FINANCIAL SECTOR REFORM (HAYNE ROYAL COMMISSION RESPONSE – STRONGER REGULATORS (2019 MEASURES)) BILL 2019

EXPLANATORY MEMORANDUM

(Circulated by authority of the Treasurer, The Hon Josh Frydenberg MP)
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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

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<th>Abbreviation</th>
<th>Definition</th>
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<tr>
<td>AFCA</td>
<td>Australian Financial Complaints Authority</td>
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<tr>
<td>ASIC</td>
<td>Australian Securities and Investments Commission</td>
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<tr>
<td>ASIC Act</td>
<td>Australian Securities and Investments Commission Act 2001</td>
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<tr>
<td>Bill</td>
<td>Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Bill 2019</td>
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<td>Credit Act</td>
<td>National Consumer Credit Protection Act 2009</td>
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<td>TIA Act</td>
<td>Telecommunications (Interception and Access) Act 1979</td>
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General outline and financial impact

Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Bill 2019

This Bill implements recommendations from the ASIC Enforcement Review Taskforce Report to:

- harmonise ASIC’s search warrant powers;
- improve ASIC’s ability to access certain telecommunications information;
- strengthen ASIC’s licencing powers; and
- extend ASIC’s banning powers to ban individuals from managing financial services businesses.

Date of effect: The day after Royal Assent.

Proposal announced: This Bill implements 16 recommendations made in ASIC Enforcement Review Taskforce Report agreed to by the Government on 16 April 2018.

Financial impact: Nil

Human rights implications: This Bill does not raise any human rights issues. See Statement of Compatibility with Human Rights — Chapter 6, paragraphs 6.1 to 6.50.

Compliance cost impact: The amendments which implement recommendations 26 and 28 of the ASIC Enforcement Review Taskforce Report are estimated to have a minor regulatory impact on business, community organisations or individuals. The other amendments in the Bill have no compliance cost impact.

The ASIC Enforcement Review Taskforce Report was certified by the Department of the Treasury as a process and analysis equivalent to a Regulation Impact Statement.

The ASIC Enforcement Review Taskforce Report can be found at this link:

Chapter 1
Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Bill 2019

Outline of chapter

1.1 This Bill implements recommendations from the ASIC Enforcement Review Taskforce Report.

- Chapter 2 of the ASIC Enforcement Review Taskforce Report contained recommendations to harmonise and enhance ASIC’s search warrant powers.
- Chapter 3 of the ASIC Enforcement Review Taskforce Report recommended that ASIC should be able to receive telecommunications intercept material to investigate and prosecute serious offences.
- Chapter 5 of the ASIC Enforcement Review Taskforce Report contained recommendations to strengthen ASIC’s licensing powers.
- Chapter 6 of the ASIC Enforcement Review Taskforce Report contained recommendations to extend ASIC’s banning powers.

Context of amendments

The establishment of the ASIC Enforcement Review Taskforce


1.3 The ASIC Enforcement Review Taskforce was established to review the enforcement regime available to ASIC and assess the suitability of the existing regulatory tools ASIC uses to perform its functions.
In reviewing the matters outlined in its terms of reference, the ASIC Enforcement Review Taskforce made a number of recommendations to:

- address gaps or deficiencies to allow more effective enforcement of ASIC’s regulatory regime;
- foster consumer confidence in the financial system and enhance ASIC’s ability to prevent harm effectively;
- promote engagement and cooperation between ASIC and its regulated population without imposing undue regulatory burden on business; and
- promote a competitive and stable financial system that contributes to Australia’s productivity and growth.

The ASIC Enforcement Review Taskforce’s findings

On 18 December 2017, the ASIC Enforcement Review Taskforce provided its final report to Government. The final report contained 50 recommendations in total.

The ASIC Enforcement Review Taskforce grouped its recommendations into eight broad themes:

- enhancing the requirement for financial services and credit licensees to report significant breaches to ASIC;
- harmonising and enhancing search warrant powers;
- providing ASIC with access to telephone intercepts for the investigation and prosecution of corporate law offences;
- shifting to a co-regulatory model in appropriate cases where industry participants are required to subscribe to an ASIC approved code;
- strengthening ASIC’s licensing powers;
- extending ASIC’s banning powers to ban individuals from managing financial services businesses;
- strengthening penalties for corporate and financial sector misconduct; and
- providing ASIC with a directions power to complement ASIC’s current powers to regulate an AFSL holder’s or credit licensee’s systems and conduct.
1.7 On 16 April 2018, the Government responded to the ASIC Enforcement Review Taskforce. This Bill implements the recommendations to:

- harmonise ASIC’s search warrant powers;
- improve ASIC’s ability to access certain telecommunications information;
- strengthen ASIC’s licencing powers; and
- extend ASIC’s banning powers to ban individuals from managing financial services businesses.

**Harmonisation and enhancement of ASIC’s search warrant powers**

1.8 Chapter 2 of the ASIC Enforcement Review Taskforce Report contained recommendations to harmonise and enhance ASIC’s search warrant powers to eliminate inconsistencies and deficiencies that exist between its various powers.

1.9 Search warrants are an important and effective regulatory tool for obtaining information. They are widely used by a range of enforcement agencies and regulatory authorities.

1.10 ASIC currently has a range of search warrant powers contained in the ASIC Act, the Credit Act, the Retirement Savings Accounts Act 1997 and the Superannuation Industry (Supervision) Act 1993. ASIC may also apply to a magistrate for a search warrant under the Crimes Act 1914 for execution by the Australian Federal Police and/or state police.

1.11 These recommendations were that:

- ASIC-specific search warrant powers in various acts should be consolidated into the ASIC Act (Recommendation 11);
- ASIC Act search warrants should provide for search and seizure of ‘evidential material’ (Recommendation 12);
- ASIC Act search warrant powers should include ancillary powers that mirror the Crimes Act 1914 provisions (Recommendation 13);
- ASIC Act search warrants should only be issued when there is a reasonable suspicion of a contravention of an indictable offence (Recommendation 14);
- material seized under ASIC Act search warrants should be available for use in criminal, civil and administrative proceedings for as long as is reasonable and practicable (Recommendation 15); and
• use of material seized under search warrants by private litigants should be subject to appropriate limits (Recommendation 16).

1.12 The recommendations address a number of inconsistencies and deficiencies identified in ASIC’s existing search warrant powers, which limit the usefulness of warrants, and restrict ASIC’s ability to use material it seized.

ASIC’s access to telecommunications intercept material

1.13 Chapter 3 of the ASIC Enforcement Review Taskforce Report recommended that ASIC should be able to receive telecommunications intercept material to investigate and prosecute serious offences.

1.14 The TIA Act sets out a regime that enables agencies to access various forms of telecommunication information in prescribed circumstances. This regime has different levels of access, with agencies that are designated ‘interception’ agencies able to seek warrants to intercept telecommunications for the purpose of investigating serious offences.

1.15 Interception agencies are subject to a range of strict controls in how they access and use telecommunications intercept information. Interception agencies must apply to an eligible judge or nominated member of the Administrative Appeals Tribunal for a telecommunications intercept warrant.

1.16 Interception agencies may also share information they have obtained with other ‘recipient agencies’ if the material appears to relate to a matter that could be investigated by the recipient agency.

1.17 However ASIC is not an interception agency or recipient agency under the TIA Act. This is despite the fact that the definition of ‘serious offence’ in the TIA Act includes offences against provisions of the Corporations Act 2001 relating to insider trading, market manipulation and financial services fraud, as well as other fraud offences that are commonly investigated and prosecuted by ASIC.

Strengthening ASIC’s licensing regimes & penalties for false and misleading documents

1.18 Chapter 5 to the ASIC Enforcement Review Taskforce Report contained recommendations to strengthen ASIC’s licensing powers and the offences for false and misleading documents.

1.19 Part 7.6 of the Corporations Act 2001 governs the licensing of financial services providers. A person who carries on a financial services business in Australia must hold an Australian financial services licence,
subject to certain exemptions. These applications are made to, assessed and granted by ASIC.

1.20 ASIC is also responsible for granting an Australian credit licence under Part 2-2 of the Credit Act.

1.21 The Financial System Inquiry Final Report identified a number of gaps in the current Australian financial services licensing and Australian credit licensing regimes and recommended the Government strengthen these regimes so that ASIC can deal more effectively with poor behaviour and misconduct.

1.22 In particular, the Financial System Inquiry Final Report identified limitations in ASIC’s ability to:

- assess the suitability of entities that control an Australian financial service licence or Australian credit licence;
- consider previous conduct in other businesses in determining whether an applicant will satisfy the fit and proper test; and
- impose conditions on firms to address concerns about internal systems relating to serious or systemic misconduct.

1.23 In response to the identified issues, the ASIC Enforcement Review Taskforce made the following recommendations:

- new applicants will be required to provide information on all controllers and ASIC may refuse to grant a licence if any controllers are found to be not fit and proper (Recommendation 23);
- ASIC will be given the power to cancel a licence if the licensee fails to commence financial services activities within six months (Recommendation 24);
- ASIC may refuse to grant a licence if the applicant makes a materially false and misleading statement in an application (Recommendation 25);
- require applicants to confirm there have been no material changes to information provided in an application before a licence is granted (Recommendation 26);
- align the assessment requirements for Australian Financial Services and credit licence applications (Recommendation 27);

• licensees will be penalised if they fail to notify ASIC of an actual change of their controllers within 30 business days (Recommendation 28); and

• align the consequences for making false and misleading statements to ASIC in Australian financial services and credit contexts (Recommendation 29);

1.24 These recommendation about aligning the consequences for making false and misleading statements included removing the specific provision in the Corporations Act 2001 that applies to false or misleading statements made in AFS licence applications (so that the provisions can have broader application), as well as other amendments to ensure:

• recklessly making or authorising a false or misleading statement or material omission is prohibited;

• a person who makes or authorises a statement in a document submitted to ASIC must take reasonable steps to ensure the document does not contain a false or misleading statement or material omission;

• authorising a statement in an AFS licence application that is false or misleading or contains a material omission is prohibited;

• consistency between the various penalties for misleading ASIC, based on the penalties that apply for false and misleading statements in the Credit Act.

