provider may, under subsection (1), give a person particulars only of a matter as changed instead of particulars of the change, but only if the credit provider:
- (a) makes it clear to the person that the matter has changed; or
  - (b) issues to the person a new set of terms and conditions relating to the credit contract, mortgage or guarantee.
- (6) Subsections (1) and (3) are offences of strict liability.

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

## **Division 3—Changes on grounds of hardship and unjust transactions**

### **72 Changes on grounds of hardship**

#### *General principle*

- (1) A debtor who is unable reasonably, because of illness, unemployment or other reasonable cause, to meet the debtor's obligations under a credit contract and who reasonably expects to be able to discharge the debtor's obligations if the terms of the contract were changed in a manner set out in subsection (2) may apply to the credit provider for such a change.

#### *Changes*

- (2) An application by a debtor must seek to change the terms of the contract in one of the following ways:
  - (a) extending the period of the contract and reducing the amount of each payment due under the contract accordingly (without a change being made to the annual percentage rate or rates);
  - (b) postponing during a specified period the dates on which payments are due under the contract (without a change being made to the annual percentage rate or rates);
  - (c) extending the period of the contract and postponing during a specified period the dates on which payments are due under the contract (without a change being made to the annual percentage rate or rates).

#### *Credit provider's notice about change*

- (3) If the debtor makes an application, the credit provider must, within 21 days after the day of receiving the application, give the debtor a written notice:
  - (a) that states whether or not the credit provider agrees to the change; and

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- (b) if the credit provider does not agree to the change—that states:
  - (i) the name of the approved external resolution scheme of which the credit provider is a member; and
  - (ii) the debtor’s rights under that scheme; and
  - (iii) the reasons for not agreeing to the change.

Criminal penalty: 30 penalty units.

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

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

*Application*

- (5) This section and sections 73 to 75 do not apply to a credit contract under which the maximum amount of credit that is or may be provided is more than:
  - (a) \$500,000; or
  - (b) if the regulations prescribe a higher amount—that amount.

**73 Notice of change**

- (1) A credit provider that enters into an agreement with the debtor on any such application must, not later than 30 days after the date of the agreement, give to the debtor, and any guarantor under a guarantee related to the contract, a written notice setting out:
  - (a) particulars of the change in the terms of the credit contract; and
  - (b) any information required by the regulations.

Criminal penalty: 50 penalty units.

- (2) The credit provider may, under subsection (1), give a person particulars only of a matter as changed instead of particulars of the change, but only if the credit provider:
  - (a) makes it clear to the person that the matter has changed; or
  - (b) issues to the person a new set of terms and conditions relating to the credit contract.
- (3) Subsection (1) is an offence of strict liability.

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

#### **74 Changes by court**

- (1) If the credit provider does not change the credit contract in accordance with the application, the debtor may apply to the court to change the terms of the credit contract.
- (2) The court may, after allowing the applicant, the credit provider and any guarantor a reasonable opportunity to be heard, by order change the credit contract in a manner set out in section 72, and make such other orders as it thinks fit, or refuse to change the credit contract.
- (3) The court may, if it thinks it appropriate in the circumstances, stay any enforcement proceedings under the credit contract, and make such other orders as it thinks fit, until the application has been determined.

#### **75 Credit provider may apply for variation of change**

- (1) A credit provider under a credit contract that has been changed by an order under subsection 74(2) may apply to the court for an order varying or revoking the order.
- (2) A credit provider subject to a stay of enforcement proceedings or other order under subsection 74(3) may apply to the court for an order varying or revoking the stay or order.
- (3) On an application under this section, the court may vary or revoke the order or stay to which the application relates as it thinks fit, or may refuse the application.

#### **76 Court may reopen unjust transactions**

##### *Power to reopen unjust transactions*

- (1) The court may, if satisfied on the application of a debtor, mortgagor or guarantor that, in the circumstances relating to the relevant credit contract, mortgage or guarantee at the time it was entered into or changed (whether or not by agreement), the contract, mortgage or guarantee or change was unjust, reopen the

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transaction that gave rise to the contract, mortgage or guarantee or change.

*Matters to be considered by court*

- (2) In determining whether a term of a particular credit contract, mortgage or guarantee is unjust in the circumstances relating to it at the time it was entered into or changed, the court is to have regard to the public interest and to all the circumstances of the case and may have regard to the following:
- (a) the consequences of compliance, or noncompliance, with all or any of the provisions of the contract, mortgage or guarantee;
  - (b) the relative bargaining power of the parties;
  - (c) whether or not, at the time the contract, mortgage or guarantee was entered into or changed, its provisions were the subject of negotiation;
  - (d) whether or not it was reasonably practicable for the applicant to negotiate for the alteration of, or to reject, any of the provisions of the contract, mortgage or guarantee or the change;
  - (e) whether or not any of the provisions of the contract, mortgage or guarantee impose conditions that are unreasonably difficult to comply with, or not reasonably necessary for the protection of the legitimate interests of a party to the contract, mortgage or guarantee;
  - (f) whether or not the debtor, mortgagor or guarantor, or a person who represented the debtor, mortgagor or guarantor, was reasonably able to protect the interests of the debtor, mortgagor or guarantor because of his or her age or physical or mental condition;
  - (g) the form of the contract, mortgage or guarantee and the intelligibility of the language in which it is expressed;
  - (h) whether or not, and if so when, independent legal or other expert advice was obtained by the debtor, mortgagor or guarantor;
  - (i) the extent to which the provisions of the contract, mortgage or guarantee or change and their legal and practical effect were accurately explained to the debtor, mortgagor or

guarantor and whether or not the debtor, mortgagor or guarantor understood those provisions and their effect;

- (j) whether the credit provider or any other person exerted or used unfair pressure, undue influence or unfair tactics on the debtor, mortgagor or guarantor and, if so, the nature and extent of that unfair pressure, undue influence or unfair tactics;
- (k) whether the credit provider took measures to ensure that the debtor, mortgagor or guarantor understood the nature and implications of the transaction and, if so, the adequacy of those measures;
- (l) whether at the time the contract, mortgage or guarantee was entered into or changed, the credit provider knew, or could have ascertained by reasonable inquiry at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship;
- (m) whether the terms of the transaction or the conduct of the credit provider is justified in the light of the risks undertaken by the credit provider;
- (n) for a mortgage—any relevant purported provision of the mortgage that is void under section 50;
- (o) the terms of other comparable transactions involving other credit providers and, if the injustice is alleged to result from excessive interest charges, the annual percentage rate or rates payable in comparable cases;
- (p) any other relevant factor.

*Representing debtor, mortgagor or guarantor*

- (3) For the purposes of paragraph (2)(f), a person is taken to have represented a debtor, mortgagor or guarantor if the person represented the debtor, mortgagor or guarantor, or assisted the debtor, mortgagor or guarantor to a significant degree, in the negotiations process prior to, or at, the time the credit contract, mortgage or guarantee was entered into or changed.

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*Unforeseen circumstances*

- (4) In determining whether a credit contract, mortgage or guarantee is unjust, the court is not to have regard to any injustice arising from circumstances that were not reasonably foreseeable when the contract, mortgage or guarantee was entered into or changed.

*Conduct*

- (5) In determining whether to grant relief in respect of a credit contract, mortgage or guarantee that it finds to be unjust, the court may have regard to the conduct of the parties to the proceedings in relation to the contract, mortgage or guarantee since it was entered into or changed.

*Application*

- (6) This section does not apply:
- (a) to a matter or thing in relation to which an application may be made under subsection 78(1); or
  - (b) to a change to a contract under this Division.
- (7) This section does apply in relation to a mortgage, and a mortgagor may make an application under this section, even though all or part of the mortgage is void under subsection 50(3).

*Meaning of unjust*

- (8) In this section:
- unjust* includes unconscionable, harsh or oppressive.

**77 Orders on reopening of transactions**

The court may, if it reopens a transaction under this Division, do any one or more of the following, despite any settlement of accounts or any agreement purporting to close previous dealings and create a new obligation:

- (a) reopen an account already taken between the parties to the transaction;



- (b) relieve the debtor and any guarantor from payment of any amount in excess of such amount as the court, having regard to the risk involved and all other circumstances, considers to be reasonably payable;
- (c) set aside either wholly or in part or revise or alter an agreement made or mortgage given in connection with the transaction;
- (d) order that the mortgagee takes such steps as are necessary to discharge the mortgage;
- (e) give judgment for or make an order in favour of a party to the transaction of such amount as, having regard to the relief (if any) which the court thinks fit to grant, is justly due to that party under the contract, mortgage or guarantee;
- (f) give judgment or make an order against a person for delivery of goods to which the contract, mortgage or guarantee relates and which are in the possession of that person;
- (g) make ancillary or consequential orders.

#### **78 Court may review unconscionable interest and other charges**

- (1) The court may, if satisfied on the application of a debtor or guarantor that:
  - (a) a change in the annual percentage rate or rates under a credit contract to which subsection 64(1) or (4) applies; or
  - (b) an establishment fee or charge; or
  - (c) a fee or charge payable on early termination of a credit contract; or
  - (d) a fee or charge for a prepayment of an amount under a credit contract;is unconscionable, annul or reduce the change or fee or charge and may make ancillary or consequential orders.
- (2) For the purposes of this section, a change to the annual percentage rate or rates is unconscionable if and only if it appears to the court that:
  - (a) it changes the annual percentage rate or rates in a manner that is unreasonable, having regard to any advertised rate or other representations made by the credit provider before or at the

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time the contract was entered into, the period of time since the contract was entered into and any other consideration the court thinks relevant; or

- (b) the change is a measure that discriminates unjustifiably against the debtor when the debtor is compared to other debtors of the credit provider under similar contracts.
- (3) In determining whether an establishment fee or charge is unconscionable, the court is to have regard to whether the amount of the fee or charge is equal to the credit provider's reasonable costs of determining an application for credit and the initial administrative costs of providing the credit or is equal to the credit provider's average reasonable costs of those things in respect of that class of contract.
  - (4) For the purposes of this section, a fee or charge payable on early termination of the contract or a prepayment of an amount under the credit contract is unconscionable if and only if it appears to the court that it exceeds a reasonable estimate of the credit provider's loss arising from the early termination or prepayment, including the credit provider's average reasonable administrative costs in respect of such a termination or prepayment.

**79 Applications by ASIC**

- (1) This section applies if ASIC considers that it is in the public interest to make an application under this Division.
- (2) ASIC may make an application under this Division and has standing to represent the public interest.
- (3) The application:
  - (a) may apply to any one or more credit contracts; and
  - (b) may apply to all or any class of credit contracts entered into by a credit provider during a specified period (for example, all credit contracts entered into during a specified period that are affected by a specified matter for which relief is sought).

## **80 Time limit**

- (1) An application (other than an application under section 78) may not be brought under this Division more than 2 years after the relevant credit contract is rescinded or discharged or otherwise comes to an end.
- (2) An application under section 78 may not be brought more than 2 years after the relevant change takes effect or fee or charge is charged under the credit contract or the credit contract is rescinded or discharged or otherwise comes to an end.

## **81 Joinder of parties**

- (1) If it appears to the court that a person other than a credit provider or a mortgagee (a *third party*) has shared in the profits of, or has a beneficial interest prospectively or otherwise in, a credit contract or mortgage that the court holds to be unjust, the court may make an order about the third party that the court considers appropriate.
- (2) However, before making an order about the third party, the court must:
  - (a) join the third party as a party to the proceedings; and
  - (b) give the third party an opportunity to appear and be heard in the proceedings.

## **Part 5—Ending and enforcing credit contracts, mortgages and guarantees**

### **Division 1—Ending of credit contract by debtor**

#### **82 Debtor's or guarantor's right to pay out contract**

- (1) A debtor or guarantor is entitled to pay out the credit contract at any time.
- (2) The amount required to pay out a credit contract (other than a continuing credit contract) is the total of the following amounts:
  - (a) the amount of credit;
  - (b) the interest charges and all other fees and charges payable by the debtor to the credit provider up to the date of termination;
  - (c) reasonable enforcement expenses;
  - (d) early termination charges, if provided for in the contract;less any payments made under the contract and any rebate of premium under section 148.

#### **83 Statement of pay out figure**

- (1) A credit provider must, at the written request of a debtor or guarantor, provide a written statement of the amount required to pay out a credit contract (other than a continuing credit contract) as at such date as the debtor or guarantor specifies. If so requested, the credit provider must also provide details of the items which make up that amount.

Criminal penalty: 50 penalty units.
- (2) The statement must also contain a statement to the effect that the amount required to pay out the credit contract may change according to the date on which it is paid.

- (3) A credit provider must give a statement, complying with this section, within 7 days after the request is given to the credit provider.

Criminal penalty: 50 penalty units.

- (4) In the case of joint debtors or guarantors, the statement under this section need only be given to a debtor or guarantor who requests the statement and not, despite section 194, to each joint debtor or guarantor.

- (5) Subsections (1) and (3) are offences of strict liability.

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

#### **84 Court may determine pay out figure if credit provider does not provide a pay out figure**

- (1) If the credit provider does not provide a statement of the amount required to pay out a credit contract (other than a continuing credit contract) in accordance with this Part after a request is duly made by a debtor or guarantor, the court may, on the application of the debtor or guarantor, determine the amount payable on the date of determination, the amount by which it increases daily and the period for which the determination is applicable.
- (2) The credit contract is discharged if an amount calculated in accordance with the determination is tendered to the credit provider within the applicable period.

#### **85 Surrender of mortgaged goods and goods subject to sale by instalments**

##### *General principle*

- (1) If:
- (a) a credit contract takes the form of a sale of goods by instalments and title in the goods does not pass until all instalments are paid; or
  - (b) the credit provider has a mortgage over goods of the debtor or guarantor;

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the debtor or mortgagor may give written notice of an intention to return the goods to the credit provider or, if the goods are in the credit provider's possession, require the credit provider in writing to sell the goods.

*Delivery of goods*

- (2) A debtor or mortgagor may return the goods to the credit provider at the credit provider's place of business during ordinary business hours within 7 days of the date of the notice or within such other period or at such other time or place as may be agreed with the credit provider.

*Notice of value*

- (3) The credit provider must, within 14 days after a debtor or mortgagor returns the goods or requires the credit provider to sell the goods, give the debtor or mortgagor a written notice containing the estimated value of the goods and any other information required by the regulations.

*Return or sale of goods*

- (4) If the debtor or mortgagor, within 21 days after the notice under subsection (3) is given, requests by written notice return of the goods to the debtor or mortgagor or withdraws the requirement to sell the goods (and the debtor is not in default under the terms of the credit contract), the credit provider must return to the debtor or mortgagor any goods returned by the debtor or mortgagor and must not comply with the requirement.

*Nominated purchaser*

- (5) The debtor or mortgagor may, within 21 days after the notice under subsection (3) is given, nominate in writing a person who is prepared to purchase the goods from the credit provider at the estimated value or at any greater amount for which the credit provider has obtained a written offer to buy the goods. The credit provider must offer to sell the goods to that person for the estimated value or, if there is a written offer to buy the goods for a greater amount, that amount.

*Sale of goods by credit provider*

- (6) The credit provider must, if the goods are not required to be returned under subsection (4), as soon as reasonably practicable (or at such other time as the credit provider and the debtor or mortgagor agree) sell the goods in accordance with subsection (5) or, if no buyer is nominated or the nominated buyer under that subsection does not buy the goods, for the best price reasonably obtainable.

*Amount to be credited to debtor or mortgagor*

- (7) The credit provider must credit the debtor or mortgagor with a payment equivalent to the proceeds of the sale less any amounts which the credit provider is entitled to deduct from those proceeds. On the sale of the goods, the amount required to pay out the contract becomes due.