Extending ASIC’s power to make banning orders

1.25 Chapter 6 of the ASIC Enforcement Review Taskforce Report contained recommendations to foster public confidence in the integrity of individuals who work in the financial sector by extending ASIC’s banning powers.

1.26 Division 8 of Part 7.6 of the Corporations Act 2001 authorises ASIC to ban certain persons from providing financial services. Equivalent provisions for banning certain persons from engaging in credit activities are contained in the Part 2-4 of the Credit Act.

1.27 These recommendations were that:

• Once an administrative banning power is triggered, ASIC should be able to ban a person from performing a specific function, or any function, in a financial services or credit business. ( Recommendation 30).
• The grounds for exercising ASIC’s power to ban individuals from performing roles in financial services and credit businesses should be expanded (Recommendation 31).

1.28 These recommendations address two deficiencies in ASIC’s existing banning powers that were identified in the ASIC Enforcement Review Taskforce Report and previously in the *Financial System Inquiry Final Report*[^2] and the Senate Final Report on the *Performance of the Australian Securities and Investments Commission*.[^3]

1.29 The first issue relates to the scope of ASIC’s existing banning powers under the *Corporations Act 2001* and the Credit Act. Although these powers permit ASIC to ban a person from providing a financial service or engaging in credit activities, they do not authorise ASIC to ban a person from controlling or managing a financial services or credit business.

1.30 The second issue relates to the grounds on which ASIC can make a banning order. As noted in the ASIC Enforcement Review Taskforce Report, the existing provisions may not necessarily authorise ASIC to ban persons such as a director or senior manager of a financial services or credit business.

Chapter 2
Harmonising and enhancing ASIC’s search warrant powers

Outline of chapter

2.1 This Bill strengthens ASIC’s ability to carry out its enforcement functions by modernising and harmonising its search warrant powers, while ensuring appropriate safeguards are in place to balance the imposition on an individual’s property and personal rights.

2.2 Schedule 1 to the Bill draws ASIC’s search warrant powers from across ASIC administered legislation into the ASIC Act and Credit Act. ASIC’s search warrant powers are enhanced by applying by reference the search warrant powers in the Crimes Act 1914, modified as necessary.

Summary of new law

2.3 Schedule 1 to this Bill harmonises and enhances ASIC’s search warrant powers across various ASIC administered legislation. To do this, Schedule 1 to the Bill amends the ASIC Act and the Credit Act to apply by reference the search warrant powers from the Crimes Act 1914, modified as necessary.

2.4 Amendments to the Retirement Savings Accounts Act 1997 and the Superannuation Industry (Supervision) Act 1993 refer to the enhanced provisions in the ASIC Act.

2.5 Under the harmonised and enhanced search warrant powers, established under this Bill, ASIC can:

- apply for a search warrant in circumstances where the contravention would be an indictable offence under the ASIC Act, the Corporations Act 2001, the Credit Act, the Retirement Savings Accounts Act 1997 and the Superannuation Industry (Supervision) Act 1993;

- apply for a search warrant where a law of the Commonwealth, a State or Territory has been contravened and concerns the management of a body corporate or managed investment scheme or involves fraud or dishonesty and relates to a body corporate, managed investment scheme...
or financial product and the contravention would be an indictable offence;

• search and seize evidential material; and

• use the evidential material to perform its functions and duties and exercise its powers including preventing and investigating breaches of ASIC administered legislation, prosecuting such breaches and taking administrative action.

2.6 By applying the search warrant provisions from the Crimes Act 1914, ASIC has available to it the ancillary powers included in the Crimes Act 1914.

2.7 In making its recommendations, the ASIC Enforcement Review Taskforce noted that the Regulatory Powers (Standard Provisions) Act 2014 creates a standard framework for monitoring and investigation powers. However, in making its recommendations, the ASIC Enforcement Review Taskforce clarified that this standard framework should only be relied upon if its provisions were equivalent to those in the Crimes Act 1914.

2.8 The ancillary provisions in the Crimes Act 1914 recognise and provide flexibility to access equipment and devices that may store evidential material. For example, the Crimes Act 1914 gives constables the power to remove a device to determine if the device contains evidential material, operate equipment to access data held at another place and seek a ‘person’ warrant which is useful where evidence may be contained on a portable device. Equivalent provisions are not in the Regulatory Powers (Standard Provisions) Act 2014.

Comparison of key features of new law and current law

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
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<tr>
<td>ASIC’s search warrant powers provide for search and seizure of evidential material.</td>
<td>ASIC’s search warrant powers provide for search and seizure of specified books.</td>
</tr>
<tr>
<td><strong>New law</strong></td>
<td><strong>Current law</strong></td>
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<tr>
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</tr>
<tr>
<td>Search warrants may be issued only when there is reasonable suspicion of a contravention of an indictable offence.</td>
<td>Search warrants may be issued when there are reasonable grounds to suspect books are on particular premises.</td>
</tr>
<tr>
<td>Evidential material seized under search warrants is available for use by ASIC in performing its functions and duties and exercising ASIC’s powers.</td>
<td>Material seized under the <em>Crimes Act 1914</em> search warrant provisions can only be used by ASIC for the purpose of investigating and prosecuting criminal offences. Material seized under the ASIC Act search warrant powers can be used for a proceeding under a Commonwealth or state law.</td>
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**Detailed explanation of new law**

2.9 Schedule 1 to the Bill harmonises ASIC’s search warrant powers across various ASIC administered legislation to ensure that ASIC has consistent search warrant powers across legislation for which it has specific enforcement responsibility.

2.10 Schedule 1 to the Bill also makes amendments to ASIC’s search warrant powers to modernise and make the powers more useful, recognising the integral part technology plays in the storage and communication of information.

2.11 To do this, Schedule 1 to the Bill incorporates by reference search warrant provisions from the *Crimes Act 1914* into the ASIC Act and Credit Act. The relevant search warrant provisions from the *Crimes Act 1914* are:

- Divisions 1, 2, 4C and 5 of Part IAA; and
- any other provisions of the Crimes Act 1914, to the extent that those other provisions relate to the operation of Divisions 1, 2, 4C and 5 of Part IAA.

*[Schedule 1, Part I, item 1, section 39D of the ASIC Act; and Schedule 1, Part 2, item 2, section 272B of the Credit Act]*

2.12 Incorporating by reference the search warrant provisions from the *Crimes Act 1914* has the practical effect of keeping ASIC’s search warrant powers up-to-date as changes are made to the *Crimes Act 1914*. 
2.13 However, certain modifications are required to the *Crimes Act 1914* provisions to make the provisions ‘fit for purpose’ in the context of ASIC’s regulatory and investigative remit. These modifications are contained in the ASIC Act and Credit Act.

2.14 The terms included in the modified provisions are defined as per their definitions in the *Crimes Act 1914* unless specified otherwise. [Schedule 1, Part 1, item 1, section 39A of the ASIC Act; and Schedule 1, Part 2, item 2, section 272BA of the Credit Act]

2.15 To this end, the applied provisions of the *Crimes Act 1914* are modified to include definitions of ASIC, ASIC senior staff member and ASIC staff member. [Schedule 1, Part 1, section 39H of the ASIC Act; and Schedule 1, Part 2, item 2, section 272F of the Credit Act]

**How can ASIC apply for a search warrant?**

2.16 To carry out its investigative and enforcement functions, ASIC can apply for a warrant.

2.17 Schedule 1 to the Bill adopts by reference a modified version of section 3E of the *Crimes Act 1914* to provide that a magistrate may issue a warrant, or authorise an ordinary search or frisk search, if the magistrate is satisfied by information given on oath or affirmation by a constable, an ASIC member or ASIC staff member. [Schedule 1, Part 1, item 1, subsections 39F(1) and 39F(2) of the ASIC Act and Schedule 1, Part 2, item 2, subsections 272D(1) and 272D(2) of the Credit Act]

2.18 Currently, when seeking a warrant under the Credit Act, the *Retirement Savings Accounts Act 1997* or the *Superannuation Industry (Supervision) Act 1993*, ASIC must demonstrate to the court that it issued a notice to produce which has not been complied with.

2.19 Consistent with the process under the *Crimes Act 1914*, ASIC is no longer required to demonstrate when seeking a search warrant that it has previously issued a notice to a person requiring the production of books which the person has failed to produce.

2.20 This means ASIC is no longer required to forewarn a person under investigation that it may apply for a search warrant. These changes will decrease the risk of destruction, concealment and alteration of evidence by such persons, and enhance ASIC’s ability to progress an investigation.

2.21 ASIC’s existing search warrant provisions require ASIC to specify particular books thought to exist. ASIC’s subsequent search and seizure is limited to those particular books.

2.22 This means that if, in the course of executing a search warrant under any of these Acts, an ASIC officer identifies documents
that are highly relevant to the offences to which the warrant relates, but
those documents do not form part of the particular books specified in
the warrant, there is no authority to seize those documents.

2.23 The amendments in Schedule 1 to this Bill mean ASIC is no
longer required to specify the exact books or evidential material that
can be searched and seized. Instead, the magistrate, in issuing the
warrant must state the offence to which the warrant relates and the
kinds of evidential material that can be searched for under the warrant.

2.24 The magistrate must also state that the warrant authorises the
seizure of evidential material about the offence to which the warrant
relates or another offence that is an indictable offence.

2.25 This means that under its amended search warrant powers
ASIC is able to seize other material relevant to the particular offence if
ASIC uncovers the material in the process of executing the warrant or
material relevant to another indictable offence.

2.26 This approach gives the Australian Federal Police and/or
state police, and ASIC more flexibility in executing a search warrant,
particularly if evidential material that was previously unknown to
ASIC is discovered at the premises. As a consequence, ASIC will be
able to search and seize a wider range of material relevant to its
investigation.

2.27 The explanation in paragraphs 2.19 and 2.23 to 2.26 is the
result of applying by reference Division 2 of Part IAA of the
Crimes Act 1914. Modifications are not required.

2.28 As search warrants are often sought and issued in
circumstances where there is a reasonable concern that relevant
evidence will be destroyed, tampered with or not produced under a
notice, there may be situations where swift action is required to ensure
that the effective execution of the warrant is not frustrated.

2.29 Schedule 1 to the Bill adopts a modified version of
subsection 3R(1) of the Crimes Act 1914 to enable a constable, ASIC
member or ASIC staff member to apply for a search warrant by
telephone, telex, fax or other electronic means in urgent cases.

[Schedule 1, Part 1, item 1, subsection 39F(4) of the ASIC Act and Schedule 1,
Part 2, item 2, subsection 272D(4) of the Credit Act]

When can a search warrant be issued?

2.30 Using a search warrant is a substantial imposition on an
individual’s property and personal rights. It is also a significant
logistical undertaking that involves substantial costs, planning and
coordination with the Australian Federal Police and/or state police.
2.31 In light of these concerns, Schedule 1 to the Bill adopts a modified version of the definition of evidential material which is limited to material relevant to an indictable offence. The definition of evidential material in the Crimes Act 1914 would normally also include a thing relevant to a summary offence. [Schedule 1, Part 1, item 1, section 39E of the ASIC Act and Schedule 1, Part 2, item 2, section 272C of the Credit Act]

2.32 This means that when a magistrate is considering issuing a search warrant under the amended ASIC search warrant provisions, the magistrate must suspect that material relevant to an indicatable offence is, or will be in the next 72 hours, present on those premises.

2.33 The definition of indictable offence applied by reference, is an offence against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months, unless the contrary intention appears.

2.34 The relevant guide in the Credit Act is updated to refer to search warrants being granted for indictable offences. [Schedule 1, Part 2, item 2, section 272A of the Credit Act]

2.35 This threshold ensures that ASIC’s amended search warrant powers are only used by ASIC to investigate serious offences. It also seeks to achieve an appropriate balance between the need for ASIC to have access to effective investigative tools, the relevant harm or risk resulting from the purported contravention, and the rights of individuals.

**How can seized evidential material be used and disclosed?**

2.36 Under the existing search warrant provisions in the ASIC Act, the Credit Act, the Retirement Savings Accounts Act 1997 and the Superannuation Industry (Supervision) Act 1993, ASIC may use books seized by ASIC under those provisions for the purposes of a proceeding under a law of the Commonwealth or of a State or Territory.

2.37 In contrast, material seized under the existing search warrant provisions in the Crimes Act 1914 which is subsequently shared with ASIC can only be used by ASIC for the purpose of investigating or prosecuting criminal offences. Seized material cannot be used to investigate contraventions that may give rise to civil proceedings or administrative action, and the material is not admissible in any such proceedings or action undertaken by ASIC.

2.38 The ASIC Enforcement Review Taskforce found that the restrictions on the permissible use of evidence obtained under the
existing Crimes Act 1914 search warrant provisions create various practical difficulties for ASIC.

2.39 Schedule 1 to the Bill substitutes section 3ZQU of the Crimes Act 1914 to set out the purposes for which material seized under ASIC’s new search warrant powers can be used by ASIC. [Schedule 1, Part 1, item 1, section 39G of the ASIC Act and Schedule 1, Part 2, item 2, section 272E of the Credit Act]

2.40 Under the substituted provision, a constable or Commonwealth officer may use or make available to an ASIC staff member to use, seized evidential material for the purpose of the performance of ASIC’s functions or duties or the exercise of ASIC’s powers.

2.41 This would include ASIC preventing or investigating a breach of an offence provision, a breach of a civil penalty provision, or a breach that could result in other civil or administrative action.

2.42 It would also include ASIC using material seized through a search warrant to:

- disqualify a person from managing a corporation or ban a person from providing financial services or engaging in credit activities;
- seek a declaration of a contravention from a court;
- revoke, suspend or vary conditions of a licence;
- issue an infringement notice;
- seek an injunction to stop future misconduct; or
- seek an order from a court to wind up a company.

2.43 These are examples of the type of administrative, civil or criminal actions that ASIC may take. This is not an exhaustive list.

2.44 ASIC is also able to share information with a person engaged by ASIC to, for example, assist in the preparation of a legal case or undertake forensic accounting. It is important that ASIC can share the information broadly with people that it engages.

2.45 A constable or Commonwealth officer may also make available to a constable or a Commonwealth officer the seized evidential material for:

- preventing or investigating a breach of an offence provision, a breach of a civil penalty provision, or a breach of an obligation (other than an obligation of a private nature);
- prosecuting a breach of an offence provision;
- prosecuting a breach of a civil penalty provision; or
• taking administrative action, or seeking an order of a court of
tribunal, in response to a breach of an obligation.

2.46 A constable or Commonwealth officer is able to use the
material in preventing, investigating or prosecuting a breach of any
offence provision. This is not limited to indictable offences.

2.47 Consistent with the explanation at paragraph 2.14, constable
and Commonwealth officer are defined in section 3 of the
Crimes Act 1914 and apply for the purposes of the substituted
provision.

2.48 The information collected under the search warrant may also
be shared and used by an agency that has responsibility for law
enforcement in a foreign country, intelligence gathering in a foreign
country or the security of a foreign country for the purpose of
enforcement action in that foreign jurisdiction.

2.49 The substituted provisions inserted by Schedule 1 to this Bill
also replicate parts of section 3ZQU in the Crimes Act 1914.

2.50 This includes using or making available for others to use the
seized material for proceedings under the Proceeds of Crimes
Act 1987, investigating or resolving a complaint under the
Ombudsman Act 1976 or the performance or functions of the
Australian Federal Police.

How are ASIC’s search warrant powers enhanced?

2.51 The existing search warrant powers in the ASIC Act, the
Credit Act, the Retirement Savings Accounts Act 1997 and the
Superannuation Industry (Supervision) Act 1993 do not adequately
address the issues that arise from the operation of modern businesses.
The ASIC Enforcement Review Taskforce found that as a result, these
search warrant powers are not as practical or effective as they could be.

2.52 The search warrant provisions in the Crimes Act 1914 were
amended by the Telecommunications and Other Legislation
Amendment (Assistance and Access) Act 2018 to address these
concerns to allow the Australian Federal Police to carry out its
functions more effectively.

2.53 Schedule 1 to this Bill incorporates by reference many of the
‘ancillary powers’ for search warrants from the Crimes Act 1914 into
the ASIC Act for the purposes of ASIC’s new search warrant powers,
with minor modifications as necessary.
2.54 For example, the amended search warrant powers give ASIC the ability to:

- take photographs and make video recordings of the search (section 3J of the *Crimes Act 1914*);
- operate electronic equipment on the premises to access data (section 3L of the *Crimes Act 1914*);
- move devices to another place for processing to determine if the devices contain evidential material (section 3K of the *Crimes Act 1914*); and
- operate seized devices to access data (section 3ZQV of the *Crimes Act 1914*).

2.55 Schedule 1 to the Bill also adopts a modified version of subsection 3LA(1) of the *Crimes Act 1914* to enable a constable, ASIC member or ASIC staff member to apply to a magistrate for an order requiring a person to provide reasonable assistance or information to assist with a computer or other electronic device. [Schedule 1, Part 1, item 1, subsection 39F(3) of the ASIC Act and Schedule 1, Part 2, item 2, subsection 272D(3) of the Credit Act]

How long can ASIC retain seized material?

2.56 Schedule 1 to the Bill applies by reference subsections 3L(1B) and 3LAA(3) and sections 3ZQX and 3ZQZB of the *Crimes Act 1914*. These provisions set out when material seized under a search warrant power must be returned, destroyed or removed from a device where the material may be stored.

2.57 These provisions also allow an application to a magistrate to make an order setting out how long a thing, which has been seized under a search warrant, may be retained.

2.58 To give effect to this outcome, the applied provisions from the *Crimes Act 1914* are modified to provide that references in those provisions to ‘the Commissioner’ are references to the ‘responsible Commissioner’ which includes the Chairperson of ASIC (as well as the Commissioner of the Australian Federal Police). [Schedule 1, Part 1, item 1, section 39H of the ASIC Act and Schedule 1, Part 2, item 2, section 272F of the Credit Act]

2.59 Similarly, references to ‘the Australian Federal Police’ should be read as references to ‘the responsible agency’ which includes ASIC (as well as the Australian Federal Police). [Schedule 1, Part 1, item 1, section 39H of the ASIC Act and Schedule 1, Part 2, item 2, section 272F of the Credit Act].
How can a person access seized material?

2.60 The ASIC Enforcement Review Taskforce specifically considered the circumstances in which a private litigant should be able to access information seized by ASIC under its harmonised search warrant provisions. The ASIC Enforcement Review Taskforce concluded that it was appropriate to provide additional protections to material seized under a search warrant to limit the ability of private litigants to access that material.

2.61 Schedule 1 to the Bill amends the ASIC Act and Credit Act to provide that another law of the Commonwealth is not able to permit access to material seized under ASIC’s amended search warrant powers to a private person. [Schedule 1, Part 1, item 1, section 39G of the ASIC Act and Schedule 1, Part 2, item 2, section 272E of the Credit Act]

2.62 This rule is intended to prevail, for example, over the Bill’s provision for the purposes for which seized material can be used by ASIC and shared, explained above at paragraph 2.40. It is also intended to prevail over those parts of section 3ZQU that seek to preserve uses that are required or authorised by other Commonwealth, State or Territory laws. The rule does not prevail over the Freedom of Information Act 1982.