*Deductions from proceeds*

- (8) A credit provider that sells mortgaged goods under this section is entitled to deduct from the proceeds of that sale only the following amounts:
- (a) the amount currently secured by the mortgage in relation to the credit contract or guarantee, not being more than the amount required to discharge the contract or guarantee;
  - (b) the amount payable to discharge any prior mortgage to which the goods were subject;
  - (c) the amounts payable in successive discharge of any subsequent mortgages to which the goods were subject and of which the credit provider had notice;
  - (d) the credit provider's reasonable enforcement expenses;
  - (e) the expenses reasonably incurred by the credit provider in connection with the possession and sale of the mortgaged goods.

*Notice of amount credited and other matters*

- (9) The credit provider must give the debtor or mortgagor a written notice stating the gross amount realised on the sale, the net
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proceeds of the sale, the amount credited to the debtor or mortgagor and the amount required to pay out the credit contract or the amount due under the guarantee.

*Offence—credit provider*

- (10) A credit provider that contravenes a requirement of this section commits an offence.

Criminal penalty: 50 penalty units.

*Strict liability offence*

- (11) Subsection (10) is an offence of strict liability.

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

**86 Compensation to debtor or mortgagor**

- (1) The court, on application by the debtor or mortgagor, may order a credit provider to credit the debtor or mortgagor with a payment, fixed by the court, exceeding the net proceeds of sale if it is not satisfied that the credit provider sold the goods as soon as reasonably practicable (or at such other time as the credit provider and debtor or mortgagor agreed) for the best price reasonably obtainable.
- (2) On application by the debtor or mortgagor, the mortgagee under any prior mortgage to which the goods are subject or the mortgagee under any subsequent mortgage of which the credit provider has notice, the court, if not satisfied that the credit provider complied with section 85, may make an order requiring the credit provider to compensate the debtor or mortgagor or the relevant mortgagee for any loss suffered as a result.
- (3) The onus of proving that section 85 was complied with is on the credit provider.

**87 One-off notice to be given the first time a direct debit default occurs**

- (1) This section applies if:
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- (a) a debtor authorises payment of an amount for a credit contract by direct debit; and
  - (b) default occurs; and
  - (c) it is the first occasion the default occurs.
- (2) The credit provider must give the debtor, and any guarantor, a direct debit default notice under this section within 10 business days of the default occurring.

Criminal penalty: 50 penalty units.

- (3) The direct debit default notice must contain the information prescribed under the regulations.
- (4) Subsection (2) is an offence of strict liability.
- Note: For strict liability, see section 6.1 of the *Criminal Code*.
- (5) This section does not affect any other requirement under this Code to give a notice.
- (6) In this section:

***Bulk Electronic Clearing System*** means the system established by the Australian Payments Clearing Association to manage the conduct of the exchange and settlement of bulk electronic low value transactions and includes any replacement system.

***direct debit***, in relation to the payment by a debtor of an amount for a credit contract, means the debiting of the amount against an account with a financial institution, as specified and authorised in writing by the debtor, that is processed through the Bulk Electronic Clearing System.

## **Division 2—Enforcement of credit contracts, mortgages and guarantees**

### **88 Requirements to be met before credit provider can enforce credit contract or mortgage against defaulting debtor or mortgagor**

#### *Enforcement of credit contract*

- (1) A credit provider must not begin enforcement proceedings against a debtor in relation to a credit contract unless the debtor is in default under the credit contract and:
  - (a) the credit provider has given the debtor, and any guarantor, a default notice, complying with this section, allowing the debtor a period of at least 30 days from the date of the notice to remedy the default; and
  - (b) the default has not been remedied within that period.

Criminal penalty: 50 penalty units.

#### *Enforcement of mortgage*

- (2) A credit provider must not begin enforcement proceedings against a mortgagor to recover payment of money due or take possession of, sell, appoint a receiver for or foreclose in relation to property subject to a mortgage, unless the mortgagor is in default under the mortgage and:
  - (a) the credit provider has given the mortgagor a default notice, complying with this section, allowing the mortgagor a period of at least 30 days from the date of the notice to remedy the default; and
  - (b) the default has not been remedied within that period.

Criminal penalty: 50 penalty units.

*Default notice requirements*

- (3) A default notice must contain a prominent heading at its top stating that it is a default notice and specify:
- (a) the default; and
  - (b) the action necessary to remedy the default; and
  - (c) a period for remedying the default; and
  - (d) the date after which enforcement proceedings in relation to the default, and, if relevant, repossession of mortgaged property may begin if the default has not been remedied; and
  - (e) that repossession and sale of mortgaged property may not extinguish the debtor's liability; and
  - (f) the information prescribed by the regulations about the debtor's right to:
    - (i) make an application to the credit provider under section 72; or
    - (ii) negotiate with the credit provider under section 94; or
    - (iii) make an application to the court under sections 74 and 96; and
  - (g) the information prescribed by the regulations about:
    - (i) the approved external dispute resolution scheme of which the credit provider is a member; or
    - (ii) the debtor's rights under that scheme; and
  - (h) that a subsequent default of the same kind that occurs during the period specified for remedying the original default may be the subject of enforcement proceedings without further notice if it is not remedied within the period; and
  - (i) that, under the *Privacy Act 1988*, the debt may be included in a credit reporting agency's credit information file about the debtor if:
    - (i) the debt remains overdue for 60 days or more; and
    - (ii) the credit provider has taken steps to recover all or part of the debt; and
  - (j) any other information prescribed by the regulations.

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*Combined notices*

- (4) Default notices that may be given under subsections (1) and (2) may be combined in one document if given to a person who is both a debtor and a mortgagor.

*When default notice not required*

- (5) A credit provider is not required to give a default notice or to wait until the period specified in the default notice has elapsed, before beginning enforcement proceedings, if:
- (a) the credit provider believes on reasonable grounds that it was induced by fraud on the part of the debtor or mortgagor to enter into the credit contract or mortgage; or
  - (b) the credit provider has made reasonable attempts to locate the debtor or mortgagor but without success; or
  - (c) the court authorises the credit provider to begin the enforcement proceedings; or
  - (d) the credit provider believes on reasonable grounds that the debtor or mortgagor has removed or disposed of mortgaged goods under a mortgage related to the credit contract or under the mortgage concerned, or intends to remove or dispose of mortgaged goods, without the credit provider's permission or that urgent action is necessary to protect the mortgaged property.

*Non-remedial default*

- (6) If the credit provider believes on reasonable grounds that a default is not capable of being remedied:
- (a) the default notice need only specify the default; and
  - (b) the credit provider may begin the enforcement proceedings after the period of 30 days from the date of the notice.
- (7) Subsections (1) and (2) are offences of strict liability.

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

*Other law about mortgages not affected*

- (8) This section is in addition to any provision of any other law relating to the enforcement of real property or other mortgages and does not prevent the issue of notices to defaulting mortgagors under other legislation. Nothing in this section prevents a notice to a defaulting mortgagor under other legislation being issued at the same time, or in the same document, as the default notice under this section.

Note: By virtue of subsection 183(2), a notice may contain information required to be given under other legislation or be included in a notice given under other legislation.

**89 Defaults may be remedied**

- (1) If a default notice states that the credit provider intends to take action because the debtor or mortgagor is in default under the credit contract or mortgage, the debtor, mortgagor or guarantor may remedy the default within the period specified in the notice, and the contract or mortgage is then reinstated and any acceleration clause cannot operate.
- (2) A debtor, mortgagor or guarantor does not remedy the default if, at the end of the period, the debtor or mortgagor is in default under the credit contract or mortgage because of the breach specified in the notice or because of a subsequent breach of the same type.

**90 Requirements to be met before credit provider can enforce guarantee against guarantor**

- (1) A credit provider must not, under a guarantee, enforce a judgment against a guarantor unless:
- (a) the credit provider has obtained a judgment against the debtor for payment of the guaranteed liability and the judgment remains unsatisfied for 30 days after the credit provider has made a written demand for payment of the judgment debt; or
  - (b) the court has relieved the credit provider from the obligation to obtain a judgment against the debtor on the ground that recovery from the debtor is unlikely; or

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- (c) the credit provider has made reasonable attempts to locate the debtor but without success; or
- (d) the debtor is insolvent.

Criminal penalty: 50 penalty units.

- (2) Subsection (1) is an offence of strict liability.

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

**91 Requirements to be met before credit provider can repossess mortgaged goods**

- (1) A credit provider must not, without the consent of the court, take possession of mortgaged goods if the amount currently owing under the credit contract related to the relevant mortgage is less than 25% of the amount of credit provided under the contract or \$10,000, whichever is the lesser.

Criminal penalty: 100 penalty units.

- (2) However, the restriction does not apply:
  - (a) to a continuing credit contract; or
  - (b) if the credit provider believes on reasonable grounds that the debtor has removed or disposed of the mortgaged goods, or intends to remove or dispose of them, without the credit provider's permission or that urgent action is necessary to protect the goods.

- (3) Subsection (1) is an offence of strict liability.

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

- (4) In any proceedings in which it is established that a credit provider has taken possession of mortgaged goods contrary to subsection (1), the burden of establishing that the possession of the goods was lawfully taken by virtue of subsection (2) lies on the credit provider.
- (5) Nothing in this section prevents a credit provider from accepting the return of goods under section 85.

## 92 Acceleration clauses

- (1) For the purposes of this Part, an ***acceleration clause*** is a term of a credit contract or mortgage providing that:
- (a) on the occurrence or non-occurrence of a particular event, the credit provider becomes entitled to immediate payment of all, or a part, of an amount under the contract that would not otherwise have been immediately payable; or
  - (b) whether or not on the occurrence or non-occurrence of a particular event, the credit provider has a discretion to require repayment of the amount of credit otherwise than by repayments fixed, or determined on a basis stated, in the contract;
- but does not include any such term in a credit contract or mortgage that is an on demand facility.
- (2) An ***on demand facility*** is a credit contract or mortgage under which:
- (a) the total amount outstanding under the contract or mortgage is repayable at any time on demand by the credit provider; and
  - (b) there is no agreement, arrangement or understanding between the credit provider and the debtor or mortgagor that repayment will only be demanded on the occurrence or non-occurrence of a particular event.

## 93 Requirements to be met before credit provider can enforce an acceleration clause

- (1) An acceleration clause is to operate only if the debtor or mortgagor is in default under the credit contract or mortgage and:
- (a) the credit provider has given to the debtor and any guarantor, or to the mortgagor, a default notice under section 88; and
  - (b) the default notice contains an additional statement of the manner in which the liabilities of the debtor or mortgagor under the contract or mortgage would be affected by the operation of the acceleration clause and also of the amount required to pay out the contract (as accelerated); and

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- (c) the default has not been remedied within the period specified in the default notice (unless the credit provider believes on reasonable grounds that the default is not capable of being remedied).
- (2) However, a credit provider is not required to give a default notice under section 88 or to wait until the period specified in the default notice has elapsed before bringing an acceleration clause into operation, if:
  - (a) the credit provider believes on reasonable grounds that it was induced by fraud on the part of the debtor or mortgagor to enter into the contract or mortgage; or
  - (b) the credit provider has made reasonable attempts to locate the debtor or mortgagor but without success; or
  - (c) the court authorises the credit provider not to do so; or
  - (d) the credit provider believes on reasonable grounds that the debtor or mortgagor has removed or disposed of mortgaged goods under a mortgage related to the credit contract or the mortgage concerned, or intends to remove or dispose of mortgaged goods, without the credit provider's permission or that urgent action is necessary to protect the goods.
- (3) This section is in addition to any provision of any other law relating to the enforcement of real property mortgages and does not prevent the issue of notices to defaulting mortgagors under other legislation.



## **Division 3—Postponement of enforcement proceedings**

### **94 Postponement of exercise of rights**

- (1) A debtor, mortgagor or guarantor who has been given a default notice under Division 2 or a demand for payment under section 90 may, at any time before the end of the period specified in the notice or demand, request the credit provider to negotiate a postponement of the enforcement proceedings or any action taken under such proceedings or of the operation of any applicable acceleration clause.

#### *Credit provider's notice about postponement*

- (2) If the debtor, mortgagor or guarantor makes the request, the credit provider must, within 21 days after the day of receiving the request, give the person a written notice:
  - (a) that states whether or not the credit provider agrees to negotiate a postponement; and
  - (b) if the credit provider does not agree to negotiate—that states:
    - (i) the name of the approved external resolution scheme of which the credit provider is a member; and
    - (ii) the person's rights under that scheme; and
    - (iii) the reasons for not agreeing to negotiate.

Criminal penalty: 30 penalty units.

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

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

- (4) This Division does not apply to a credit contract in respect of which the maximum amount of credit that is or may be provided is more than:
  - (a) \$500,000; or
  - (b) if the regulations prescribe a higher amount—that amount.

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**95 Effect of negotiated postponement**

- (1) The default notice or demand for payment is taken, for the purposes of this Code, not to have been given or made if a postponement is negotiated with the credit provider and the debtor, mortgagor or guarantor complies with the conditions of postponement.
- (2) It is a condition of any postponement negotiated with a credit provider after the credit provider has taken possession of property subject to a mortgage that the mortgagor pay the reasonable costs of the credit provider in taking possession of the property.
- (3) A credit provider must give written notice of the conditions of a postponement referred to in subsection (1) not later than 30 days after agreement is reached on the postponement. The notice must set out the consequences under subsection (5) if the conditions of the postponement are not complied with.

Criminal penalty: 100 penalty units.

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

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

- (5) A credit provider that is required to give notice under section 71 in relation to a postponement is not required to comply with subsection (3).
- (6) If any of the conditions of a postponement are not complied with, a credit provider is not required to give a further default notice under this Code to the debtor, mortgagor or guarantor with whom the postponement was negotiated before proceeding with enforcement proceedings.

**96 Postponement by court**

- (1) If the debtor, mortgagor or guarantor is unable to negotiate a postponement, the debtor, mortgagor or guarantor may apply to the court for a postponement.
- (2) The court may, after allowing the applicant, the credit provider and any debtor, mortgagor or guarantor concerned a reasonable

opportunity to be heard, order or refuse to order the postponement to which the application relates and may make such other orders as it thinks fit.

- (3) The court may, if it thinks it appropriate in the circumstances, stay any enforcement proceedings under the credit contract or mortgage until the application has been determined.

**97 Credit provider may apply for variation of postponement order**

- (1) A credit provider that is subject to an order under this Division may apply to the court for variation of the order.
- (2) On such an application, the court may vary the order to which the application relates as it thinks fit or may refuse to vary the order or may revoke the order.

## Division 4—Enforcement procedures for goods mortgaged

### 98 Information as to location of mortgaged goods

- (1) A credit provider may, by written notice to a mortgagor under a goods mortgage, require the mortgagor to inform the credit provider within 7 days where the mortgaged goods are and, if the mortgaged goods are not in the mortgagor's possession, to give the credit provider all information in the mortgagor's possession that might assist the credit provider to trace the goods.
- (2) A mortgagor who contravenes a notice under this section commits an offence.

Criminal penalty: 50 penalty units.

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

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

### 99 Entry to residential property to take possession of goods

- (1) A credit provider, or an agent of a credit provider, must not enter any part of premises used for residential purposes for the purpose of taking possession of mortgaged goods under a goods mortgage unless:
  - (a) the court has authorised the entry; or
  - (b) the occupier of the premises has, after being informed in writing of the provisions of this section, consented in writing to the entry.
- (2) The regulations may provide for procedures for the obtaining and giving of consent for the purposes of this section and may set out the circumstances in which consent is or is not taken to have been given.
- (3) If premises are entered in contravention of this section by a credit provider or an agent of a credit provider, the credit provider commits an offence.

Criminal penalty: 50 penalty units.

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

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

### **100 Court may order entry**

The court may, on the application of a credit provider that is entitled to take possession of mortgaged goods, authorise the credit provider to enter residential premises for the purpose of taking possession of mortgaged goods.

### **101 Order for possession**

- (1) The court may, on the application of a credit provider that is entitled to take possession of mortgaged goods, order a person who has possession of the goods to deliver them to the credit provider at a specified time or place or within a specified period.
- (2) The court may, on the application of a credit provider or other person required to deliver goods to a credit provider, by order vary the place at which or time or period within which goods must be delivered to the credit provider.
- (3) A person who contravenes an order under this section commits an offence.

Criminal penalty: 30 penalty units.

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

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

### **102 Procedures to be followed by credit provider after taking possession of goods**

*Notice to be given*

- (1) A credit provider that has taken possession of goods under a mortgage must, within 14 days after doing so, give the mortgagor a written notice containing the following matters:
- (a) the estimated value of the goods;

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- (b) the enforcement expenses incurred up to the date on which the goods were taken into the credit provider's possession and, if enforcement expenses are accruing while the goods remain in the credit provider's possession, the rate of accrual;
- (c) a statement of the mortgagor's rights and obligations in the form set out in the regulations.

*Goods not to be sold immediately*

- (2) A credit provider must not dispose of goods taken under the mortgage within 21 days after the date of the notice, unless the court authorises the credit provider to do so.

*Effect of proceedings*

- (3) If at the end of that 21 day period a stay of enforcement proceedings is in force under this Code or an application under section 76 has not been determined, the credit provider must not dispose of the goods until those proceedings have been determined and any period allowed for appeal has elapsed.

*Payment during notice period*

- (4) The credit provider must return the goods if:
  - (a) the amount in arrears (less any accelerated amount) and the credit provider's reasonable enforcement expenses are paid within that 21 day period and the debtor has not committed a further default of the same kind under the credit contract; or
  - (b) the credit contract is paid out.

*Offence*

- (5) A credit provider that contravenes this section commits an offence.

Criminal penalty: 50 penalty units.

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

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

### **103 Mortgagor may nominate purchaser of goods taken by credit provider**

- (1) The mortgagor may, within 21 days after the date of the notice given under section 102, nominate in writing a person who is prepared to purchase the goods from the credit provider at the estimated value or at any greater amount for which the credit provider has obtained a written offer to buy the goods.
- (2) The credit provider must offer to sell the goods to that person for the estimated value or, if there is a written offer to buy the goods for a greater amount, that amount.

Criminal penalty: 50 penalty units.

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

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

### **104 Sale of goods by credit provider**

- (1) The credit provider must, if payment is not made within 21 days after the date of the notice given under section 102 and that section does not prevent the sale, as soon as reasonably practicable (or at such time as the credit provider and mortgagor agree) sell the goods in accordance with section 103 or, if there is no nominated buyer or the nominated buyer under that section does not buy the goods, for the best price reasonably obtainable.
- (2) The credit provider must credit the mortgagor with a payment equivalent to the proceeds of the sale less any amounts which the credit provider is entitled to deduct from those proceeds. On the sale of the goods, the amount required to pay out the contract becomes due.
- (3) A credit provider that sells mortgaged goods must give the mortgagor a written notice stating the gross amount realised on the sale, the net proceeds of the sale, the amount required to pay out the credit contract or the amount due under the guarantee, any further recovery action proposed to be taken by the credit provider against the debtor and any other information required by the regulations.

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- (4) A credit provider that contravenes a requirement of this section commits an offence.

Criminal penalty: 50 penalty units.

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

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

**105 Matters for which account can be debited after mortgagee sale of goods**

A credit provider that sells mortgaged goods under section 104 is entitled to deduct from the proceeds of that sale only the following amounts:

- (a) the amount currently secured by the mortgage in relation to the credit contract, not being more than the amount required to discharge the contract;
- (b) the amount payable to discharge any prior mortgage to which the goods were subject;
- (c) the amounts payable in successive discharge of any subsequent mortgages to which the goods were subject and of which the credit provider had notice;
- (d) the credit provider's reasonable enforcement expenses.

**106 Compensation to mortgagor**

- (1) The court, on application by a mortgagor, may order a credit provider to credit the mortgagor with a payment, fixed by the court, exceeding the net proceeds of sale if it is not satisfied that the credit provider sold the goods as soon as reasonably practicable, or at a time agreed between the credit provider and the mortgagor, for the best price reasonably obtainable.
- (2) On application by a mortgagor, the mortgagee under any prior mortgage to which the goods are subject or the mortgagee under any subsequent mortgage of which the credit provider has notice, the court, if not satisfied that the credit provider exercised its power of sale in accordance with this Division, may make an order requiring the credit provider to compensate the mortgagor or the relevant mortgagee for any loss suffered as a result.



- (3) The onus of proving that a power of sale was exercised in accordance with this Division is on the credit provider that exercised it.

## **Division 5—Enforcement expenses**

### **107 Recovery of enforcement expenses**

- (1) A credit provider must not recover or seek to recover enforcement expenses from a debtor, mortgagor or guarantor in excess of those reasonably incurred by the credit provider. Enforcement expenses of a credit provider extend to those reasonably incurred by the use of the staff and facilities of the credit provider.

#### *Civil effect*

- (2) Any provision of the credit contract, mortgage or guarantee that appears to confer a greater right is void. If enforcement expenses are in fact recovered in excess of this limitation, they may be recovered back.
- (3) If there is a dispute between the credit provider and the debtor, mortgagor or guarantor about the amount of enforcement expenses that may be recovered by the credit provider, the court may, on application by any of the parties to the dispute, determine the amount of that liability.

## **Division 6—Mortgagor's remedies**

### **108 Mortgagor may apply to regain possession of mortgaged goods**

- (1) If a credit provider takes possession of mortgaged goods in contravention of Division 2 or Division 4, the court may, on the application of the mortgagor, order the credit provider, at the credit provider's expense, to return possession of the goods to the mortgagor.
- (2) An order may be made under subsection (1) even though the relevant default has not been remedied.
- (3) A person who contravenes an order under subsection (1) commits an offence.

Criminal penalty: 30 penalty units.

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

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

### **109 Order for possession for mortgagor**

- (1) The court may, when making an order under subsection 108(1), order a person who has possession of the goods to deliver them to the mortgagor at a specified time or place or within a specified period.
- (2) If the person is not the credit provider, the court may also order the credit provider to pay the person's costs of delivering the goods to the mortgagor.
- (3) The court may, on the application of a mortgagor or other person required to deliver goods to a mortgagor, by order vary the place at which or time or period within which goods must be delivered to the mortgagor.
- (4) A person who contravenes an order under this section commits an offence.

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Criminal penalty: 30 penalty units.

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

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

**110 Ancillary or consequential orders**

- (1) This section applies if the court makes an order under this Division.
- (2) The court may make ancillary or consequential orders it considers appropriate, including, for example, orders to restore the parties to the position they were in before the taking of possession in contravention of Division 2 or Division 4.
- (3) Without limiting subsection (2), the court may order that the mortgagor be paid compensation for any damage to the goods because of the taking of possession.

## **Part 6—Penalties for defaults of credit providers**

### **Division 1—Penalties for breach of key disclosure and other requirements**

#### **111 Key requirements**

- (1) For the purposes of this Division, a *key requirement* in connection with a credit contract (other than a continuing credit contract) is any one of the requirements of this Code contained in the following provisions:
  - (a) subsection 17(3);
  - (b) subsection 17(4);
  - (c) subsection 17(5);
  - (d) subsection 17(6);
  - (e) paragraphs 17(8)(a) and (b)—but only in respect of retained credit fees and charges;
  - (f) subsection 17(9);
  - (g) subsection 17(11);
  - (h) paragraphs 17(15)(a) and (b);
  - (i) subsection 23(1)—but only at the time the credit contract is entered into.
  
- (2) For the purposes of this Division, a *key requirement* in connection with a continuing credit contract is any one of the requirements of this Code contained in the following provisions:
  - (a) paragraph 17(3)(b);
  - (b) subsection 17(4);
  - (c) subsection 17(5);
  - (d) paragraphs 17(8)(a) and (b)—but only in respect of retained credit fees and charges;
  - (e) subsection 17(9);
  - (f) subsection 23(1);
  - (g) subsection 34(6);
  - (h) section 35.

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- (3) A key requirement relating to a disclosure or a statement of account extends to the requirements set out in Part 2 as to the manner in which the disclosure or statement is to be made, but does not extend to any requirements set out in the regulations.

**112 Application for order relating to key requirements**

- (1) A party to a credit contract or a guarantor or ASIC may apply to the court for an order under this Division.
- (2) A debtor or guarantor may not make an application for an order under this Division in respect of a contravention under a contract if the contravention under that contract is or has been subject to an application for an order made by the credit provider or ASIC anywhere in Australia under this Code.
- (3) Subsection (2) does not prevent an application from being made for an order for the payment of compensation under section 118.

**113 Penalty may be imposed for contravention of key requirement**

*Declaration as to key requirement*

- (1) The court must, on an application being made, by order declare whether or not the credit provider has contravened a key requirement in connection with the credit contract or contracts concerned.

*Penalty orders*

- (2) The court may make an order, in accordance with this Division, requiring the credit provider to pay an amount as a penalty, if it is of the opinion that the credit provider has contravened a key requirement.

*Prudential standing*

- (3) The court, in considering the imposition of a penalty, must have regard primarily to the prudential standing of any credit provider concerned, or of any subsidiary of the credit provider (within the meaning of the *Corporations Act 2001*), if the credit provider or

subsidiary takes deposits or is a borrowing corporation (within the meaning of that Act). However, the court is to have regard to that prudential standing only if the credit provider requests the court to do so.

*Other matters to be considered*

- (4) The court, in considering the imposition of a penalty, must have regard to the following:
- (a) the conduct of the credit provider and debtor before and after the credit contract was entered into;
  - (b) whether the contravention was deliberate or otherwise;
  - (c) the loss or other detriment (if any) suffered by the debtor as a result of the contravention;
  - (d) when the credit provider first became aware, or ought reasonably to have become aware, of the contravention;
  - (e) any systems or procedures of the credit provider to prevent or identify contraventions;
  - (f) whether the contravention could have been prevented by the credit provider;
  - (g) any action taken by the credit provider to remedy the contravention or compensate the debtor or to prevent further contraventions;
  - (h) the time taken to make the application and the nature of the application;
  - (i) any other matter the court considers relevant.

*Related contraventions*

- (5) The court must, for the purposes of determining an application for an order under this Division or the amount of a penalty, treat a contravention of a key requirement that occurs merely because of another contravention of a key requirement as being a contravention of the same kind. If a provision referred to in section 111 contains several requirements, the court must treat contraventions of more than one of those requirements as a single contravention of the one key requirement for the purposes of determining the amount of a penalty.

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*Suppression of publication of application*

- (6) The court may, if it thinks it appropriate in the circumstances, order that particulars of or any matters relating to an application for an order under this Division not be published.

**114 Penalty if application made by debtor or guarantor**

- (1) On application being made by a debtor or a guarantor for an order, the maximum penalty that may be imposed by the court for a contravention of a key requirement is an amount not exceeding the amount of:
- (a) except as provided by paragraphs (b) and (c)—all interest charges payable under the contract from the date it was made; or
  - (b) in the case of a contravention of a key requirement relating to a statement of account of a continuing credit contract—all interest charges payable under the contract for the period to which the statement of account relates; or
  - (c) in the case of a contravention of a key requirement relating to prohibited monetary obligations—all interest charges accruing under the contract from the date the contravention occurred.
- (2) The court may, however, impose a greater penalty if the debtor or guarantor satisfies the court that the debtor has suffered a loss. The amount of the penalty is to be not less than the amount of the loss.
- (3) For the purposes of paragraph (1)(a), the amount of future interest charges payable under a credit contract is to be calculated on the assumptions in sections 180 and 182.

**115 Payment of penalty to debtor or guarantor**

- (1) An amount of penalty ordered by the court to be paid on an application for an order made by a debtor or a guarantor may be set off by the debtor or guarantor against any amount that is due or becomes due to the credit provider under the credit contract. If there is no such amount, the amount of the penalty is a debt due by the credit provider to the debtor or guarantor.



- (2) The Consolidated Revenue Fund is appropriated for the purposes of:
- (a) a set-off; or
  - (b) a debt due;
- in relation to a penalty ordered under subsection (1). The *Financial Management and Accountability Act 1997* does not apply in relation to those amounts.
- (3) An order made on application by a debtor or a guarantor may include such directions as the court considers appropriate relating to the payment of the amount owed by the debtor or the credit provider as a result of the order.

### **116 Penalty if application made by a credit provider or ASIC**

On application being made by a credit provider or ASIC for an order, the maximum penalty that may be imposed by the court for a contravention of a key requirement relating to a contract affected by the application is an amount calculated so that the total penalty for all contraventions of the requirement in Australia (as disclosed by the credit provider) does not exceed \$500,000.

### **117 Payment of penalty**

An amount of penalty ordered by the court to be paid on an application for an order made by a credit provider or ASIC must be paid by the credit provider to ASIC on behalf of the Commonwealth.

### **118 Compensation for debtor or guarantor**

- (1) The court may, on application by a debtor or a guarantor, order that the credit provider pay to the debtor or guarantor an amount by way of compensation for loss arising from the contravention of a key requirement.
- (2) The court may only order an amount to be paid by way of compensation if the debtor or guarantor satisfies the court that the debtor or guarantor has suffered a loss arising from the

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contravention. The amount of compensation is not to exceed the amount of the loss.

- (3) The court may not make an order under this section if the debtor or guarantor has previously obtained or been refused a penalty referred to in section 115 relating to the same contravention.
- (4) An amount payable under this section does not affect the amount of penalty for the purposes of section 116.

**119 General provisions relating to applications by credit providers or ASIC**

- (1) An application for an order by a credit provider or ASIC:
  - (a) may apply to any one or more credit contracts; and
  - (b) may apply to all or any class of credit contracts entered into by the credit provider during a specified period (for example, all credit contracts entered into during a specified period which are affected by a specified contravention).
- (2) The court may require notice of any such application to be published by notice, in a form approved by the court, in a newspaper circulating throughout one or more States or Territories, as the court determines.
- (3) Notice of an application by a credit provider must be given by the credit provider to ASIC.

**120 ASIC may represent interests of debtors**

ASIC may apply to the court to become a party to an application under this Division and, if joined as a party, has standing to represent the public interest and the interests of debtors.

**121 Directions pending court's decision**

- (1) The court may, before disposing of an application by a debtor or guarantor for an order under this Division, make such directions as it considers appropriate to protect the interests of the debtor or guarantor concerned.

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- (2) Subject to any such directions of the court, the application does not prevent:
  - (a) any proceedings for the enforcement of the debtor's obligations (or the obligations of a guarantor) from being taken; or
  - (b) any rights over property the subject of a mortgage from being exercised.
- (3) For the purposes of this section, a reference to the disposal of an application includes a reference to its withdrawal by the applicant.
- (4) A credit provider affected by a direction of the court may apply to the court for variation of the direction. The court may, on such an application being made, vary or revoke the direction or refuse to vary or revoke the direction.

### **122 Offences**

Nothing in this Division affects the liability of a person for an offence against this Code or the regulations.