2.63 A private person can only obtain the seized material through an order of a court or of a tribunal (as defined in the ASIC Act). [Schedule 1, Part 1, item 1, section 39G of the ASIC Act and Schedule 1, Part 2, item 2, section 272E of the Credit Act]

2.64 Consequential amendments are also required to section 37 of the ASIC Act and section 271 of the Credit Act. Section 37 of the ASIC Act and section 271 of the Credit Act allow for the sharing and use of seized books. However, section 37 of the ASIC Act and section 271 of the Credit Act are amended to exclude material obtained under ASIC’s amended search warrant powers. [Schedule 1, Part 3, items 5, 6, 7 and 8, paragraph 37(1)(b), subsections 37(1A), 37(8) and 37(9) of the ASIC Act; and items 16, 17, 18 and 19, paragraph 271(1)(b) and subsections 271(1A), 271(8) and 271(9) of the Credit Act]

Consequential amendments

2.65 Schedule 1 to the Bill also makes consequential amendments to the ASIC Act and Credit Act to support the updated approach to search warrants.
Harmonising and enhancing ASIC’s search warrant powers

2.66 The existing search warrant provisions in the ASIC Act and Credit Act are repealed as are redundant references. [Schedule 1 Part 3, items 3, 4 and 11, sections 28 and 35 to 36A, and subsection 65(1) of the ASIC Act; and items 13, 14 and 15, sections 262, 263, and 269 and 270 of the Credit Act]

2.67 References to the existing search warrant provisions in the ASIC Act are updated to refer to the adopted and modified provisions from the Crimes Act 1914. [Schedule 1, Part 3, items 9 and 10 paragraphs 39B(1)(b) and 39B(1)(d) of the ASIC Act]

2.68 Existing subsection 65(2) of the ASIC Act and section 292 of the Credit Act provide that a person must not intentionally or recklessly fail to provide reasonable assistance to a person who is exercising his or her powers under a search warrant are repealed. The provisions applied by reference from the Crimes Act 1914 provide avenues for ASIC to seek assistance when executing a warrant. [Schedule 1, Part 3, items 12 and 20, subsection 65(2) of the ASIC Act and subsection 292 of the Credit Act]

Superannuation Industry (Supervision) Act 1993

2.69 Schedule 1 to the Bill amends the Superannuation Industry (Supervision) Act 1993 to remove the search warrant provisions contained in the Superannuation Industry (Supervision) Act 1993 and refer to the new provisions included in the ASIC Act. [Schedule 1, Part 3, items 24, 25 and 26, section 271, paragraph 273(1)(b) and subsection 273(1A) of the Superannuation Industry (Supervision) Act 1993]

Retirement Savings Accounts Act 1997

2.70 Schedule 1 to the Bill amends the Retirement Savings Accounts Act 1997 to remove the search warrant provisions contained in the Retirement Savings Accounts Act 1997 and refer to the new provisions included in the ASIC Act. [Schedule 1, Part 3, items 21, 22 and 23, section 102, paragraph 104(1)(b) and subsections 104(1) of the Retirement Savings Accounts Act 1997]

Application and transitional provisions

2.71 The amendments contained in Schedule 1 to the Bill commence the day after Royal Assent.

2.72 The amendments made by Schedule 1 to the Bill apply to search warrants applied for on or after the Schedule commences. However, the matter to which the warrant relates may have occurred before commencement. [Schedule 1, Part 4, items 27, 28 and 29]

2.73 The Bill provides that search warrants issued under the repealed provisions in the ASIC Act, Credit Act, Retirement Savings Accounts Act 1997 and Superannuation Industry (Supervision)
Act 1993 can still be served and result in the seizure of material relating to crimes committed after commencement of the new provisions.
Chapter 3
Access to telecommunications interception information

Outline of chapter

3.1 Schedule 2 to the Bill amends the TIA Act to allow ASIC to receive and use intercepted information for its own investigations and prosecutions of serious offences.

3.2 All legislative references in this chapter are to the TIA Act unless indicated otherwise.

Summary of new law

3.3 The amendments allow interception agencies to provide information about interception warrants or lawfully intercepted information to ASIC for any serious offences that ASIC can investigate.

3.4 The amendments also allow an ASIC member or staff member to use, record or provide another person with the received information for the purpose of an investigation of a serious offence by ASIC and subsequent reporting or prosecutions.

Comparison of key features of new law and current law

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
</tr>
</thead>
<tbody>
<tr>
<td>The chief officer of an interception agency can provide an ASIC member or staff member with information about an interception warrant or lawfully intercepted information, where the information relates, or appears to relate, to a matter that ASIC can investigate involving a serious offence or the likely commission of a serious offence.</td>
<td>The chief officer of an interception agency cannot provide an ASIC staff member with information about an interception warrant or lawfully intercepted information.</td>
</tr>
<tr>
<td>The chief officer can also provide the information through an authorised officer of the interception agency.</td>
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</tbody>
</table>
### New law vs. Current law

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
</tr>
</thead>
<tbody>
<tr>
<td>An ASIC member or staff member can also use, record or provide another person with information about an interception warrant or lawfully intercepted information for a permitted purpose.</td>
<td>An ASIC staff member can receive information about an interception warrant or lawfully intercepted information if the ASIC staff member is assisting an interception agency’s investigation, or for the purpose of a Royal Commission inquiry, but cannot provide the information to another person for the purpose of an ASIC investigation.</td>
</tr>
<tr>
<td>A permitted purpose includes an investigation of a serious offence by ASIC and subsequent reporting or prosecutions.</td>
<td>A permitted purpose does not include an investigation of a serious offence by ASIC, or any subsequent reporting or prosecution.</td>
</tr>
</tbody>
</table>

### Detailed explanation of new law

3.5 The TIA Act prohibits the interception of communications and access to stored communications. The *Telecommunications Act 1997* prohibits telecommunications service providers from disclosing information about their customers’ use of telecommunications services (telecommunications data).

3.6 The TIA Act then sets out certain exceptions to those prohibitions to permit eligible Australian law enforcement agencies and the Australian Security Intelligence Organisation to obtain warrants to intercept communications, obtains warrants to access stored communications or authorise disclosure of telecommunications data. This includes the provision of information to other agencies for subsequent reporting and prosecutions.

3.7 Telecommunications interception information is obtained by listening to or recording content passing over a telecommunications service (for example, real-time listening to telephone calls).

3.8 This is different to stored communications and telecommunications data. Stored communications are the content of historical communications, such as short message service (SMS) or email, held by the carrier. Telecommunications data refers to the underlying details or ‘metadata’ of communications, such as subscriber details, call time or call location.

3.9 As indicated above, the TIA Act contains an exception to allow for the interception of communications in certain circumstances (for example, for the purposes of investigating serious offences).
3.10 Only specific listed agencies may obtain an interception warrant under the TIA Act; these are ‘interception agencies’. Interception agencies are broadly Federal and State police, the Australian Security Intelligence Organisation and anti-corruption bodies.

3.11 ASIC investigates and prosecutes offences under the Corporations Act 2001 and other corporate crime. Some of these offences are defined as serious offences under the TIA Act, such as insider trading, market manipulation and financial services fraud.

3.12 ASIC is currently able to access and use stored communications and telecommunications data. However, ASIC is not listed as an interception agency and its staff members do not have access to telecommunications intercept information, unless they are assisting with an interception agency’s investigation or prosecution or a Royal Commission inquiry.

**Enabling ASIC to access and use intercepted information**

3.13 Information obtained by interception activities is defined as ‘lawfully intercepted information’ under sections 5 and 6E of the TIA Act. Information about a warrant is defined as ‘interception warrant information’ under sections 5 and 6EA. Under specific legislated circumstances, interception agencies can share this information with other bodies, such as Commonwealth Royal Commissions.

3.14 The Bill extends those circumstances so that the chief officer of an interception agency (or authorised officer of that interception agency) can provide interception warrant information or lawfully intercepted information to an ASIC member or staff member where the information relates, or appears to relate, to a serious offence that ASIC can investigate. \[Schedule 2, item 11, paragraph 68(p)\]

3.15 This ensures ASIC has access to intercepted information as well as telecommunications data and stored communications for its own investigations and prosecutions. Importantly, the Bill does not allow ASIC to intercept information itself but rather allows ASIC to receive and use information already intercepted by other agencies.

3.16 To facilitate ASIC’s investigations and prosecutions of serious offences, the Bill allows an ASIC member or staff member to use and record the received information, as well as communicate the information to another person, for a permitted purpose in relation to ASIC. \[Schedule 2, item 10, subsection 67(3)\]

3.17 ‘Permitted purpose’ is defined in the TIA Act in relation to a specific agency or body under section 5. The definition does not currently capture ASIC or its functions.
Accordingly, the Bill expands the scope of ‘permitted purpose’ to include a purpose connected with:

- an investigation by ASIC of a serious offence or of the likely commission of a serious offence;
- a report on such an investigation;
- the making of a decision whether or not to begin a prosecution for a serious offence if the prosecution arises from or relates to such an investigation; or
- a prosecution for a serious offence if the prosecution arises from or relates to such an investigation.

[Schedule 2, items 2 to 4, definition of ‘permitted purpose’ in subsection 5(1)]

An example of a report on such an ASIC investigation is an interim report on the investigation.

The Bill does not change the existing scope of serious offences defined in the TIA Act or permit ASIC to obtain an interception warrant.