### **123 Time limit for application for orders under this Division**

- (1) Proceedings under this Division for a declaration of contravention and the imposition of a penalty for a contravention may not be brought after 6 years from the day the contravention happened.
- (2) Subsection (1) applies despite any Act relating to the limitation of time for commencing actions.
- (3) In this section:

***contravention*** means contravention of a key requirement.

## **Division 2—Other penalties**

### **124 Civil effect of other contraventions**

- (1) If a credit provider contravenes a requirement of or made under this Code (other than one for which a civil effect is specifically provided by Division 1 or by any other provision of this Code), the court may order the credit provider to make restitution or pay compensation to any person affected by the contravention and, in that event, may make any consequential order it considers appropriate in the circumstances.
- (2) An application for the exercise of the court's powers under this section may be made by ASIC or by any person affected by the contravention.

## **Part 7—Related sale contracts**

### **Division 1—Interpretation and application**

#### **125 Meaning of *sale contract***

For the purposes of this Code, a *sale contract* is a contract for any one or more of the following:

- (a) a contract for the sale of goods;
- (b) a contract for the supply of services.

#### **126 Sale contracts to which this Part applies**

This Part applies to or in respect of a sale contract or proposed sale contract only if the sale of the goods or supply of services concerned is financed, or is proposed to be financed, wholly or partly by the provision of credit to which this Code applies.

#### **127 Linked credit providers and tied credit contracts**

- (1) For the purposes of this Code, a *linked credit provider* of a supplier means a credit provider:
  - (a) with whom the supplier has a contract, arrangement or understanding relating to the supply to the supplier of goods in which the supplier deals, relating to the business carried on by the supplier of supplying goods or services or relating to the provision to persons to whom goods or services are supplied by the supplier of credit in respect of payment for those goods or services; or
  - (b) to whom the supplier, by arrangement with the credit provider, regularly refers persons for the purpose of obtaining credit; or
  - (c) whose forms of contract or forms of application or offers for credit are, by arrangement with the credit provider, made available to persons by the supplier; or

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- (d) with whom the supplier has a contract, arrangement or understanding under which contracts or applications or offers for credit from the credit provider may be signed by persons at the premises of the supplier.
- (2) For the purposes of this Code, a  *tied continuing credit*  contract is a continuing credit contract under which a credit provider provides credit in respect of the payment by a debtor for goods or services supplied by a supplier in relation to whom the credit provider is a linked credit provider.
- (3) For the purposes of this Code, a  *tied loan contract*  is a credit contract (other than a continuing credit contract) entered into between a credit provider and a debtor where:
  - (a) the credit provider knows or ought reasonably to know that the debtor enters into the credit contract wholly or partly for the purposes of payment for the goods or services supplied by a supplier; and
  - (b) at the time the credit contract is entered into the credit provider is a linked credit provider of the supplier.

**Division 2—Liability of credit providers for suppliers' misrepresentations**

**128 Credit provider liable with respect to supplier's misrepresentations etc. about tied credit contract**

- (1) If there is a tied loan contract or a tied continuing credit contract in respect of a sale contract, any representation, warranty or statement made (whether orally or in writing) by the supplier, or any person acting on behalf of the supplier, to the debtor in relation to the tied loan contract or tied continuing credit contract gives the debtor the same rights against the credit provider as the debtor would have had if it had been made by the credit provider.
- (2) Without prejudice to any other rights or remedies to which a credit provider may be entitled, a credit provider is entitled to be indemnified by the person who made the representation, warranty or statement, and any person on whose behalf it was made, against any damage suffered by the credit provider through the operation of this section.

### **Division 3—Liability of credit providers in relation to goods**

#### **129 Right to damages under sale contract against both supplier and linked credit provider (cf. section 73 of the *Trade Practices Act 1974*)**

##### *General right to damages*

- (1) If:
- (a) a supplier supplies goods, or causes goods to be supplied, to a linked credit provider of the supplier and a debtor enters into a contract with the linked credit provider for the provision of credit in respect of the supply by way of sale of the goods to the debtor; or
  - (b) a debtor enters into a contract with a linked credit provider of a supplier for the provision of credit in respect of the supply by the supplier of goods or services, or goods and services, to the debtor;

and the debtor suffers loss or damage as a result of misrepresentation, breach of contract, or failure of consideration in relation to the sale contract, the supplier and the linked credit provider are, subject to this Division, jointly and severally liable to the debtor for the amount of the loss or damage, and the debtor may recover that amount by action in accordance with this section in a court of competent jurisdiction.

##### *Credit provider's defences*

- (2) A linked credit provider of a particular supplier is not liable to a debtor by virtue of subsection (1) in proceedings arising under that subsection if the credit provider establishes:
- (a) that the credit provided by the credit provider to the debtor was the result of an approach made to the credit provider by the debtor that was not induced by the supplier; or
  - (b) if the proceedings relate to a contract of sale with respect to which a tied loan contract applies, that:



- (i) after due inquiry before becoming a linked credit provider of the supplier, the credit provider was satisfied that the reputation of the supplier in respect of the supplier's financial standing and business conduct was good; and
  - (ii) after becoming a linked credit provider of the supplier, but before the tied loan contract was entered into, the linked credit provider had not had cause to suspect that the debtor might, if the contract was entered into, be entitled to recover an amount of loss or damage suffered as a result of misrepresentation, breach of contract or failure of consideration in relation to the contract as referred to in subsection (1); and
  - (iii) after becoming a linked credit provider of the supplier, but before the tied loan contract was entered into, the credit provider had not had cause to suspect that the supplier might be unable to meet the supplier's liabilities as and when they fell due; or
- (c) if the proceedings relate to a contract of sale with respect to which a tied continuing credit contract entered into by the linked credit provider applies, that, having regard to:
- (i) the nature and volume of business carried on by the linked credit provider; and
  - (ii) such other matters as appear to be relevant in the circumstances of the case;

the linked credit provider, before becoming aware of the contract of sale, or of proposals for the making of the contract of sale (whichever the linked credit provider first became aware of), had not had cause to suspect that a person entering into such a contract with the supplier might be entitled to claim damages against, or recover a sum of money from, the supplier for misrepresentation, breach of contract or failure of consideration as referred to in subsection (1).

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**130 Limits on debtor's right of action against linked credit provider  
(cf. section 73 of the *Trade Practices Act 1974*)**

*Debtor may raise credit provider's liability*

- (1) Subject to subsection (2), in relation to a contract referred to in paragraph 129(1)(a) or (b), in which a credit provider claims damages or an amount of money from a debtor, the debtor may set up the liability of the credit provider under section 129 in diminution or extinction of the debtor's liability.

*Proceedings to be brought against both supplier and linked credit provider*

- (2) Subject to subsection (3), a debtor may not, in respect of a liability for which, by reason of section 129, a supplier and a linked credit provider are jointly and severally liable:
  - (a) bring proceedings to recover an amount of loss or damage from the credit provider; or
  - (b) where proceedings are brought against the debtor by the linked credit provider, make a counterclaim or exercise the right conferred by subsection (1) against the credit provider;unless the debtor brings the action against the supplier and the credit provider jointly or, in the case of a counterclaim or right conferred by subsection (1), claims in the proceedings against the supplier in respect of the liability by third-party proceedings or otherwise.

*When joint proceedings not required*

- (3) Subsection (2) and paragraphs (5)(a) and (6)(a) do not apply in relation to proceedings where:
  - (a) the supplier is insolvent, cannot be located after reasonable inquiry, or has died or been dissolved; or
  - (b) in the opinion of the court in which the proceedings are taken, it is not reasonably likely that a judgment obtained against the supplier would be satisfied and the court has, on the application of the debtor, declared that subsection (2) and paragraphs (5)(a) and (6)(a) do not apply in relation to the proceedings.

*Limit of credit provider's liability*

- (4) The liability of a linked credit provider to a debtor for damages or a sum of money in respect of a contract referred to in subsection 129(1) is not to exceed the sum of:
- (a) the amount of credit under the tied loan contract or tied continuing credit contract; and
  - (b) the amount of interest (if any) or damages in the nature of interest allowed or awarded against the linked credit provider by the court; and
  - (c) the amount of costs (if any) awarded by the court against the linked credit provider or supplier or both.

*Enforcement of judgment against linked credit provider*

- (5) Where in proceedings arising under section 129, judgment is given against a supplier and a linked credit provider, the judgment:
- (a) must not be enforced against the linked credit provider unless a written demand made on the supplier for satisfaction of the judgment has remained unsatisfied for not less than 30 days; and
  - (b) may be enforced against the linked credit provider only to the extent of the amount calculated in accordance with this section, or so much of the judgment debt as has not been satisfied by the supplier, whichever is the lesser.

*Enforcement of right against linked credit provider*

- (6) Where in proceedings in respect of the liability arising under section 129, a right conferred by subsection (1) is established against a linked credit provider, the debtor:
- (a) may not receive the benefit of the right unless judgment has been given against the supplier and linked credit provider, a written demand has been made on the supplier for satisfaction of the judgment and the demand has remained unsatisfied for not less than 30 days; and
  - (b) may receive the benefit only to the extent of the amount calculated in accordance with this section or so much of the judgment debt as has not been satisfied by the supplier, whichever is the lesser.

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**131 Liability of supplier to linked credit provider (cf. section 73 of the *Trade Practices Act 1974*)**

Unless the linked credit provider and supplier otherwise agree, the supplier is liable to the linked credit provider for the amount of a loss suffered by the linked credit provider, being an amount not exceeding the maximum amount of the linked credit provider's liability under subsection 130(4) and, unless the court otherwise determines, the amount of costs (if any) reasonably incurred by the linked credit provider in defending the proceedings by reason of which the liability was incurred.

**132 Interest may be awarded (cf. section 73 of the *Trade Practices Act 1974*)**

- (1) Despite any other law, where, in proceedings arising under section 129, judgment is given against a supplier and a linked credit provider or against a linked credit provider for an amount of loss or damage, the court in which the proceedings are taken must, on the application of the debtor, unless good cause is shown to the contrary, award interest to the debtor against the supplier and credit provider or against the credit provider, as the case may be, on the whole or a part of the amount from the time when the debtor became entitled to recover the amount until the date on which the judgment is given, at a rate prescribed by the regulations.
- (2) In determining whether good cause is shown against awarding interest under this section on the whole or part of an amount of loss or damage, the court is to take into account any payment made into court by the supplier or credit provider.

**133 Subrogation of credit provider (cf. section 73 of the *Trade Practices Act 1974*)**

If a judgment given in proceedings arising under section 129 is enforced against a linked credit provider of a particular supplier, the credit provider is subrogated to the extent of the judgment so enforced to any rights that the debtor would have had but for the judgment against the supplier or any other person in respect of the loss or damage suffered by the debtor as a result of the

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misrepresentation, breach of contract or failure of consideration in relation to the contract from which the liability arose.

## **Division 4—Termination of related transactions**

### **134 Termination of sale contract which is conditional on obtaining credit**

- (1) If a purchaser of goods or services makes it known to a supplier that credit is required in order to pay for the goods or services and the purchaser, after making reasonable endeavours to do so, fails to obtain credit on reasonable terms, the purchaser is entitled to terminate the sale contract.
- (2) A purchaser may terminate a sale contract under this section even though goods or services have already been supplied under the contract but, if practicable, goods supplied under the sale contract must be returned to the supplier.
- (3) If a sale contract is terminated under this section:
  - (a) the supplier is entitled to:
    - (i) reasonable compensation for damage to, or deterioration of, goods supplied under the sale contract (other than fair wear and tear) up to the date of their return to the supplier or, if they are not returned, the cash price of the goods; and
    - (ii) the reasonable value of the services supplied under the sale contract up to the date of termination; and
  - (b) the purchaser is entitled (subject to the supplier's entitlement referred to above) to the return of money paid under the sale contract.
- (4) This section does not apply to a sale contract for the supply of rights in relation to, and interests in, real property unless the supplier was aware that the purchaser intended to obtain the credit from the supplier or from a linked credit provider of the supplier.

**135 Termination of (or recredit under) tied credit contract if sale contract terminated**

- (1) If a sale contract is rescinded or discharged (whether under this Code or any other law) and there is a tied loan contract or a tied continuing credit contract made with the purchaser by a linked credit provider of the supplier under the sale contract, the debtor is entitled:
  - (a) in the case of a tied loan contract—to terminate the credit contract; or
  - (b) in the case of a tied continuing credit contract—to be credited with the amount of credit in relation to the sale contract and the interest charges attributable to that amount.
- (2) If a tied loan contract is terminated under this section, any related guarantee or mortgage is terminated to the extent to which it secures obligations under the contract or any related guarantee.
- (3) If a tied loan contract is terminated under this section, the credit provider is entitled to recover from the debtor any part of the amount of credit that has not been paid to the supplier and the debtor is entitled to recover from the credit provider any interest charges or other amounts paid by the debtor under the credit contract.
- (4) If a mortgage or guarantee is terminated under this section, the credit provider is entitled to recover from the mortgagor or guarantor any part of the amount of credit that has not been paid to the supplier and that is secured by the mortgage or guarantee, and the mortgagor or guarantor is entitled to recover from the credit provider any other amounts paid by the mortgagor or guarantor.
- (5) If a tied loan contract is terminated under this section, the credit provider is entitled to recover from the supplier (subject to any agreement between them) the amount of any loss suffered by the credit provider as a result of the operation of this section.
- (6) A supplier who knows that a sale contract referred to in subsection (1) has been rescinded or discharged must forthwith give the credit provider under any tied loan contract or tied continuing credit contract notice of the termination.

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Criminal penalty: 50 penalty units.

- (7) This section does not apply if the credit is provided as a result of an approach by the debtor that was not induced by the supplier or credit provider.
- (8) This section applies:
- (a) to the exercise by a purchaser of a right under this Code or any other law to rescind or discharge a sale contract; and
  - (b) to a tied loan contract or a tied continuing credit contract, but only if the sale contract was the principal purpose for which the credit was provided.

**136 Termination of linked maintenance services contract if credit contract terminated**

- (1) If:
- (a) there is a tied loan contract or a tied continuing credit contract made with the debtor by a linked credit provider of the supplier under a sale contract to supply maintenance services; and
  - (b) the tied loan contract or tied continuing credit contract is terminated (whether under this Code or any other law) before the end of the term of the sale contract;
- the debtor is entitled to terminate the sale contract to supply maintenance services and recover from the supplier a proportionate rebate of consideration paid under the sale contract.
- (2) In any such case, the credit provider must inform the debtor in accordance with the regulations of the debtor's rights under this section.

Criminal penalty: 50 penalty units.

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

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

- (4) The regulations may prescribe the manner of calculating the proportionate rebate of consideration for the purposes of this section.



- (5) This section does not apply if the credit is provided as a result of an approach by the debtor that was not induced by the supplier or credit provider.

**137 Termination of contract under this Part to be in writing**

An entitlement to terminate a sale contract or credit contract that is conferred by a provision of this Part may be exercised only by notice in writing to the other party to the contract.

**138 Powers of court with respect to termination of contract under this Part**

The court may, on the application of any interested party, make orders:

- (a) declaring whether a purported termination of a contract under this Part is valid; and
- (b) for the adjustment of rights following termination of a contract under this Part.

**139 Part 5 not to apply to termination of contract under this Part**

Part 5 does not apply to the termination of a contract under this Part.

## Division 5—Other provisions

### 140 Requirement as to source of credit for goods or services

- (1) A supplier must not require a purchaser of goods or services to apply for, or obtain, credit from a particular credit provider.

Criminal penalty: 100 penalty units.

- (2) Subsection (1) is an offence of strict liability.

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

### 141 Prohibition on payment for goods or services by postdated bills of exchange or notes which exceed cash price of goods or services

- (1) A supplier must not demand or accept payment from the purchaser for goods or services supplied under a sale contract in the form of a postdated bill of exchange or promissory note given by the purchaser if the face value of the bill or note exceeds the cash price of the goods or services.