Consequential amendments

The terms ASIC and staff member of ASIC are inserted into the definition section of the TIA Act. [Schedule 2, items 1 and 5, subsection 5(1)]

The Bill amends the headings within section 67 of the TIA Act to better reflect that communicating, using and recording intercepted information is not limited to an officer or staff member of an interception agency. The section currently also makes provision for an officer of a Commonwealth Royal Commission. [Schedule 2, items 7 to 9, section 67]

Application and transitional provisions

The amendments apply to information about interception warrants or lawfully intercepted information obtained by an interception agency before, at or after the day after Royal Assent. [Schedule 2, item 12]

This ensures that ASIC has access to interception information that interception agencies currently hold, which will enhance ASIC’s ability to investigate and successfully prosecute serious offences in the future.
Other amendments

3.25 The Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 removed the subsection numbering in section 1041G of the Corporations Act 2001. Accordingly, the Bill includes an amendment updating a reference in the TIA Act to former subsection 1041G(1) of the Corporations Act 2001. [Schedule 2, item 6, paragraph 5D(5C)(g)]
Chapter 4
Licensing and false or misleading documents

Outline of chapter

4.1 Schedule 3 to the Bill amends the Corporations Act 2001 and Credit Act to strengthen ASIC’s licensing powers and the offences for false and misleading documents. The amendments implement the recommendations in Chapter 5 of the ASIC Enforcement Review Taskforce Report¹ (the ASIC Enforcement Review) that was presented to the Government in December 2017.

Summary of new law

4.2 The amendments in Part 1 of Schedule 3 update the requirements for obtaining an Australian financial services licence (AFS licence) by replacing requirement that a person be of ‘good fame and character’ with the requirement that they be a ‘fit and proper person’ to provide the financial service covered by the licence. The amendments in Parts 1 and 2 of Schedule 3 make a number of changes to the AFS licence and Australian credit licence regimes to ensure broader application of the respective fit and proper person tests to all officers, partners and trustees of an applicant, and to extend the test to their controllers. The ‘fit and proper person’ requirements must be satisfied on an ongoing basis.

4.3 The amendments in Parts 1 and 2 of Schedule 3 also make a number of other improvements to the AFS licence and Australian credit licence regimes. These improvements ensure that ASIC has access to adequate information in relation to an application or a licence, ensure that ASIC can refuse to grant a licence when a material particular in an application is false or misleading, and ensure that a licence can be suspended or revoked in certain circumstances (including where the financial services authorised by the licence have not been provided within 6 months of the licence being granted).
4.4 The amendments in Part 3 of Schedule 3 align the consequences for making false or misleading statements in documents provided to ASIC in AFS licence and Australian credit licence contexts.

Comparison of key features of new law and current law

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
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<tbody>
<tr>
<td><strong>Licence application</strong></td>
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<tr>
<td>To grant an AFS licence, ASIC must be satisfied that there is no reason to believe that the applicant is not a ‘fit and proper person’ to provide the financial service covered by the licence. The test also applies to all officers, partners or trustees of the applicant, as well as any controllers of the applicant.</td>
<td>To grant an AFS licence, ASIC must be satisfied that there is no reason to believe that the applicant is not of ‘good fame or character’. The test also applies any officers, partners or trustees of an applicant who would perform duties in connection with the holding of the licence.</td>
</tr>
<tr>
<td>No equivalent</td>
<td>If ASIC is not satisfied that certain applicant is of good fame or character, ASIC may grant an AFS licence if it is satisfied that the applicant’s ability to provide financial services covered by the licence would not be significantly impaired.</td>
</tr>
<tr>
<td>To grant an Australian credit licence, ASIC must be satisfied that there is no reason to believe that the applicant is not a ‘fit and proper person’ to engage in the credit activities authorised by the licence. The test also applies to all officers, partners or trustees of the applicant, as well as any controllers of the applicant.</td>
<td>To grant an Australian credit licence, ASIC must be satisfied that there is no reason to believe that the applicant is not a ‘fit and proper person’ to engage in the credit activities authorised by the licence. The test also applies any officers, partners or trustees of an applicant who would perform duties in connection with the holding of the licence.</td>
</tr>
<tr>
<td>ASIC may request information from an applicant in relation to an application for an AFS licence or an Australian credit licence. The application is deemed to be withdrawn if the applicant does not provide the information.</td>
<td>ASIC may request information from an applicant in relation to an application for an Australian credit licence. The application is deemed to be withdrawn if the applicant does not provide the information.</td>
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<tr>
<td>An applicant for an AFS licence or</td>
<td>No equivalent.</td>
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<tr>
<td>New law</td>
<td>Current law</td>
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<td>------------------------------------------------------------------------</td>
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<tr>
<td>an Australian credit licence must confirm with ASIC that there have</td>
<td>ASIC may refuse to grant an AFS licence or an Australian credit licence,</td>
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<td>been no material changes to the information provided in relation to</td>
<td>or may cancel such a licence, if the application for the licence was false</td>
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<td>their application, or inform ASIC of any material changes of the</td>
<td>in a material particular or materially misleading.</td>
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<tr>
<td>information.</td>
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<tr>
<td>ASIC may refuse to grant an AFS licence or an Australian credit</td>
<td>ASIC may cancel an AFS licence or an Australian credit licence if the</td>
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<tr>
<td>licence, or may cancel such a licence, if the application for the</td>
<td>application for the licence was false in a material particular or</td>
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<td>licence was false in a material particular or materially misleading.</td>
<td>materially misleading.</td>
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**Licence requirements and obligations**

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
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<tbody>
<tr>
<td>ASIC may suspend or cancel an AFS licence if the licensee does not</td>
<td>ASIC may suspend or cancel an AFS licence if the licensee ceases to carry</td>
</tr>
<tr>
<td>provide a financial service within 6 months of the licence being</td>
<td>on a financial service business.</td>
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<tr>
<td>granted, or if the licensee ceases to carry on a financial service</td>
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<tr>
<td>business.</td>
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<tr>
<td>An AFS licensee or credit licensee who requests a variation of their</td>
<td>No equivalent.</td>
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<tr>
<td>licence must satisfy the fit and proper person test in order for ASIC</td>
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<tr>
<td>to grant a varied licence.</td>
<td></td>
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<tr>
<td>ASIC may vary or revoke an AFS licence or Australian credit licence if</td>
<td>ASIC may vary or revoke an AFS licence or Australian credit licence if it</td>
</tr>
<tr>
<td>it is no longer satisfied that the licensee, its officers, or controllers</td>
<td>is no longer satisfied that the licensee, or certain officers, no longer</td>
</tr>
<tr>
<td>no longer satisfy the ‘fit and proper person’ requirement.</td>
<td>satisfy the respective ‘good fame or character’ or ‘fit and proper person’</td>
</tr>
<tr>
<td>An AFS licensee or credit licensee must notify ASIC of a change of</td>
<td>requirements.</td>
</tr>
<tr>
<td>control within 30 business days of the change.</td>
<td></td>
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<tr>
<td>A failure to notify is an offence of strict liability.</td>
<td></td>
</tr>
<tr>
<td>An AFS licensee or credit licensee must notify ASIC if it does not</td>
<td>No equivalent.</td>
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<tr>
<td>provide a financial service or engage in a credit activity covered by</td>
<td></td>
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<tr>
<td>its licence within 6 months of the licence being granted.</td>
<td></td>
</tr>
<tr>
<td>A failure to notify ASIC is an offence of strict liability.</td>
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</table>

No equivalent.
<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>False and misleading documents</strong></td>
<td><strong>False and misleading documents</strong></td>
</tr>
<tr>
<td>Broadly equivalent offences for false and misleading documents apply under the <em>Corporations Act 2001</em> and Credit Act. These offences apply to persons who make statements in documents, omit a matter or thing from a document, or authorise such statements or omissions. A person commits an offence if they know that, because of the statement or omission, the document is materially false or misleading because of the statement or omission. A person commits an offence of strict liability if the person did not take reasonable steps to ensure that the document was not materially false or misleading because of the statement or omission. Equivalent civil penalty provisions apply to both types of offences.</td>
<td>Offences for false and misleading documents apply under the <em>Corporations Act 2001</em> to persons who make statements in documents, omit a matter or thing from the document, or authorise such statements or omissions. A person commits an offence if they know that the document is materially false or misleading because of the statement or omission, or if the person did not take reasonable steps to ensure that the document was not materially false or misleading because of the statement or omission. The <em>Corporations Act 2001</em> does not contain equivalent civil penalty provisions. Offences for false and misleading documents apply under the Credit Act to persons who make statements in documents, omit a matter or thing from the document, or authorise such statements or omissions. A person commits an offence if they know that, because of the statement or omission, the document is materially false or misleading because of the statement or omission. A person commits an offence of strict liability if the person did not take reasonable steps to ensure that the document was not materially false or misleading because of the statement or omission. Equivalent civil penalty provisions apply to both types of both offences.</td>
</tr>
</tbody>
</table>
Detailed explanation of new law

Licence application

*Fit and proper test – alignment of AFS licensing and the credit licensing regimes (recommendation 27)*

4.5 To grant an AFS licence, currently, ASIC must have no reason to believe that an applicant (either an individual, responsible officers of a body corporate, partners of a partnership or trustees of a trust) is not of ‘good fame or character’.

4.6 A ‘fit and proper’ test was adopted in the credit licensing regime (implemented in 2009) after having regard to the administration of the AFS licensing regime that had been operating for a number of years. A number of other enhancements to the AFS licensing model were implemented as part of the credit licensing regime.

4.7 The ASIC Enforcement Review Taskforce found that there are no policy reasons for applicants to be subject to different tests as both licensing regimes regulate similar types of conduct, and therefore to the extent practicable, the application requirements should be aligned.

4.8 The amendments replace the ‘good fame or character’ test with a ‘fit and proper’ person test in the AFS licensing regime. The amendments also make minor changes to the current fit and proper test in the credit licensing regime to ensure alignment in both regimes, as set out below.