Criminal penalty: 100 penalty units.

- (2) Subsection (1) does not apply unless the postponement of the debt to the supplier constitutes a provision of credit to which this Code applies.

- (3) Subsection (1) is an offence of strict liability.

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

## **Part 8—Related insurance contracts**

### **142 Interpretation and application**

- (1) For the purposes of this Code, a *credit-related insurance contract* is a contract for insurance of any of the following kinds in connection with a credit contract:
  - (a) insurance over mortgaged property;
  - (b) consumer credit insurance;
  - (c) insurance of a nature prescribed for the purposes of this section by the regulations.
- (2) This Code does not apply to insurance over mortgaged property that:
  - (a) is insurance for an extended period of warranty for goods; or
  - (b) is insurance over property that is not mortgaged to secure obligations under the credit contract.
- (3) This Code does not apply to consumer credit insurance in connection with a credit contract unless the contract for consumer credit insurance insures the obligations of the debtor under the credit contract.

### **143 Requirement to take out insurance or to insure with particular insurer or on particular terms**

- (1) A credit provider or a supplier must not:
  - (a) require a debtor or guarantor to take out insurance or to pay the cost of insurance taken out or arranged by the credit provider or supplier; or
  - (b) represent to a debtor or guarantor that the debtor or guarantor is required to pay the cost of any such insurance;unless the insurance is compulsory insurance, mortgage indemnity insurance, insurance over mortgaged property or insurance of a nature and extent approved for the purposes of this section by the regulations.

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Criminal penalty: 100 penalty units.

- (2) A credit provider or a supplier must not, in connection with a credit contract or a sale contract in relation to which there is a tied loan contract or a tied continuing credit contract:
- (a) require a debtor or guarantor to take out insurance with a particular insurer (unless the insurer is the only insurer providing insurance of the relevant kind or the requirement is exempted from the operation of this section by the regulations); or
  - (b) make any unreasonable requirement as to the terms on which the debtor or guarantor is to take out insurance.

Criminal penalty: 100 penalty units.

- (3) Subsections (1) and (2) are offences of strict liability.

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

*Civil effect*

- (4) If the credit provider or supplier contravenes this section, the insured is entitled to recover the whole of the premium paid under the contract from the credit provider or supplier, as the case requires.

**144 Financing of insurance premiums over mortgaged property**

- (1) A credit provider must not knowingly provide credit to the debtor to pay the premium or finance the premium on insurance taken out by the debtor over mortgaged property for a period of insurance exceeding 1 year, but may provide credit for or finance successive premiums for periods of 1 year or less.

Criminal penalty: 100 penalty units.

- (2) The credit provider must not knowingly debit the premium to the debtor's account more than 30 days before the beginning of the period of insurance to which it relates.

Criminal penalty: 100 penalty units.

*Civil effect*

- (3) If a credit provider contravenes subsection (1), the insured is entitled to recover the whole of the premium paid under the contract from the credit provider. If a credit provider contravenes subsection (2), the insured is entitled to recover the amount of premium debited in contravention of the subsection.

**145 Commission for consumer credit insurance**

- (1) This section applies to commission paid by an insurer in connection with consumer credit insurance taken out by the debtor, or for which an amount is paid by the debtor.
- (2) The total of any such commission accepted by all or any of the following:
- (a) the credit provider;
  - (b) the supplier under a sale contract in relation to which there is a tied loan contract or a tied continuing credit contract;
  - (c) the agent of the credit provider or supplier;
- must not exceed, in amount or value, 20% of the premium (excluding government charges).
- (3) A credit provider or any such supplier or agent must not accept, and an insurer must not pay, a commission exceeding, in amount or value, the maximum allowed under this section.

Criminal penalty: 100 penalty units.

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

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

*Civil effect*

- (5) If a credit provider or supplier contravenes this section, the insured is entitled to recover the whole amount or value of the commission from the credit provider or the supplier, as the case requires.

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**146 Supply of copy of credit-related insurance contract by insurer**

- (1) If the premium under a credit-related insurance contract is financed under the credit contract, the insurer must ensure that a copy of the policy of insurance is given to the debtor within 14 days after acceptance of the insurance proposal by the insurer.

Criminal penalty: 100 penalty units.

- (2) In the case of any such contract of insurance entered into by the credit provider in which the debtor has a beneficial interest, the credit provider must ensure that a written notice containing particulars of the insurance prescribed by the regulations is given to the debtor within 14 days after the beneficial interest is acquired by the debtor.

Criminal penalty: 100 penalty units.

- (3) Subsections (1) and (2) do not apply to compulsory insurance.

- (4) Subsections (1) and (2) are offences of strict liability.

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

**147 Rejection of debtor's proposal for insurance**

- (1) If a credit provider proposes to finance the amount payable by the debtor under or in connection with a credit-related insurance contract and the proposal for insurance is rejected by an insurer, the insurer must inform the debtor and the credit provider of its rejection.

- (2) Unless the insurance is to be arranged with another insurer, the credit provider must ensure that any amount paid by the debtor is refunded or credited in full.

Criminal penalty: 100 penalty units.

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

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

- (4) The credit provider may, in turn, recover the amount paid to the debtor from the insurer, if an amount has been paid to the insurer

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by the debtor under or in connection with the proposed insurance contract.

**148 Termination of consumer credit insurance contract if credit contract terminated**

- (1) On termination of a credit contract, any relevant credit-related insurance contract financed under the credit contract for consumer credit insurance in force is also terminated.
- (2) If a credit contract is terminated, the credit provider is required to pay the debtor or credit the debtor with a proportionate rebate of premium paid under any relevant credit-related insurance contract for consumer credit insurance in force immediately before the credit contract is terminated.
- (3) The credit provider may, in turn, recover the amount paid to the debtor from the insurer.
- (4) The regulations may prescribe the manner of calculating the proportionate rebate of premium for the purposes of this section, including the rebate payable where this section does not apply to the whole of a credit-related insurance contract.
- (5) This section has effect despite any provision of the credit-related insurance contract.
- (6) This section does not apply to a credit-related insurance contract, to the extent that it provides a benefit in the event of the death of the debtor, if a credit contract is terminated on the death of a debtor. However, it does apply to the credit-related insurance contract to the extent that it provides other benefits.

**149 Termination of insurance contract over mortgaged property if credit contract terminated**

- (1) If a credit contract is terminated before the end of the term of a credit-related insurance contract over mortgaged property financed under the credit contract or before any such insurance contract is otherwise terminated, the debtor is entitled to terminate the

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insurance contract and recover from the insurer a proportionate rebate of premium paid under the insurance contract.

- (2) On the termination of the credit contract, the credit provider must inform the debtor in accordance with the regulations of the debtor's rights under this section.

Criminal penalty: 50 penalty units.

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

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

- (4) The regulations may prescribe the manner of calculating the proportionate rebate of premium for the purposes of this section.
- (5) An entitlement under this section to terminate an insurance contract may be exercised only by notice in writing to the insurer.
- (6) This section has effect despite any provision of the credit-related insurance contract.



## **Part 9—Advertising and related conduct**

### **150 Advertising**

#### *General principle*

- (1) A person must not publish, or cause to be published, an advertisement that states or implies that credit is available unless the advertisement complies with:
  - (a) this section; and
  - (b) if, under Part 10, the comparison rate is included—Division 2 of that Part.

Criminal penalty: 100 penalty units.

#### *Regulations*

- (2) The advertisement must not contain a statement of a kind prohibited by the regulations. It must contain any statement required by the regulations.

#### *Annual percentage rate*

- (3) The advertisement need not contain an annual percentage rate, but must do so if the advertisement states the amount of any repayment. If the advertisement contains an annual percentage rate and credit fees and charges are payable, the advertisement must:
  - (a) state that fees and charges are payable; or
  - (b) specify the amount of the fees and charges payable; or
  - (c) specify the amount of some of the fees and charges payable and state that other fees and charges are payable.

#### *Civil effect*

- (4) A person who suffers loss as a result of a contravention by another person of this section may recover the amount of the loss against that other person or any other person involved in the contravention.

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### **151 Persons liable for advertisements**

- (1) A person is, in the absence of proof to the contrary, taken to have caused an advertisement to be published if:
  - (a) the person provides credit, owns or has an interest in any goods, or supplies or has an interest in the supply of any goods or services, which the advertisement promotes; and
  - (b) the advertisement specifies the name, business name, address, telephone number, facsimile number or post office box number of the person or the person's agent.
- (2) It is a defence to a charge under section 150 of causing an advertisement that does not comply with that section to be published if the person charged proves that he or she could not, by the exercise of reasonable care, have prevented the noncompliance to which the offence relates.

### **152 Defence**

A printer, publisher or proprietor of a newspaper, a licensee of a commercial broadcasting or television station, an exhibitor of a film, or a person acting with the authority of any of them, does not commit an offence under section 150 unless he or she suspected, or had reason to suspect, that publishing the advertisement would constitute an offence.

### **153 Interest rates which may be disclosed**

- (1) A person must not disclose an interest rate:
  - (a) in an advertisement that states or implies that credit is available; or
  - (b) to a debtor before the debtor enters into a credit contract; unless the interest rate is expressed as a nominal percentage rate per annum or is the comparison rate calculated as prescribed by the regulations and accompanied by the warnings set out in the regulations.

Criminal penalty: 100 penalty units.
- (2) Subsection (1) is an offence of strict liability.

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

### **154 False or misleading representations**

- (1) A person must not make a false or misleading representation in relation to a matter that is material to entry into a credit contract or a related transaction or in attempting to induce another person to enter into a credit contract or related transaction.

Criminal penalty: 50 penalty units.

- (2) It is a defence to prosecution for an offence against this section if a person charged proves that he or she reasonably believed that the representation was not false or misleading.

*Civil effect*

- (3) A person who suffers loss as a result of a contravention by another person of this section may recover the amount of the loss from that other person or any other person involved in the contravention.

### **155 Harassment**

A credit provider or supplier must not harass a person in attempting to get that person to apply for credit or to enter into a credit contract or a related transaction.

Criminal penalty: 100 penalty units.

### **156 Canvassing of credit at home**

- (1) A credit provider must not visit (personally or in the person of an employee or agent) a place of residence for the purpose of inducing a person who resides there to apply for or obtain credit, except by prior arrangement by the credit provider with a person who resides there.

Criminal penalty: 100 penalty units.

- (2) A person who visits another's residence for the purpose of offering goods or services for sale and who offers to provide or arrange for the provision of credit to finance the sale will not be taken to have

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called for the purpose of inducing a person to apply for or obtain credit.

## **Part 10—Comparison rates**

### **Division 1—Preliminary**

#### **157 Object of Part**

- (1) The object of this Part is to assist consumers to identify the true cost of credit offered by credit providers.
- (2) In order to achieve that object, this Part makes it mandatory for credit providers to include the comparison rate in advertisements for consumer credit (other than under continuing credit contracts) if an interest rate is advertised.
- (3) The comparison rate will reflect the total cost of credit arising from interest charges and other prescribed credit fees and charges.

#### **158 Part not to apply to continuing credit contracts**

- (1) This Part does not apply to advertising or other matters about the provision of credit under continuing credit contracts.
- (2) Accordingly, a reference in this Part to the provision of credit (or to a credit contract or related matters) does not include a reference to the provision of credit under a continuing credit contract (or to a continuing credit contract or matters related to such a contract).

#### **159 Definitions**

In this Part:

***consumer credit product*** means any form of facility for the provision of credit (other than under a continuing credit contract) provided to debtors by a credit provider.

***credit advertisement*** means an advertisement in any form or medium that states or implies that credit is available, but (for the avoidance of doubt) does not include:

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- (a) notices or other documents required or authorised to be given under this Code; or
- (b) a publication that only lists reference rates.

***name***, of a consumer credit product, means the usual name or description by which the credit provider describes or advertises the product.

## **Division 2—Comparison rate in credit advertising**

### **160 Comparison rate mandatory in advertisements containing annual percentage rate**

- (1) A credit advertisement must contain the relevant comparison rate in accordance with this Part if it contains an annual percentage rate.
- (2) A credit advertisement may contain the relevant comparison rate in accordance with this Part even if it does not contain an annual percentage rate.

Note: Section 150(1) makes it an offence (penalty—100 penalty units) if a person publishes a credit advertisement that does not comply with this Division.

### **161 The relevant comparison rate**

- (1) The relevant comparison rate for the purposes of section 160 is the comparison rate calculated for whichever of the designated amounts and terms most closely represents the typical amount of credit and term initially provided by the credit provider for the consumer credit product being advertised.
- (2) The designated amounts and terms are the amounts and terms prescribed by a regulation for the purposes of this section.
- (3) The credit advertisement may contain more than one relevant comparison rate.

### **162 Information about comparison rate**

- (1) The credit advertisement must clearly state the name of the consumer credit product, the amount of credit and the term to which each comparison rate applies.
- (2) If the comparison rate is calculated for an amount of credit prescribed by a regulation for the purposes of this subsection, the credit advertisement must clearly state:

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- (a) that the comparison rate is for a secured loan if it has been calculated on the basis that a mortgage or guarantee is taken by the credit provider; or
- (b) that the comparison rate is for an unsecured loan if it has not been so calculated.

The word “secured” or “unsecured” in connection with the amount of credit for which the comparison rate is calculated is a sufficient description for the purposes of this subsection.

**163 Warning about comparison rate**

- (1) A comparison rate in a credit advertisement must be accompanied by a warning about the accuracy of the comparison rate that is prescribed by a regulation.
- (2) The warning may be given in conjunction with the basis on which the comparison rate is calculated, that is, that the comparison rate is accurate only for the specified amount of credit and specified term.

**164 Other requirements for comparison rate**

- (1) A comparison rate in any credit advertisement must be identified as a comparison rate.
- (2) A comparison rate in any credit advertisement must not be less prominent than:
  - (a) any annual percentage rate stated in the advertisement; and
  - (b) the amount of any repayment stated in the advertisement.
- (3) The following applies to credit advertisements on television, the internet or other electronic display medium:
  - (a) if the annual percentage rate is in spoken form and not displayed on the screen in text, the comparison rate must also be in spoken form;
  - (b) if the annual percentage rate is displayed on the screen in text, the comparison rate must also be displayed on the screen in text and may be in spoken form;



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- (c) if the comparison rate is in spoken form, the warning and other information may be either in spoken form or displayed on the screen in text;
- (d) if the comparison rate is displayed on the screen in text, the warning and other information must also be displayed on the screen in text.

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### **Division 3—Comparison rate in other documents**

#### **165 Comparison rates in documents other than credit advertising**

If a document, other than a credit advertisement, contains a comparison rate, Division 2 applies (with necessary changes) in relation to the comparison rate as if it were in a credit advertisement.

## **Division 4—Miscellaneous**

### **166 Calculation of comparison rates**

- (1) A regulation may make provision about the way in which comparison rates are to be calculated for the purposes of this Part.
- (2) For the purposes of calculating the relevant comparison rate, credit fees or charges are not ascertainable and need not be included in the calculation if their imposition or amount is dependent on events that may or may not happen (unless a regulation under this section otherwise provides).

### **167 Compliance grace period following changes in interest or fees**

A credit advertisement does not cease to comply with this Part merely because of a change in the annual percentage rate or in any credit fees or charges during the period of 7 days after the change takes effect.

### **168 Regulations—exemptions and other matters**

A regulation may make provision about the following:

- (a) exempting any class of persons or matters from the operation of any provision of this Part;
- (b) requirements with which a credit advertisement containing a comparison rate must comply.

## Part 11—Consumer leases

### Division 1—Interpretation and application

#### 169 Meaning of *consumer lease*

For the purposes of this Code, a *consumer lease* is a contract for the hire of goods by a natural person or strata corporation under which that person or corporation does not have a right or obligation to purchase the goods.

#### 170 Consumer leases to which this Part applies

- (1) This Part applies to a consumer lease if, when the lease is entered into:
  - (a) the goods are hired wholly or predominantly for personal, domestic or household purposes; and
  - (b) a charge is or may be made for hiring the goods and the charge together with any other amount payable under the consumer lease exceeds the cash price of the goods; and
  - (c) the lessor hires the goods in the course of a business of hiring goods carried on in this jurisdiction or as part of or incidentally to any other business of the lessor carried on in this jurisdiction.
- (2) If this Part applies to a consumer lease:
  - (a) this Part applies to all transactions or acts under the lease whether or not they take place in this jurisdiction; and
  - (b) this Part continues to apply even though the lessee ceases to carry on a business in this jurisdiction.
- (3) For the purposes of this section, the amount payable under a consumer lease includes any agreed or residual value of the goods at the end of the lease or on termination of the lease by the lessor or lessee, but does not include:
  - (a) any amount payable for services that are incidental to the hire of the goods under the lease; or

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- (b) any amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the lessee at the earliest opportunity.
- (4) For the purposes of this section, the predominant purpose for which goods are hired is:
  - (a) the purpose for which more than one half of the goods are intended to be used; or
  - (b) if the same goods are intended to be used for different purposes, the purpose for which the goods are intended to be most used.

**171 Consumer leases to which this Part does not apply**

*Short term or indefinite leases*

- (1) This Part does not apply to a consumer lease for a fixed period of 4 months or less or for an indefinite period.

*Employment-related leases*

- (2) This Part does not apply to a consumer lease under which goods are hired by an employee in connection with the employee's remuneration or other employment benefits.

*Regulations may exclude leases*

- (3) The regulations may exclude from the application of this Part consumer leases of a class specified in the regulations.

*ASIC may exclude leases*

- (4) ASIC may exclude, from the application of this Part, a consumer lease specified by ASIC.
- (5) An exemption under subsection (4) is not a legislative instrument.
- (6) ASIC may, by legislative instrument, exclude from the application of this Part, consumer leases of a class specified in the instrument.

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**172 Presumptions relating to application of this Part**

- (1) In any proceedings (whether brought under this Code or not) in which a party claims that a lease is a consumer lease to which this Part applies, it is presumed to be such unless the contrary is established.
- (2) It is presumed for the purposes of this Code that goods hired under a lease are not hired wholly or predominantly for personal, domestic or household purposes if the lessee declares, before entering the lease, that the goods are hired wholly or predominantly for business purposes, unless the contrary is established.
- (3) However, the declaration is ineffective if, when the declaration was made, the lessor or a person (the *prescribed person*) of a kind prescribed by the regulations:
  - (a) knew, or had reason to believe; or
  - (b) would have known, or had reason to believe, if the lessor or prescribed person had made reasonable inquiries about the purpose for which the goods were hired;that the goods were in fact hired wholly or predominantly for personal, domestic or household purposes.
- (4) If the declaration is ineffective under subsection (3), paragraph 170(1)(a) is taken to be satisfied in relation to the lease.
- (5) A declaration under this section is to be substantially in the form (if any) required by the regulations and is ineffective for the purposes of this section if it is not.
- (6) A person commits an offence if:
  - (a) the person engages in conduct; and
  - (b) the conduct induces a debtor to make a declaration under this section that is false or misleading in a material particular; and
  - (c) the declaration is false or misleading in a material particular.Criminal penalty: 100 penalty units, or 2 years imprisonment, or both.
- (7) Strict liability applies to paragraph (6)(c).

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

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**Division 2—Form of and information to be included in consumer leases**

**173 Form of consumer lease**

- (1) A consumer lease must be in the form of a written lease document signed by the lessee and containing the information required by this Division.
- (2) The regulations may make provision for or with respect to the form of consumer leases and the way they are expressed.
- (3) A lessor must not enter into a consumer lease that contravenes a requirement of this section or regulations made under this section.

Criminal penalty: 100 penalty units.

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

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

**174 Disclosures in consumer leases**

- (1) A consumer lease must contain the following matters, if ascertainable:
  - (a) a description or identification of the goods hired under the lease;
  - (b) the amount or value of any consideration to be paid or provided by the lessee before the delivery of those goods;
  - (c) the amount of any stamp duty or other government charge (other than on receipts or withdrawals) payable by the lessee in respect of the lease;
  - (d) the amount of any other charges not included in the rental payable under the lease, and a description of those charges;
  - (e) the amount of each rental payment to be made by the lessee under the lease, the date on which the first rental payment is due and either the dates on which subsequent rental payments are due or the interval between rental payments;



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- (f) the number of rental payments to be made by the lessee, and the total amount of rental payable under the lease;
  - (g) a statement of the conditions on which the lessee may terminate the lease;
  - (h) a statement of the liabilities (if any) of the lessee on termination of the lease.
- (2) A consumer lease is taken to comply with this section despite any omission or other error if the court is satisfied that the omission or error is not of such a nature as to mislead the lessee to his or her disadvantage.
- (3) A lessor must not enter into a consumer lease that contravenes a requirement of this section.

Criminal penalty: 100 penalty units.

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

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

### **175 Copy of lease etc. for lessee**

- (1) A lessor must, within 14 days after entering into a consumer lease, give to the lessee a copy of the consumer lease, together with a statement in the form prescribed by the regulations explaining the rights and obligations of a lessee.

Criminal penalty: 50 penalty units.

- (2) Subsection (1) does not apply if the lessor has previously given the lessee a copy of the consumer lease to keep.
- (3) Subsection (1) is an offence of strict liability.

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

- (4) Section 194 applies to this section as if references in that section to the credit provider were references to the lessor or a lease broker and as if references in that section to the debtor were references to the lessee.

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**Division 2** Form of and information to be included in consumer leases

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**176 Further goods and deferrals or waivers under consumer leases**

The provision of further goods under a consumer lease or a change in a consumer lease as a result of a deferral or waiver of payment of an amount payable under a consumer lease is not to be treated as creating a new consumer lease for the purposes of this Part or as creating a credit contract, if the provision of the further goods or the deferral or waiver is permitted by this Code or the consumer lease.

## **Division 3—Other provisions applicable to consumer leases**

### **177 Application of certain Code provisions to consumer leases**

- (1) The following provisions of this Code apply in relation to a consumer lease in the same way as they apply in relation to credit contracts:
  - (a) Division 3 of Part 4 (relating to changes to contracts on the grounds of hardship and unjust transactions), other than section 78;
  - (b) sections 98 to 101 (relating to information as to mortgaged goods, entry to residential property to take possession of goods and orders by the court for entry and possession);
  - (c) Part 12 (relating to miscellaneous matters).
- (2) For the purposes of the application of those provisions:
  - (a) references to a credit provider are to be read as references to a lessor; and
  - (b) references to a debtor are to be read as references to a lessee; and
  - (c) references to a credit contract or contract are to be read as references to a consumer lease; and
  - (d) references to mortgaged goods are to be read as references to goods hired under a consumer lease.
- (3) For the purposes of the application of Division 3 of Part 4, the words “(without a change being made to the annual percentage rate or rates)” are taken to be omitted from section 72 wherever occurring.

### **178 Notice of repossession**

- (1) A lessor must not exercise any right under a consumer lease to take possession of goods subject to the lease unless the lessor has given the lessee 30 days’ written notice of the lessor’s intention to do so.

Criminal penalty: 50 penalty units.

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- (2) However, the lessor is not required to give the notice in accordance with this section if:
- (a) the right arises under a lease granted for a fixed term at the end of that term; or
  - (b) the lessor believes on reasonable grounds that the lessee has disposed of goods hired under the lease, or intends to dispose of such goods, contrary to the terms of the lease; or
  - (c) the lessor has made reasonable attempts to locate the lessee but without success; or
  - (d) the lessee is insolvent; or
  - (e) the court authorises the lessor to do so.
- (3) Subsection (1) is an offence of strict liability.

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

**179 Termination of lease**

- (1) A lessee may, at any time before the end of a consumer lease, end the lease by returning the goods hired under the lease to the lessor during ordinary business hours or at such other time as may be agreed with the lessor or fixed by the court on the application of the lessee.
- (2) The amount payable by a lessee on the termination of a consumer lease under this section before the end of its fixed term is:
- (a) the amount payable under the lease on such a termination; or
  - (b) the amount determined in accordance with the principles (if any) set out in the regulations for the purposes of this section; whichever is the lesser.

## **Part 12—Miscellaneous**

### **Division 1—Tolerances and assumptions**

#### **180 Tolerances and assumptions relating to information**

##### *Disclosures generally*

- (1) Information disclosed in a precontractual statement, contract document, mortgage document or guarantee, statement, notice or consumer lease, or otherwise disclosed for the purposes of this Code, is taken to be correctly disclosed if:
  - (a) it is within tolerances allowed by the regulations; and
  - (b) the disclosure is made as at a date stated in it.

##### *Disclosure of interest charges*

- (2) Disclosures for the purposes of this Code relating to interest charges may be made on the following assumptions (and such other assumptions under this section as are applicable):
  - (a) that, in the case of an annual percentage rate or default rate, there will be no variation in the rate as disclosed over the whole term of the contract or any shorter term for which it applies;
  - (b) if a change to a variable rate is provided for by the contract, that the variable rate applicable over the term for which it applies is the same as the equivalent variable rate as at the date disclosure is made;
  - (c) that the debtor will make the repayments required by the contract at the times required by the contract.

##### *Disclosure of repayments*

- (3) Disclosures for the purposes of this Code relating to repayments may be made on the assumption that the debtor will pay the repayments required by the contract at the times required by the

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contract and on such other assumptions under this section as are applicable.

### *Disclosures of credit fees and charges*

- (4) Disclosures relating to credit fees and charges for the purposes of this Code may be made on the following assumptions (and on such other assumptions under this section as are applicable):
- (a) that there will be no change in the credit fees and charges as so disclosed and no new fees or charges imposed;
  - (b) that the debtor will pay the fees and charges required by the contract at the times required by the contract.

### *Disclosures in consumer leases*

- (5) Disclosures for the purposes of this Code relating to consideration, charges and payments in a consumer lease may be made on the assumptions that there will be no change in the matters disclosed and no new charges imposed.

### *When information is ascertainable*

- (6) Information required to be disclosed for the purposes of this Code, which is not otherwise ascertainable, is taken to be ascertainable if it is ascertainable, as at the date the disclosure is made, on the basis of assumptions set out in this section or in the regulations.

### *Disclosure of names*

- (7) Information disclosed for the purposes of this Code as to a name is taken to be correctly disclosed if the information is sufficient to identify the person concerned.

## **181 Tolerances relating to contracts and other documents**

An amount of interest, a fee or charge or any other amount charged, payable or calculated under or in connection with a credit contract, mortgage, guarantee or consumer lease is, for the purposes of this Code, taken to comply with this Code if the amount is within tolerances allowed by the regulations.

## **182 Regulations**

The regulations may vary an assumption set out in this Division and may provide for additional assumptions.

## **Division 2—Documentary provisions**

### **183 Form of notices**

- (1) The regulations may prescribe the form of any notices required or authorised to be given under this Code and may require such notices to contain specified information.
- (2) A notice required to be given by a mortgagee under this Code may include information required to be given in the same situation under an Act, and the notice may be included in any notice given under that Act.
- (3) A notice required or authorised to be given under this Code is to be in writing unless this Code or the regulations otherwise provide.

### **184 Legibility and language**

- (1) A credit contract, mortgage or guarantee or a notice given by a credit provider under this Code, other than a document transmitted by electronic communication:
  - (a) must be easily legible; and
  - (b) to the extent that it is printed or typed must conform with the provisions of the regulations as to print or type; and
  - (c) must be clearly expressed.
- (2) A credit contract, mortgage or guarantee or a notice given by a credit provider under this Code, if transmitted by electronic communication:
  - (a) must be easily legible; and
  - (b) must conform with the provisions of the regulations, if any, as to content, legibility and accompanying information; and
  - (c) must be clearly expressed.
- (3) If the court is satisfied, on application by ASIC, that a provision of a credit contract, mortgage or guarantee or a notice given by a credit provider under this Code does not comply with the requirements of this section, it may prohibit the credit provider



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from using a provision in the same or similar terms in future credit contracts, mortgages or guarantees or notices.

- (4) A credit provider that contravenes a prohibition imposed under subsection (3) commits an offence.

Criminal penalty (subsection (4)): 100 penalty units.

**185 Copies of contracts and other documents**

- (1) A credit provider must in accordance with this section, at the written request of a debtor, mortgagor or guarantor, provide to the debtor, mortgagor or guarantor a copy of:
- (a) the credit contract, mortgage or guarantee; or
  - (b) any credit-related insurance contract in the credit provider's possession; or
  - (c) a notice previously given to the debtor, mortgagor or guarantor under this Code.

Criminal penalty: 30 penalty units.

- (2) The copy must be provided:
- (a) within 14 days, if the original came into existence one year or less before the request is given; or
  - (b) within 30 days, if the original came into existence more than one year before the request is given.

Note: Section 196 provides for the date on which notice is taken to be given.

- (3) A credit provider must provide a copy of a notice which requires a debtor, mortgagor or guarantor to take action if requested in accordance with subsection (1) even though the contract has been discharged or terminated but only if the request is made within 2 years of the discharge or termination.

Criminal penalty: 30 penalty units.

- (4) Subsections (1) and (3) are offences of strict liability.

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

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**186 Signing of documents**

- (1) It is sufficient compliance with a requirement under this Code that a document be signed by a person if the person's signature is written on the document by another person by or under the authority of the person required to sign.
- (2) This section has effect subject to section 199 (Conduct of agents and related matters).

**187 Electronic transactions and documents**

- (1) Without limiting the provisions of this Code, it is declared that any contract, mortgage or guarantee referred to in this Code may be made in accordance with the *Electronic Transactions Act 1999*.
- (2) Without limiting the provisions of this Code, it is declared that any requirement or permission by or under this Code, however expressed:
  - (a) to give information in writing; or
  - (b) to provide a signature; or
  - (c) to produce a document; or
  - (d) to record information in writing; or
  - (e) to retain a document;

may be met in accordance with the *Electronic Transactions Act 1999*.

Example: Giving information would include the requirement under subsection 36(1) to provide a statement of amount owing.

Note 1: Subsection 9(5) of the *Electronic Transactions Act 1999* has a definition relating to the giving of information. That definition provides, generally, that giving information includes, but is not limited to, the following:

- (a) making an application;
- (b) making or lodging a claim;
- (c) giving, sending or serving a notification;
- (d) lodging a return;
- (e) making a request;
- (f) making a declaration;
- (g) lodging or issuing a certificate;
- (h) making, varying or cancelling an election;
- (i) lodging an objection;

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(j) giving a statement of reasons.

Note 2: See regulations made under the *Electronic Transactions Act 1999* for exemptions relating to electronic transactions.

## **Division 3—General provisions**

### **188 Assignment by credit provider**

- (1) If the rights of a credit provider under a credit contract, mortgage or guarantee are assigned or pass by law to another person, this Code from then on applies to that other person and does not impose any further obligation on the credit provider.
- (2) The debtor, mortgagor or guarantor has and may exercise the same rights in respect of the credit contract, mortgage or guarantee against the assignee as the debtor, mortgagor or guarantor has against the credit provider.
- (3) Subsection (1) does not apply while the credit provider continues to receive payments from the debtor, or would continue to do so if the debtor complied with the credit contract.