*AFS licensing*

**Individual applicant**

4.9 If the applicant is a natural person, ASIC must be satisfied that there is no reason to believe that the individual is not a fit and proper person to provide the financial services covered by the licence. [*Schedule 3, items 4 and 7, subsection 913B(1)(c) and paragraph 913BA(1)(a) of the Corporations Act 2001*]

**Body corporate applicant**

4.10 If the applicant is a body corporate, ASIC must have no reason to believe that the body corporate is not a fit and proper person to provide the financial services authorised by the licence. [*Schedule 3, item 4 and 7, paragraph 913B(1)(c) and paragraph 913BA(1)(a) of the Corporations Act 2001*]

4.11 In addition, ASIC must have no reason to believe that each officer of the body corporate is not a fit and proper person to perform one or more functions as an officer of an entity that provides financial services covered by the licence. [*Schedule 3, items 4 and 7, paragraph 913B(1)(c) and paragraph 913BA(1)(b) of the Corporations Act 2001*]
4.12 The requirement to test the ‘officer’ of a body corporate replaces the current requirement to test the ‘responsible officers’ of a body corporate. The concept of ‘officer’ in the Corporations Act 2001 is broader than the concept of ‘responsible officer’. [Schedule 3, item 1, section 9 of the Corporations Act 2001, definition of ‘responsible officer’]

4.13 An ‘officer’ is defined in section 9 of the Corporations Act 2001. An officer of a corporation means:

- a director or secretary of the corporation; or
- a person:
  - who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
  - who has the capacity to affect significantly the corporation’s financial standing; or
  - in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors of the corporation); or
- a receiver, or receiver and manager, of the property of the corporation; or
- an administrator of the corporation; or
- an administrator of a deed of company arrangement executed by the corporation; or
- a liquidator of the corporation; or
- a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

4.14 A ‘responsible officer’ in relation to a body corporate is an officer of the body who would perform duties in connection with the holding of the AFS licence. The amendment ensures that all persons who meet the definition of ‘officer’ are required to meet the fit and proper test, not just those who would perform duties in connection with the licence. This is appropriate because the fitness and proprietary of all persons occupying these positions is relevant to ASIC’s consideration of whether an application should be granted, as they can affect or influence the operations, policies and procedures of the body corporate.
Partnership or trustees of a trust applicant

4.15 If the applicant is a partnership or trustees of a trust, ASIC must have no reason to believe that any of the partners or trustees are not fit and proper to provide the financial services covered by the licence. [Schedule 3, items 4 and 7, paragraph 913B(1)(c) and subparagraph 913BA(1)(c)(i) of the Corporations Act 2001]

4.16 In addition, ASIC must have no reason to believe that any of the senior managers (as defined under section 9) of the partnership or trust are not fit and proper persons to perform one or more functions as an officer of an entity that provides the financial services authorised by the licence. [Schedule 3, items 4 and 7, paragraph 913B(1)(c) and subparagraph 913BA(1)(c)(ii)) of the Corporations Act 2001]

4.17 A ‘senior manager’ in relation to a partnership or a trust means a person, other than a partner or a trustee, who:

- makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or affairs of the partnership or trust; and
- has the capacity to affect significantly the financial standing of the partnership or trust.

4.18 The fit and proper test, as it applies to a partner or trustee, also removes the current requirement to assess the good fame or character of only the partners or trustees ‘who would perform duties in connection with the holding of the licence’ (current subparagraph 913B(3)(a)(ii)).

4.19 The removal of this requirement ensures that ASIC must be satisfied that all partners and trustees are fit and proper, not just those who would perform duties in connection with the holding of the licence. This amendment aligns the fit and proper test to the credit licensing regime.

Removal of ‘ability not significantly impaired’ alternative to good fame or character test

4.20 Currently, if ASIC is not satisfied that certain applicants (body corporates, partnerships or trustees of a trust) are of good fame or character, but is otherwise satisfied that the applicant’s ability to provide financial services covered by the licence would not be significantly impaired, the applicant does not fail the good fame or character test (current paragraph 913B(3)(b)).

4.21 The amendments remove this alternative test as part of the introduction of the fit and proper test. It is not appropriate to include an alternative ground where the applicant does not meet the fit and proper test. This amendment aligns the fit and proper test to the credit licensing regime. [Schedule 3, items 4 and 7, paragraph 913B(1)(c) and section 913BA of the Corporations Act 2001]
Credit licensing

4.22 The fit and proper test applies to Australian credit licence applicants in an equivalent way as it applies to AFS licence applicants, set out below.

Individual applicant

4.23 If the applicant is a natural person, ASIC must be satisfied that there is no reason to believe that the individual is not a fit and proper person to engage in the credit activities authorised by the licence. [Schedule 3, items 34 and 41, paragraph 37(1)(c) and paragraph 37A(1)(a) of the Credit Act]

Body corporate applicant

4.24 If the applicant is a body corporate, ASIC must have no reason to believe that the body corporate is not a fit and proper person to engage in the credit activities authorised by the licence. [Schedule 3, items 34 and 41, paragraph 37(1)(c) and paragraph 37A(1)(b) of the Credit Act]

4.25 In addition, ASIC must have no reason to believe that an officer of the body corporate is not a fit and proper person to perform one or more functions as an officer of an entity that engages in credit activities authorised by the licence. [Schedule 3, items 34 and 41, paragraph 37(1)(c) and paragraph 37A(1)(b) of the Credit Act]

4.26 The term ‘officer’ takes its meaning from section 9 of the Corporations Act 2001. This term is explained in further detail above.

Partnership or trust applicant

4.27 If the applicant is a partnership or trustees of a trust, ASIC must have no reason to believe that any partner or trustee is not fit and proper to engage in the credit activities authorised by the licence. [Schedule 3, items 34 and 41, paragraph 37(1)(c) and subparagraph 37A(1)(c)(i) of the Credit Act]

4.28 In addition, ASIC must have not reason to believe that any of the senior managers of the partnership or trust are not fit and proper persons to perform one or more functions as an officer of an entity that engages in the credit activities authorised by the licence. [Schedule 3, items 34 and 41, paragraph 37(1)(c) and subparagraph 37A(1)(c)(ii)]

4.29 A ‘senior manager’ takes its meaning from section 9 of the Corporations Act 2001. This term is explained in further detail above.

Fit and proper test – extension to controllers (recommendation 23)

4.30 Currently, the good fame or character test (AFS licensing), and fit and proper test (credit licensing) does not apply to the controllers of a licence applicant. Despite the legal separation between a controller and an applicant, a controller may be the directing mind of an applicant and have
the capacity to influence the applicant’s financial and operating policy, and any practice or behaviour of the applicant.

4.31 Under current practices, ASIC requires new applicants to identify its controller/s on an AFS or Australian credit licence application, and undertakes a search of its database to ascertain if it has any information regarding the character or prior conduct of those individuals. If so, this conduct is taken into account in determining whether ASIC has reason to believe the applicant will not comply with its obligations as an AFS or credit licensee. However, there is no obligation for an applicant to make specific disclosures about the past history, conduct or character of controllers and ASIC receives no upfront information about these matters.

4.32 Under the amendments, the fit and proper test applies to controllers of an applicant in both the AFS and credit licensing regimes, as set out below.

*The meaning of ‘control’*

4.33 Control, of a body corporate, or another entity, for the purposes of both the AFS and credit licensing regimes, can be determined through a number of ways. The control test applies to both the banning and licensing regimes, and is being re-written as part of the amendments to the banning regime in Schedule 4. The re-written test is explained in the explanatory memorandum for those amendments.

*AFS licensing*

4.34 ASIC must be satisfied that there is no reason to believe that any person who controls the applicant is not a fit and proper person to control a person that provides the financial services covered by the licence. [*Schedule 3, item 7, paragraph 913BA(1)(d) of the Corporations Act 2001]*

4.35 If the controller is a body corporate, ASIC must also be satisfied there is no reason to believe that an officer of its controller or controllers is not a fit and proper person to perform one or more functions as an officer of a controller body corporate that provides the financial services covered by the licence. [*Schedule 3, item 7, paragraph 913BA(1)(e) of the Corporations Act 2001]*

**Example 4.1**

ABC Co Pty Ltd (ABC Co) applies for an AFS licence to be authorised to provide general financial advice.

ABC Co has two directors, John and Vibhu, and is wholly owned by XYZ Co Pty Ltd (XYZ Co).

XYZ Co has 3 directors, Sally, Anh and Jordan. Jordan’s brother, Nik, holds more than half of the issued share capital of XYZ Co. Although Nik is not a director of XYZ Co, his shareholding in the company means that he is also a controller of. XYZ Co is not owned by any other entities and is not subject to any other controlling interests.
ABC Co provides ASIC with the required information to assess whether ABC Co, John and Vibhu satisfy the fit and proper test. ABC Co is also required to provide ASIC with the required information to assess whether XYZ Co, Sally, Anh, Jordan and Nik, satisfy the fit and proper test.

4.36 If the controller is a partnership or trustee, ASIC must be satisfied there is no reason to believe that:

- any of the partners or trustees are not fit and proper persons to control an entity that provides the financial services covered by the licence;
- any of the senior managers of the partnership or trust are not fit and proper persons to perform one or more functions as an officer of a controller entity that provides the financial services covered by the licence.

[Schedule 3, item 7, paragraph 913BA(1)(f) of the Corporations Act 2001]

4.37 ASIC must have regard to a number of matters when considering whether the applicant or their controller/s are fit and proper (see the **Fit and proper test – factors for consideration** section below).

[Schedule 3, item 7, paragraph 913BA(2) of the Corporations Act 2001]

**Credit licensing**

4.38 ASIC must be satisfied that there is no reason to believe that any person who controls the applicant is not a fit and proper person to control a person that engages in credit activities authorised by the licence.

[Schedule 3, items 34 and 41, paragraph 37(1)(c) and paragraph 37A(1)(d) of the Credit Act]

4.39 If the controller is a body corporate, ASIC must also be satisfied there is no reason to believe that an officer of its controller or controllers is not a fit and proper person to perform one or more functions as an officer of a controller body corporate that controls a person that engages in the credit activities authorised by the licence.