### **189 Assignment by debtor, mortgagor or guarantor**

- (1) If the rights of a debtor, mortgagor or guarantor under a credit contract, mortgage or guarantee are assigned or pass by law to another person, this Code from then on applies to that other person and does not confer any further rights on the debtor, mortgagor or guarantor.
- (2) Subsection (1) does not apply if the rights are assigned or pass by law to a corporation which is neither a trustee for the debtor, mortgagor or guarantor nor an executor of the debtor's, mortgagor's or guarantor's estate.
- (3) Subsection (1) does not affect a requirement which is made of a debtor or mortgagor under section 52.

### **190 Appropriation of payments**

- (1) A debtor who is liable to a credit provider under 2 or more credit contracts may require the credit provider by written notice to apply

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a payment to a particular one of those contracts or to divide the payment between them in a specified manner.

- (2) A credit provider that contravenes a requirement under this section commits an offence.

Criminal penalty: 30 penalty units.

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

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

- (4) A debtor may not make a requirement under this section if the debtor and the credit provider have previously agreed as to the application of the payment concerned in relation to the credit contracts under which the debtor is liable to the credit provider.

### **191 Contracting out**

- (1) A provision of a contract or other instrument by which a person seeks to avoid or modify the effect of this Code is void.
- (2) A provision of a contract or other instrument by which a person seeks to have the debtor, mortgagor or guarantor indemnify the credit provider for any loss or liability arising under this Code is void.
- (3) A credit provider that is a party to any such contract or other instrument commits an offence.

Criminal penalty: 100 penalty units.

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

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

- (5) Subsection (2) does not affect the operation of subsection 60(2).

### **192 Indemnities**

- (1) An indemnity for any liability under this Code is not void, and cannot be declared void, on the grounds of public policy, despite any rule of law to the contrary.

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- (2) The liabilities to which this section applies include the following:
  - (a) a liability for any criminal or civil penalty incurred by any person under this Code;
  - (b) a payment in settlement of a liability or alleged liability under this Code;
  - (c) a liability under another indemnity for any liability under this Code.
- (3) This section is subject to subsection 191(2).
- (4) This section does not derogate from any other rights and remedies that exist apart from this section.

**193 Effect of noncompliance**

- (1) A credit contract, mortgage or guarantee or any other contract is not illegal, void or unenforceable because of a contravention of this Code unless this Code contains an express provision to that effect.
- (2) Except as provided by this section, this Code does not derogate from rights and remedies that exist apart from this Code.

**194 Giving notice or other document**

*Application*

- (1) This section applies as follows:
  - (a) this section applies (subject to this subsection) to notices or other documents that are required to be given for the purposes of this Code;
  - (b) this subsection and subsections (3) and (7) apply, but the remainder of this section does not apply, to precontractual statements and notices given under section 16;
  - (c) subsections (4), (5) and (6) do not apply to default notices;
  - (d) this section applies despite the provisions of any other section of this Code (except subsections 36(4) and 83(4)) to the contrary.

Note: Examples of notices or other documents to which this section applies are those required to be given under sections 20, 33, 36, 43, 56, 57 and 83.

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*Unsuccessful attempts by credit provider*

- (2) A credit provider is relieved from the obligation to give a notice or other document to a person if:
- (a) the credit provider has previously made a reasonable (but unsuccessful) attempt to give a notice or other document in accordance with this Code by leaving it at, or by sending it by post or electronic communication to the appropriate address of the person under section 195; and
  - (b) the credit provider has reasonable grounds for believing that the person can no longer be contacted at that address.

*Joint debtors etc—general obligation*

- (3) In the case of joint debtors, mortgagors or guarantors, a notice or other document must be given to each debtor, mortgagor or guarantor, except as provided by this section.

*Joint debtors etc—nomination of one of them*

- (4) A notice or other document may be given to any 2 or more joint debtors, mortgagors or guarantors by being given to one of the joint debtors, mortgagors or guarantors nominated by them to receive the notice or other document on their behalf. The notice or other document need not be addressed to all of them.

*Joint debtors etc—same address*

- (5) A single copy of a notice or other document may be given to any 2 or more joint debtors, mortgagors or guarantors at the same address if each of them has consented to a single copy being given and the notice or other document is addressed jointly to them. The procedure prescribed by this subsection is an alternative to the procedure prescribed by subsection (4).

*Nominated persons generally*

- (6) A notice or other document may be given to a person by being given to any other person nominated by the person to receive the notice or other document on his or her behalf. However—

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- (a) a debtor, mortgagor or guarantor cannot nominate the credit provider or a person associated with the credit provider; and
- (b) a mortgagor cannot nominate the debtor if the mortgage is given by a guarantor; and
- (c) a guarantor cannot nominate the debtor.

*Lawyers*

- (7) A notice or other document may be given to a person by being given to a lawyer acting for the person in the matter concerned.

*Withdrawal of nomination or consent*

- (8) A nomination or consent under this section ceases to have effect if it is withdrawn by the person who made or gave it.

*Form of nomination or consent*

- (9) A nomination or consent under this section (or the withdrawal of any such nomination or consent) must be in the form required by the regulations.

**195 Manner of giving notice or other document**

- (1) If this Code requires or permits a notice or other document to be given to a person who is a debtor, mortgagor or guarantor, the appropriate address of the person is:
  - (a) an address nominated in writing by that person to the person giving the notice or other document; or
  - (b) if there is no such nomination, the address of the place of residence of that person last known to the person giving the notice or other document.

Note: A nominated address may be an electronic address.

- (2) An appropriate address of any other person is:
  - (a) an address nominated in writing by that person to the person giving the notice or other document; or
  - (b) the address of the place of residence or business of that person last known to the person giving the notice or other document.



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Note: A nominated address may be an electronic address.

- (3) If a person nominates an address under paragraph (1)(a) or (2)(a), the person may, by notice in writing to the person giving the notice or other document referred to in subsection (1), change the nominated address or cancel the nomination.
- (4) A nomination under this section ceases to have effect if it is cancelled by the person who made it.

### **196 Date of notice or other document**

- (1) For the purposes of this Code a notice or other document is taken to be given:
  - (a) in the case of a notice or other document given personally—on the date it bears or the date it is received by the addressee, whichever is the later; or
  - (b) in the case of a notice or other document sent by post—on the date it bears or the date when it would have been delivered in the ordinary course of post, whichever is the later; or
  - (c) in the case of a notice or other document given by electronic communication—at the time that subsection 14(3) of the *Electronic Transactions Act 1999* provides is the time of receipt of the electronic communication.
- (2) For the purposes of this Code, the date of a notice or other document is the date it is taken to be given in accordance with this section.

### **197 Extensions of time**

The court may extend a period if authorised by this Code to do so even though the period has elapsed.

### **198 Orders of court**

An order of the court in force under this Code, including such an order as varied from time to time, has effect according to its tenor.

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**199 Conduct of agents and related matters**

- (1) The conduct of an officer, agent or employee of a credit provider acting within his or her actual or ostensible authority will be imputed to the credit provider and taken to be conduct of the credit provider.
- (2) A person cannot authorise a credit provider, or a person associated with a credit provider, to enter into a credit contract, mortgage or guarantee on the person's behalf. This subsection does not prevent a credit provider from authorising a person associated with the credit provider to enter into a credit contract on behalf of the credit provider.
- (3) A credit provider or person associated with a credit provider that purports to act as agent of a debtor, mortgagor or a guarantor in entering into a credit contract or a mortgage or guarantee commits an offence.

Criminal penalty: 50 penalty units.

- (4) A credit provider is not, for the purposes of this Code, taken to know or have reason to believe something because an officer, agent or employee of the credit provider does so, unless the knowledge or reason to believe that thing is acquired by the officer, agent or employee acting in that capacity and in connection with the transaction concerned.

## **Division 4—Provisions relating to offences**

### **200 Offences by officers, agents or employees**

An officer, agent or employee of a credit provider or other person may be prosecuted for an offence against this Code or the regulations (if liable for the offence) whether or not proceedings have been taken against the credit provider or other person.

### **201 Offences by corporations**

- (1) If a corporation contravenes a provision of this Code or the regulations, each officer of the corporation is taken to have contravened the provision if the officer knowingly authorised or permitted the contravention.
- (2) An officer of a corporation may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or convicted under the provision.
- (3) Nothing in this section affects the liability imposed on a corporation for an offence committed by the corporation against this Code or the regulations.
- (4) In this section:

*officer* means a director of the corporation or a person who is otherwise concerned in its management.

### **202 Limitations**

Despite anything in any Act, proceedings for an offence against this Code or the regulations may be brought within the period of 3 years that next succeeds the commission of the offence or, with the consent of the Attorney-General, at any later time.

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**203 Application of section 4K of the *Crimes Act 1914***

Section 4K of the *Crimes Act 1914* does not apply in relation to an offence against this Code or the regulations.

## **Division 5—Exemptions from this Code**

### **203A Exemptions by ASIC**

#### *Exemptions*

- (1) ASIC may exempt a person, contract, mortgage, guarantee or consumer lease from all or specified provisions of this Code.
- (2) An exemption under subsection (1) is not a legislative instrument.
- (3) ASIC may, by legislative instrument, exempt a class of persons, contracts, mortgages, guarantees or consumer leases from all or specified provisions of this Code.

#### *Conditions on exemptions*

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

#### *Publication of exemptions under subsection (1)*

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

### **203B Exemptions by the regulations**

The regulations may:

- (a) exempt a person, contract, mortgage, guarantee or consumer lease from all or specified provisions of this Code; or
- (b) exempt a class of persons, contracts, mortgages, guarantees or consumer leases from all or specified provisions of this Code.

## Part 13—Principal definitions

### 204 Principal definitions

(1) In this Code:

*acceleration clause*: see section 92.

*ADI* has the same meaning as in the *Banking Act 1959*.

*amend* includes:

- (a) omit or omit and substitute; or
- (b) alter or vary; or
- (c) amend by implication.

*amount of credit*: see subsection 3(2).

*annual percentage rate*: see section 27.

*approved external dispute resolution scheme* has same meaning as in section 11 of the National Credit Act.

*ASIC* means the Australian Securities and Investments Commission.

*associated*: see subsection (2).

*Australia* means the Commonwealth of Australia but, when used in a geographical sense, does not include an external Territory.

*business day* means a day that is not:

- (a) a Saturday or Sunday; or
- (b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done.

*carried on in this jurisdiction* has a meaning affected by section 12 of the National Credit Act.

*cash price* of goods or services to which a credit contract relates means:

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- (a) the lowest price that a cash purchaser might reasonably be expected to pay for them from the supplier; or
- (b) if the goods or services are not available for cash from the supplier or are only available for cash at the same, or a reasonably similar, price to the price that would be payable for them if they were sold with credit provided—the market value of the goods or services.

**commission** includes any form of monetary consideration or any form of non-monetary consideration to which a monetary value can be assigned.

**Commonwealth** means the Commonwealth of Australia but, when used in a geographical sense, does not include an external Territory.

**compulsory insurance** means:

- (a) compulsory third-party personal injury insurance; or
- (b) insurance of a nature declared by the regulations to be compulsory insurance for the purposes of this Code.

**consumer credit insurance** means insurance that insures the capacity of the debtor to make repayments under the credit contract, including insurance against sickness of, injury to, or disability or death of, the debtor or against unemployment of the debtor, and also including life insurance (including insurance under a group policy) to cover any outstanding amount on the debtor's death.

**consumer lease**: see section 169.

**continuing credit contract** means a credit contract under which:

- (a) multiple advances of credit are contemplated; and
- (b) the amount of available credit ordinarily increases as the amount of credit is reduced.

**contract** includes a series or combination of contracts, or contracts and arrangements.

**contract document** means the document or documents setting out the terms of a contract.

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**credit:** see subsection 3(1).

**credit contract:** see section 4.

**credit fees and charges** means fees and charges payable in connection with a credit contract or mortgage, but does not include:

- (a) interest charges (including default charges); or
- (b) any fees or charges that are payable to or by a credit provider in connection with a credit contract in connection with which both credit and debit facilities are available if the fees or charges would be payable even if credit facilities were not available (not being annual fees or charges in connection with continuing credit contracts under which credit is ordinarily obtained only by the use of a card); or
- (c) government charges, or duties, on receipts or withdrawals; or
- (d) enforcement expenses.

**credit provider** means a person that provides credit, and includes a prospective credit provider.

**credit-related insurance contract:** see section 142.

**credit service** has the same meaning as in section 7 of the National Credit Act.

**daily percentage rate:** see section 27.

**date** of a notice: see section 196.

**debtor** means a person (other than a guarantor) who is liable to pay for (or to repay) credit, and includes a prospective debtor.

**default notice:** see Part 5.

**default rate:** see section 27.

**definition** means a provision of this Code (however expressed) that:

- (a) gives a meaning to a word or expression; or
- (b) limits or extends the meaning of a word or expression.



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**dispose** of property includes:

- (a) sell the property; or
- (b) part with possession of the property to the prejudice of the owner or a mortgagee of the property; or
- (c) destroy the property.

**electronic communication** has the same meaning as in the *Electronic Transactions Act 1999*.

**enforcement expenses**, in relation to a mortgage, includes expenses incurred by the mortgagee in preserving or maintaining property subject to the mortgage (including insurance, rates and taxes payable for the property) but only if the expenses are incurred after a breach occurs and are authorised by the mortgage.

**enforcement proceedings**, in relation to a credit contract or a guarantee or mortgage, means:

- (a) proceedings in a court to recover a payment due under the contract or a guarantee; or
- (b) taking possession of property under a mortgage or taking any other action to enforce a mortgage.

**fail** includes refuse.

**goods** includes:

- (a) ships, aircraft or other vehicles; or
- (b) animals, including fish; or
- (c) minerals, trees or crops, whether on, under or attached to land or not;

but does not include anything declared by the regulations not to be goods for the purposes of this Code.

**goods mortgage** means a mortgage over goods.

**guarantee** includes an indemnity (other than one arising under a contract of insurance).

**guarantee document** means the document or documents setting out the terms of a guarantee.

**guarantor** includes a prospective guarantor.

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***insolvent*** means:

- (a) in the case of a natural person—a person who is an insolvent under administration within the meaning of the *Corporations Act 2001*; or
- (b) in the case of a corporation—a corporation that is an externally-administered corporation within the meaning of the *Corporations Act 2001*.

***instrument*** includes a statutory instrument.

***interest***, in relation to land or other property, means:

- (a) a legal or equitable estate in the land or other property; or
- (b) a right, power or privilege over, or in relation to, the land or other property.

***key requirement***: see Part 6.

***land*** includes any interest in land.

***linked credit provider***: see subsection 127(1).

***lowest price***, in relation to the cash price of goods or services to which a credit contract relates, means the lowest price including any goods and services tax but unaffected by any discount between the credit provider and the supplier.

***market value***, of goods or services to which a credit contract relates, means fair market value including any goods and services tax.

***merchant service agreement*** means an agreement between a credit provider and a supplier of goods and services under which the credit provider agrees to pay to the supplier amounts for goods or services supplied by the supplier and paid by means of credit cards, whether or not the credit cards are issued by the credit provider.

***modification*** includes addition, omission or substitution.

***mortgage*** includes:

- (a) any interest in, or power over, property securing obligations of a debtor or guarantor; or

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- (b) a credit provider's title to land or goods subject to a sale by instalments; or
- (c) a mortgage taken to have been entered into under subsection 9(3);

but does not include a consumer lease to which Part 11 applies.

**mortgage document** means the document or documents setting out the terms of a mortgage by reference to which the mortgage is created.

**mortgagor** includes a prospective mortgagor.

**National Credit Act** means the *National Consumer Credit Protection Act 2009* and includes regulations made under section 329 of that Act, but does not include this Code.