[Schedule 3, item 41, paragraph 37A(1)(e) of the Credit Act]

4.40 If the controller is a partnership or trustee, ASIC must be satisfied there is no reason to believe that:

- any of the partners or trustees are not fit and proper persons to control an entity that engages in the credit activities authorised by the licence;
- any of the senior managers of the partnership or trust are not fit and proper persons to perform one or more functions as an officer of a controller entity that provides the financial services authorised by the licence.

[Schedule 3, item 41, paragraph 37A(1)(f) of the Credit Act]
4.41 ASIC must have regard to the matters listed in section 37B of the Credit Act, when considering whether the applicant or their controller/s are fit and proper (see the *Fit and proper test – factors for consideration* section below). [Schedule 3, item 41, paragraph 37A(2) of the Credit Act]

**Fit and proper test – factors for consideration**

4.42 ASIC must have regard to a number of factors when applying the fit and proper test to an applicant and their officers, or a controller and their officers. These factors broadly reflect the existing matters in subsection 37(2) of the Credit Act with amendments to implement recommendations of the ASIC Enforcement Review Taskforce and align the two licensing regimes. The factors are also used for the purposes of the fit and proper tests for the banning order regimes in the *Corporations Act 2001* and Credit Act, which are updated by Schedule 4. This ensures that determinations about whether or not a person is a fit and proper person under each regime is made in a consistent manner.

4.43 The amendments specify the matters that ASIC must have regard to in working out whether a person is a fit and proper person for the purposes of the new grounds. These matters are generally consistent with those that are relevant in working out whether a person is a fit and proper person to engage in credit activities for the purposes of the Credit Act.

4.44 In determining when a person is a fit and proper person, ASIC must, subject to Part VIIC of the *Crimes Act 1914*, have regard to each of the following:

- whether the person has ever had an Australian financial services licence suspended or cancelled;
- whether the person has ever had an Australian credit licence, or a registration under the Transitional Act, within the meaning of the Credit Act, suspended or cancelled;
- whether the person has ever had a banning order under the *Corporations Act 2001* or Credit Act;
- if the person is an individual – whether the person has ever been disqualified from managing corporations under any law of the Commonwealth, or of a State or Territory;
- whether the person has ever been banned from engaging in a credit activity under a law of a State or Territory;
- whether a person has ever been linked to a refusal or failure to give effect to a determination made by AFCA;
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- for the AFS licensing test:
  - whether the person has even been a Chapter 5 body corporate or an insolvent under administration;
  - if the person is partnership – whether the person has ever had a creditor’s petition or debtor’s petition presented against it under Division 2 or 3 of Part IV of the Bankruptcy Act 1966;
  - if the person is the multiple trustees of a trust – whether a trustee of the trust has ever been a Chapter 5 body corporate or an insolvent under administration;

- for the credit licensing test:
  - whether the person has even been insolvent;
  - if the person is the multiple trustees of a trust – whether a trustee of the trust has ever been insolvent;

- whether, in the last 10 years, the person has been convicted of an offence;
- any relevant information given to ASIC by a State or Territory, or an authority of a State or Territory, in relation to the person;
- any matters prescribed by regulations;
- any other matters ASIC considers relevant.

[Schedule 3, items 7 and 41, subsection 913BB(2) of the Corporations Act 2001 and subsection 37B(2) of the Credit Act]

4.45 While these considerations replace those that applied in working out whether a person was of good fame or character under the Corporations Act 2001, a number of the considerations are the same under each test. As with the previous test, none of these matters is determinative, but each must be taken into account by ASIC when it forms its view about whether a person is not fit and proper.

4.46 In particular, the considerations about having had an Australian financial services licence, banning orders and disqualifications in relation to financial services, and other matters that ASIC considers relevant are all relevant for working out whether person was not of good fame or character.

4.47 The requirement that ASIC have regard to any offences that a person has been convicted of in the last 10 years is similar to the test of whether a person was of good fame or character. However, the new consideration is not limited to offences involving dishonesty that are punishable by imprisonment for at least three months. This expanded
scope is appropriate given the different scope of the fit and proper person
test, and is based on the original requirement in the Credit Act.

4.48 Consistent with the previous tests in both Acts, ASIC must take
into account Part VIIC of the Crimes Act 1914. Part VIIC provides that a
person that has been granted a pardon for an offence is taken to have
never been convicted of the offence. Part VIIC also specifies that person
is not required to disclose a conviction that has been quashed or spent, and
that another person (such as ASIC) is not permitted to take into account
the fact that a person was charged or convicted of a quashed or spent
conviction.

4.49 The amendments respective sets of matters contain different
provisions for persons who have been insolvent or subject to bankruptcy
proceedings. These differences reflect the differences in approach taken
under the Corporations Act 2001 and Credit Act.

4.50 For the Corporations Act 2001, the amendments specify that
ASIC must take into account whether a person has been a Chapter 5 body
corporate or an insolvent under administration. Although the reference to
Chapter 5 bodies corporate is not included in the Credit Act, the scope of
the two matters under each Act is the same. This is because the definition
of insolvent in that Act is not limited to natural persons. Extending these
considerations to a person who is a partner of a partnership or the multiple
trustees of a trust ensures that the same considerations apply to each of the
partners or trustees.

4.51 For the Credit Act, in contrast to the previous consideration
about a person having ever been insolvent, the revised consideration
applies to all persons, irrespective of whether they are the trustee of a
trust. This change is consistent with the broader change to the ground for
making a banning order that relates to a person being insolvent.

4.52 The meaning of ‘linked to a refusal or failure to give effect to a
determination made by AFCA’ is being inserted as part of the
amendments in Schedule 4 for banning orders. Those amendments ensure
that being linked to a refusal or failure to give effect to a determination on
more than one occasion is a ground on which a banning order may be
made. The concept is explained in further detail in Chapter 2.

4.53 Including this concept in the matters that are relevant for
determining whether a person is a fit and proper person means that such
refusals or failures can also be taken into account and balanced against
other matters, irrespective of the number of times that such failure or
refusal have occurred. This is particularly relevant for the licensing
regimes, which do not contain specific provisions requiring ASIC to
refuse a licence because of a failure or refusal to comply with an AFCA
determination.
4.54 As noted above, the other matters are based on those that are relevant for the test in the Credit Act. Aligning the two provisions ensures ongoing consistency between the regimes under each Act. There are two primary benefits with this approach.

4.55 First, the additional matters require ASIC to consider whether a person has been subject to a banning order or a disqualification order under the Credit Act, or banned from engaging in a credit activity (within the meaning of the Credit Act) under the law of a State or Territory. As such activities are comparable in nature, it is appropriate that they also be taken into account under each act.

4.56 Second, the additional matters about whether a person has been insolvent or disqualified from managing corporations require ASIC to take into account matters that are relevant to the person’s broader capacity or suitability to control or manage the activities of a financial services entity.

**ASIC may request further information or documents from the applicant (recommendation 27)**

4.57 The credit licensing regime currently includes a specific provision that provides ASIC may, by written notice, request information from an applicant in relation to the application, or an audit report in relation to any matters ASIC may have regard to in deciding whether to grant the licence (subsection 37(4) of the Credit Act).

4.58 If an applicant for an Australian credit licence does not provide the required information within the time specified in the notice and ASIC does not extend the time, the application is deemed to be withdrawn (subsection 37(5) of the Credit Act).

4.59 These principles equally apply to the AFS licensing regime. There is currently a broad power to request information from the applicant but no power to request an audit report. All the required information, including any required audit reports, should be provided by the applicant to ASIC before it can make a decision on whether a licence can be granted.

4.60 The amendments provide that ASIC may, by written notice, request information from an applicant in relation to an AFS licence application, or an audit report in relation to any matters ASIC may have regard to in deciding whether to grant the licence. To avoid doubt, the amendments also clarify in both licensing regimes that ASIC may request information relating to any person to which the fit and proper test applies. This means that ASIC may request information relating to controllers.

*Schedule 3, items 5 and 39, paragraphs 913B(3)(a) and (b) of the Corporations Act 2001 and subsection 37(5) of the Credit Act*
ASIC’s power to request information serves as an authorisation to collect, use and disclose personal information for the purposes of the Australian Privacy Principles in the Privacy Act 1988.

If an AFS licence applicant does not provide the information within the time specified and ASIC does not extend the time for compliance, the applicant is deemed to have withdrawn the application. ASIC may however, within the time specified in the notice, withdraw the request or extend the time specified in the request. [Schedule 3, items 5 and 40, subsections 913B(4A) and (4B) of the Corporations Act 2001 and subsections 37(6) and (7) of the Credit Act]

The amendments also clarify that the regulations may make provision in relation to all types of audit reports that ASIC may request under both the AFS and credit licensing regimes. [Schedule 3, items 5 and 53, subsection 913B(4D) of the Corporations Act 2001 and paragraph 106(b) of the Credit Act]

Express obligation for applicants to confirm no material changes prior to granting of licence (recommendation 26)

To ensure that ASIC has considered all the relevant and accurate information in assessing a licence application, if ASIC proposes to grant the licence, the amendments required an applicant to confirm that there have been no material changes to the information provided, or if there have been, inform ASIC of those changes. This is because there can be a significant period of time between when a licence application is received and when ASIC finalises its assessment.

The confirmation is required at the end of the assessment period, generally after the applicant has been provided with the draft licence that ASIC proposes to grant. [Schedule 3, items 5 and 39, subsection 913B(3)(c) of the Corporations Act 2001 and subsection 37(4)(c) of the Credit Act]

Application false or misleading in a material particular – grounds for refusal (recommendation 25)

ASIC is currently able to cancel an AFS licence or Australian credit licence, after giving the licensee a hearing, if the application for the licence was false in a material particular or materially misleading (see subsection 915C(2) of the Corporations Act 2001 and paragraph 55(1)(d) of the Credit Act).