**number** means:

- (a) a number expressed in figures or words; or
- (b) a letter; or
- (c) a combination of a number so expressed and a letter.

**omit**, in relation to a provision of this Code or an Act, includes repeal.

**penalty** includes forfeiture or punishment.

**power** includes authority.

**printed** includes typewritten, lithographed or reproduced by any mechanical means.

**proceedings** means a legal or other action or proceedings.

**property** means any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action.

**provision**, in relation to this Code or an Act, means words or other matter that form or forms part of this Code or the Act, and includes:

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- (a) a Chapter, Part, Division, Subdivision, section, subsection, paragraph, subparagraph, subsubparagraph or Schedule of or to this Code or the Act; or
- (b) a section, clause, subclause, item, column, table or form of or in a Schedule to this Code or the Act; or
- (c) the long title and any preamble to the Act.

***purchaser*** means:

- (a) in relation to goods—a person who purchases, or proposes to purchase, the goods; or
- (b) in relation to services—a person who contracts, or proposes to contract, to obtain services.

***reference rate*** means a benchmark, index or other reference rate.

***referring State*** has the same meaning as in section 19 of the National Credit Act.

***regulation*** means a regulation made or in force for the purposes of this Code.

***repeal*** includes:

- (a) revoke or rescind; or
- (b) repeal by implication; or
- (c) abrogate or limit the effect of this Code or instrument concerned; or
- (d) exclude from, or include in, the application of this Code or instrument concerned any person, subject matter or circumstance.

***residential property*** means:

- (a) land on which a dwelling is or will be affixed predominantly for residential purposes; or
- (b) a lease of land on which a dwelling is or will be affixed predominantly for residential purposes, being a lease that:
  - (i) is a Crown lease (within the meaning of the *Income Tax Assessment Act 1997*); and
  - (ii) gives the lessee reasonable security of tenure; or

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- (c) a licence in relation to land on which a dwelling is or will be affixed predominantly for residential purposes, being a licence that:
  - (i) is granted by the Commonwealth, a State or a Territory; and
  - (ii) gives the licensee reasonable security of tenure; or
- (d) a share that:
  - (i) is in a company that is the legal owner of the land on which a dwelling is or will be affixed predominantly for residential purposes; and
  - (ii) gives the person who legally owns the share a right to occupy the dwelling; or
- (e) a right to occupy a dwelling in an aged care facility or retirement village;
- (f) an equity of redemption in relation to land on which a dwelling is or will be affixed predominantly for residential purposes.

***retained credit fees and charges*** means credit fees and charges retained by the credit provider, other than credit fees and charges passed on to (or retained in reimbursement of an amount paid to):

- (a) a third party that is not a related body corporate (for the purposes of the *Corporations Act 2001*) of the credit provider; or
- (b) a financial institution that is such a related body corporate in respect of the provision of banking services that are provided to the credit provider by the financial institution on the same terms as those services are ordinarily provided to customers who are not related to or associated with the financial institution.

***sale contract***: see section 125.

***services*** includes:

- (a) rights in relation to, and interests in, real property; or
- (b) insurance; or
- (c) professional services; or
- (d) a right to services;

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but does not include the provision of credit or a right to credit or services provided under a consumer lease.

*sign* includes the affixing of a seal or the making of a mark.

Note: See section 186.

*statutory instrument* means an instrument (including a regulation) made or in force under or for the purposes of this Code, and includes an instrument made or in force under any such instrument.

*strata corporation* means:

- (a) a body corporate incorporated in relation to land subdivided wholly or mainly for residential purposes under a law of the Commonwealth, a State or a Territory providing for strata, cluster, precinct or other subdivision of land; or
- (b) a body corporate whose issued shares confer a right to occupy land for residential purposes.

*supplier* means a supplier of goods or services.

*supply* includes agree to supply.

*termination* of a contract includes the discharge or rescission of the contract.

*this Code* means this Schedule and includes regulations made for the purposes of this Schedule.

*this jurisdiction* has the same meaning as in section 21 of the National Credit Act.

*tied continuing credit contract*: see subsection 127(2).

*tied loan contract*: see subsection 127(3).

*unpaid balance*: see section 27.

*unpaid daily balance*: see section 27.

*word* includes any symbol, figure or drawing.

*writing* includes any mode of representing or reproducing words in a visible form.

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Note: See section 187.

- (2) For the purposes of this Code, a person is *associated* with a credit provider if:
- (a) the person and the credit provider are related bodies corporate for the purposes of the *Corporations Act 2001*; or
  - (b) the person is a supplier in respect of whom the credit provider is a linked credit provider; or
  - (c) the person is an officer, agent or employee of the credit provider, or of any such related body corporate or supplier, acting in that capacity.

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**Division 1** Preliminary

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## **Part 14—Miscellaneous provisions relating to interpretation**

### **Division 1—Preliminary**

#### **205 Displacement of Part by contrary intention**

The application of this Part may be displaced, wholly or partly, by a contrary intention appearing in this Code.



## **Division 2—General**

### **206 Material that is, and is not, part of this Code**

- (1) The heading to a Part, Division or Subdivision into which this Code is divided is part of this Code.
- (2) Punctuation in this Code is part of this Code.
- (3) A heading to a section or subsection of this Code does not form part of this Code.
- (4) Notes included in this Code (including footnotes and endnotes) do not form part of this Code.

### **207 References to particular Acts and to enactments**

In this Code:

- (a) an Act of the Commonwealth may be cited by its short title; and
- (b) an Act of a State or Territory may be cited:
  - (i) by its short title; or
  - (ii) in another way sufficient in an Act of the State or Territory for the citation of such an Act; together with a reference to the State or Territory.

### **208 Compliance with forms**

- (1) If a form is prescribed or approved by or for the purpose of this Code, strict compliance with the form is not necessary and substantial compliance is sufficient.
- (2) If a form prescribed or approved by or for the purpose of this Code requires:
  - (a) the form to be completed in a specified way; or
  - (b) specified information or documents to be included in, attached to or given with the form; or

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(c) the form, or information or documents included in, attached to or given with the form, to be verified in a specified way; the form is not properly completed unless the requirement is complied with.

## **Division 3—Terms and references**

### **209 Provisions relating to defined terms and gender and number**

- (1) If this Code defines a word or expression, other parts of speech and grammatical forms of the word or expression have corresponding meanings.
- (2) Definitions in or applicable to this Code apply except so far as the context or subject matter otherwise indicates or requires.
- (3) In this Code, words indicating a gender include each other gender.
- (4) In this Code:
  - (a) words in the singular include the plural; and
  - (b) words in the plural include the singular.

### **210 Meaning of *may* and *must* etc.**

- (1) In this Code, the word *may*, or a similar word or expression, used in relation to a power indicates that the power may be exercised or not exercised, at discretion.
- (2) In this Code, the word *must*, or a similar word or expression, used in relation to a power indicates that the power is required to be exercised.
- (3) This section has effect despite any rule of construction to the contrary.

### **211 Effect of express references to bodies corporate and individuals**

In this Code, a reference to a person generally (whether the expression “person”, “party”, “someone”, “anyone”, “no-one”, “one”, “another” or “whoever” or another expression is used):

- (a) does not exclude a reference to a body corporate or an individual merely because elsewhere in this Code there is particular reference to a body corporate (however expressed); and

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- (b) does not exclude a reference to an individual or a body corporate merely because elsewhere in this Code there is particular reference to an individual (however expressed).

**212 Reference to certain provisions of Code**

If a provision of this Code refers:

- (a) to a Part or section by a number and without reference to this Code—the reference is a reference to the Part or section, designated by the number, of this Code; or
- (b) to a Division, Subdivision, subsection, paragraph, subparagraph or subsubparagraph by a number and without reference to this Code—the reference is a reference to:
  - (i) the Division, designated by the number, of the Part in which the reference occurs; and
  - (ii) the Subdivision, designated by the number, of the Division in which the reference occurs; and
  - (iii) the subsection, designated by the number, of the section in which the reference occurs; and
  - (iv) the paragraph, designated by the number, of the section, subsection, or other provision in which the reference occurs; and
  - (v) the subparagraph, designated by the number, of the paragraph in which the reference occurs; and
  - (vi) the subsubparagraph, designated by the number, of the subparagraph in which the reference occurs;as the case requires.

**213 Reference to provisions of this Code or an Act is inclusive**

In this Code, a reference to a portion of this Code or an Act includes:

- (a) a reference to the Chapter, Part, Division, Subdivision, section, subsection or other provision of this Code or the Act referred to that forms the beginning of the portion; and
- (b) a reference to the Chapter, Part, Division, Subdivision, section, subsection or other provision of this Code or the Act referred to that forms the end of the portion.

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Example: A reference to “sections 5 to 9” includes both section 5 and section 9. It is not necessary to refer to “sections 5 to 9 (both inclusive)” to ensure that the reference is given an inclusive interpretation.

## **Division 4—Functions and powers**

### **214 Power to make instrument or decision includes power to amend or repeal**

If this Code authorises or requires the making of an instrument or decision:

- (a) the power includes power to amend or repeal the instrument or decision; and
- (b) the power to amend or repeal the instrument or decision is exercisable in the same way, and subject to the same conditions, as the power to make the instrument or decision.

### **215 Matters for which statutory instruments may make provision**

- (1) If this Code authorises or requires the making of a statutory instrument in relation to a matter, a statutory instrument made under this Code may make provision for the matter by applying, adopting or incorporating (with or without modification) the provisions of:
  - (a) an Act or statutory instrument; or
  - (b) another document (whether of the same or a different kind);as in force at a particular time or as in force from time to time.
- (2) If a statutory instrument applies, adopts or incorporates the provisions of a document, the statutory instrument applies, adopts or incorporates the provisions as in force from time to time, unless the statutory instrument otherwise expressly provides.
- (3) A statutory instrument may:
  - (a) apply generally to all persons, matters or things or be limited in its application to:
    - (i) particular persons, matters or things; or
    - (ii) particular classes of persons, matters or things; or
  - (b) otherwise apply generally or be limited in its application by reference to specified exceptions or factors.

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- (4) A statutory instrument may:
  - (a) apply differently according to different specified factors; or
  - (b) otherwise make different provision in relation to:
    - (i) different persons, matters or things; or
    - (ii) different classes of persons, matters or things.
- (5) A statutory instrument may authorise a matter or thing to be from time to time determined, applied or regulated by a specified person or body.
- (6) If this Code authorises or requires a matter to be regulated by statutory instrument, the power may be exercised by prohibiting by statutory instrument the matter or any aspect of the matter.
- (7) If this Code authorises or requires provision to be made with respect to a matter by statutory instrument, a statutory instrument made under this Code may make provision with respect to a particular aspect of the matter despite the fact that provision is made by this Code in relation to another aspect of the matter or in relation to another matter.
- (8) A statutory instrument may provide for the review of, or a right of appeal against, a decision made under the statutory instrument, or this Code, and may, for that purpose, confer jurisdiction on any court, tribunal, person or body.
- (9) A statutory instrument may require a form prescribed by or under the statutory instrument, or information or documents included in, attached to or given with the form, to be verified by statutory declaration.

### **216 Presumption of validity and power to make**

- (1) All conditions and preliminary steps required for the making of a statutory instrument are presumed to have been satisfied and performed in the absence of evidence to the contrary.
- (2) A statutory instrument is taken to be made under all powers under which it may be made, even though it purports to be made under this Code or a particular provision of this Code.

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**217 Exercise of powers between enactment and commencement**

- (1) If a provision of this Code (the *empowering provision*) that does not commence on its enactment would, had it commenced, confer a power:
- (a) to make an appointment; or
  - (b) to make a statutory instrument of a legislative or administrative character; or
  - (c) to do another thing;
- then:
- (d) the power may be exercised; and
  - (e) anything may be done for the purpose of enabling the exercise of the power or of bringing the appointment, instrument or other thing into effect;
- before the empowering provision commences.
- (2) If a provision of an Act (the *empowering provision*) that does not commence on its enactment would, had it commenced, amend a provision of this Code so that it would confer a power:
- (a) to make an appointment; or
  - (b) to make a statutory instrument of a legislative or administrative character; or
  - (c) to do another thing;
- then:
- (d) the power may be exercised; and
  - (e) anything may be done for the purpose of enabling the exercise of the power or of bringing the appointment, instrument or other thing into effect;
- before the empowering provision commences.
- (3) If:
- (a) this Code has commenced and confers a power to make a statutory instrument (the *basic instrument-making power*); and
  - (b) a provision of an Act that does not commence on its enactment would, had it commenced, amend this Code so as to confer additional power to make a statutory instrument (the *additional instrument-making power*);



then:

- (c) the basic instrument-making power and the additional instrument-making power may be exercised by making a single instrument; and
  - (d) any provision of the instrument that required an exercise of the additional instrument-making power is to be treated as made under subsection (2).
- (4) If an instrument, or a provision of an instrument, is made under subsection (1) or (2) that is necessary for the purpose of:
- (a) enabling the exercise of a power mentioned in the subsection; or
  - (b) bringing an appointment, instrument or other thing made or done under such a power into effect;
- the instrument or provision takes effect:
- (c) on the making of the instrument; or
  - (d) on such later day (if any) on which, or at such later time (if any) at which, the instrument or provision is expressed to take effect.
- (5) If:
- (a) an appointment is made under subsection (1) or (2); or
  - (b) an instrument, or a provision of an instrument, made under subsection (1) or (2) is not necessary for a purpose mentioned in subsection (4);
- the appointment, instrument or provision takes effect:
- (c) on the commencement of the relevant empowering provision; or
  - (d) on such later day (if any) on which, or at such later time (if any) at which, the appointment, instrument or provision is expressed to take effect.
- (6) Anything done under subsection (1) or (2) does not confer a right, or impose a liability, on a person before the relevant empowering provision commences.
- (7) After the enactment of a provision mentioned in subsection (2) but before the provision's commencement, this section applies as if the references in subsections (2) and (5) to the commencement of the

**Schedule 1** National Credit Code

**Part 14** Miscellaneous provisions relating to interpretation

**Division 4** Functions and powers

**Section 217**

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empowering provision were references to the commencement of the provision mentioned in subsection (2) as amended by the empowering provision.

- (8) In the application of this section to a statutory instrument, a reference to the enactment of the instrument is a reference to the making of the instrument.

## **Division 5—Distance, time and age**

### **218 Matters relating to distance, time and age**

- (1) In the measurement of distance for the purposes of this Code, the distance is to be measured along the shortest road ordinarily used for travelling.
- (2) If a period beginning on a given day, act or event is provided or allowed for a purpose by this Code, the period is to be calculated by excluding the day, or the day of the act or event, and:
  - (a) if the period is expressed to be a specified number of clear days or at least a specified number of days—by excluding the day on which the purpose is to be fulfilled; and
  - (b) in any other case—by including the day on which the purpose is to be fulfilled.
- (3) If the last day of a period provided or allowed by this Code for doing anything is not a business day in the place in which the thing is to be or may be done, the thing may be done on the next business day in the place.
- (4) If the last day of a period provided or allowed by this Code for the filing or registration of a document is a day on which the office is closed where the filing or registration is to be or may be done, the document may be filed or registered at the office on the next day that the office is open.
- (5) If no time is provided or allowed for doing anything, the thing is to be done as soon as possible, and as often as the prescribed occasion happens.
- (6) If, in this Code, there is a reference to time, the reference is, in relation to the doing of anything in a State or Territory, a reference to the legal time in the State or Territory.
- (7) For the purposes of this Code, a person attains an age in years at the beginning of the person's birthday for the age.

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*[Minister's second reading speech made in—  
House of Representatives on 25 June 2009  
Senate on 7 September 2009]*

(147/09)

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