There is no specific ground for ASIC to refuse a licence in the first instance if it is false or misleading in a material particular. ASIC must rely on the general test under which the false or misleading statement may provide a basis for ASIC to have reason to believe that the applicant is likely to contravene its licence obligations.
4.68 The amendments provide ASIC with a specific ground to refuse a licence where there has been false or misleading in a material particular or there is an omission of a material matter in an application, information, report or statement from the applicant. [Schedule 3, items 5 and 35, subsection 913B(2) of the Corporations Act 2001 and subsection 37(2) of the Credit Act]

Licence requirements and obligations

Requirement to commence business within 6 months of granting of licence (recommendation 24) (AFS licensing and credit licensing)

4.69 Currently, the AFS licensing regime allows ASIC, with written notice, to suspend or cancel an AFS licence if the licensee ceases to carry on a financial service business. However, under the credit licensing regime, ASIC can suspend or cancel a licence if the licensee does not engage, or ceases to engage, in credit activities.

4.70 ASIC’s existing powers in the AFS licensing regime do not provide for suspension or cancellation if the licensee does not provide the financial services that have been authorised.

4.71 The ASIC Enforcement Review Taskforce found that this provides an opportunity for entities to ‘warehouse’ and commoditise AFS licences. In practice, an entity is able to apply for a licence without any intention of commencing activities authorised by the licences. The intention is to sell the licences to persons who may not always meet the requirements to hold an AFS or Australian credit licence. The ASIC Enforcement Review Taskforce also found there was a lack of certainty as to when a licensee should have commenced business after being granted a licence.

4.72 The amendments implement the ASIC Enforcement Review Taskforce’s recommendation that ASIC be given the power to cancel an AFS licence if the licensee does not start to provide the financial services covered by the licence within six months after the licence is granted.

4.73 The amendments also clarify ASIC’s power to suspend or cancel an Australian credit licence if the person does not engage, or ceases to engage, in credit activities, to align the amendments to the AFS licensing regime with the credit licensing regime.

4.74 The amendments also support these powers by requiring licensees to notify ASIC if they do not start to provide the financial services or engage in the credit activities covered by licence within six months of it being granted.
Licensing and false or misleading documents

4.75 The amendments to both regimes are detailed below.

AFS licence

Individual licensee

4.76 If the licence holder is an individual, ASIC may cancel an AFS licence by giving written notice to the individual if they do not provide a financial service covered by the licence within six months after the licence is granted. [Schedule 3, item 13, subsection 915B(1A) of the Corporations Act 2001]

Partnership licensee

4.77 If the licensee is a partnership, ASIC may cancel an AFS licence by giving written notice to the partnership if the partnership does not provide a financial service covered by the licence within six months after the licence is granted. [Schedule 3, item 15, subsection 915B(2A)]

Body corporate licensee

4.78 If the licensee is a body corporate, ASIC may cancel an AFS licence by giving written notice to the body corporate if the body corporate does not provide a financial service covered by the licence within six months after the licence is granted. [Schedule 3, item 23, subsection 915B(3A)]

Trustees of a trust licensee

4.79 If the licence holder is the trustees of a trust, ASIC may cancel an AFS licence by giving written notice to the trustees if the trustees do not provide a financial service covered by the licence within six months after the licence is granted. [Schedule 3, item 28, subsection 915B(4A)]

Australian credit licence

4.81 The amendments clarify that ASIC may cancel an Australian credit licence if the licensee does not engage in credit activities authorised by the licence within six months after the licence is granted. [Schedule 3, item 49, subsection 54(1A) of the Credit Act]

‘Provide a financial service covered by the licence’ and ‘engage in credit activities authorised by the licence’

4.82 The licensee must provide a financial service covered by the licence or engage in credit activities authorised by the licence within six months after the licence is granted.

4.83 Including this requirement to provide a financial service or engage in credit activities is intended to reduce the incentive to commoditise licences. This requirement, along with applying the fit and proper test to the licensees and their controllers, and the requirement to notify ASIC if there is a change of control with a penalty for
non-compliance aims to effectively address ‘warehousing’ of licences identified by the ASIC Enforcement Review Taskforce.

4.84 Licensees must have commenced providing the relevant services to clients within the 6 month period. It is intended that merely preparatory or auxiliary activities related to the provision of a service or activity will not be sufficient to satisfy this requirement. ASIC will provide further guidance on compliance with this requirement as part of regulatory guidance material.

4.85 The ASIC Enforcement Review Taskforce also recommended providing licensees an extension of time from ASIC should the licensee be unable to commence its business within the six months period. Under this amendment, the power to cancel the licence is discretionary and it will be open to ASIC to work with licensees if there are genuine reasons for not being able to commence its business within the six month timeframe.

**Requirement to notify ASIC if no financial service provided or no credit activities engaged in**

4.86 These amendments also introduce a notification requirement to support ASIC’s ability to cancel an AFS licence or Australian credit licence if no financial services are provided, or no credit activities engaged in, within 6 months of the relevant licence being granted.

4.87 In such cases, the licensee must lodge a notification with ASIC in the prescribed form (for notifications in relation to AFS licences) or the approved form (for Australian credit licences) before the end of 15 business days after the end of the 6 months. Failure to do so is a strict liability offence that carries a penalty of 30 penalty units for individuals and 300 penalty units for body corporates. [*Schedule 3, items 3 and 46, section 912DB of the Corporations Act 2001 and section 53B of the Credit Act*]

4.88 The amendments provide certainty as to when the notification time frame commences, that is, it commences when the licence is granted.

4.89 In imposing a strict liability offence for non-compliant conduct, the Attorney General’s Department *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* has been considered and applied. A strict liability offence is appropriate as it is likely to enhance enforcement by deterring non-reporting of a failure to provide a financial service or engage in a credit activities. These are both matters that the licensee will be aware of, as they can only be provided or undertaken by the licensee, or provided or undertaken on their behalf in accordance with their instructions. A strict liability offence is also appropriate to ensure integrity of the financial regulatory regime.
Fit and proper test – applies to a licence variation request (AFS and credit licensing)

4.90 An AFS or credit licensee may make an application for ASIC to impose, vary or revoke their licence (variation request) (see paragraph 914A(2)(b) of the Corporations Act 2001 and paragraph 45(2)(b) of the Credit Act).

4.91 Currently, where a variation request is made, there is no specific provision to require ASIC to apply the good fame or character test, or fit and proper test (as applicable). However, a licensee has an implicit ongoing obligation to comply with the relevant test as ASIC has a power to suspend or cancel a licence if it is no longer satisfied the licensee meets the relevant test, and therefore a reconsideration of whether the licensee meets the relevant test does occur when a licence is varied.

4.92 The amendments specifically provide that where a licensee makes a variation request, ASIC must apply the fit and proper test, in a similar manner to a licence application. That is, ASIC must have no reason to believe that the licensee and the controllers are not fit and proper having regard to the factors described above. The amendments to the variation provisions also align with the amendments to the original licence application process, that is, provide ASIC with the power to request information from controllers, confirm that there have been no material changes to the information provided by the licensee before the variation is granted and deem withdrawal of the variation request if the licensee does not provide information that is requested by ASIC. [Schedule 3, items 8, 10, 42 and 44, subsection 914A(1) and section 914B of the Corporations Act 2001 and subsection 45(1) and section 46A of the Credit Act]

 Licence variations in accordance with licensee’s request

4.93 The amendments also clarify that ASIC is not required to provide a hearing to a licensee before imposing new conditions or varying or revoking existing conditions on a licence if the change to the licence is in accordance with an application made by the licensee. [Schedule 3, item 9 and 43, subsection 914A(3) of the Corporations Act 2001 and subsection 45(5) of the Credit Act]

4.94 Such hearings are not required where ASIC agrees to a request by the licensee to vary their licence in the manner requested. The exception to the hearing requirement does not apply if ASIC makes any variations that are not accordance with the licensees request (for example, a hearing would be required if ASIC imposed a condition that was in addition to a condition requested by a licensee).
Fit and proper test – suspension or cancellation of licence where ASIC no longer satisfied of the fit and proper test (AFS and credit licensing)

4.95 Currently, as part of the ongoing licence requirements, the licensee and relevant officers (as applicable) must satisfy the good fame or character test (paragraph 915C(1)(b) of the Corporations Act 2001), or fit and proper test (paragraph 55(1)(c) of the Credit Act). If ASIC is no longer satisfied the licensee meets the relevant test, ASIC may suspend or cancel the licence (after offering the licensee a hearing).

4.96 The amendments that extend the fit and proper test to licensees, controllers and officers of those entities (as applicable) in both licensing regimes, also extend and apply an ongoing requirement that these persons continue to satisfy the fit and proper test. This is to ensure that licensees, their controllers and officers of those entities (as applicable) remain fit and proper to provide or control financial or credit services to consumers. [Schedule 3, items 29 and 50, paragraph 915C(1)(b) of the Corporations Act 2001 and paragraph 55(1)(c) of the Credit Act]

4.97 For the purposes of assessing compliance with this ongoing requirement, the amendments also give ASIC the ability to request relevant information from the licensee in relation to its controllers and relevant officers (as applicable). ASIC’s power to request information serves as an authorisation to collect, use and disclose personal information for the purposes of the Australian Privacy Principles in the Privacy Act 1988. [Schedule 3, items 2 and 45, paragraph 912C(1)(c) of the Corporations Act 2001 and subsection 49(1) of the Credit Act]

Obligation to notify of a change in control within 30 business days (recommendation 28)

4.98 Currently, a condition of an AFS or Australian credit licence is that a licensee is required to notify ASIC within 10 business days of becoming aware of a change in control (see subsection 914A(8) of the Corporations Act 2001, regulation 7.6.04(1)(i) of the Corporations Regulations, subsection 45(7) of the Credit Act and regulation 9(10) of the Credit Regulations). A breach of this condition is not currently subject to any specific penalty.

4.99 The amendments provide that a licensee must notify ASIC of a change in control within 30 business days after an entity starts to control, or stops controlling, a licensee. Failure to do so is a strict liability offence that carries a penalty of 30 penalty units for individuals and 300 penalty units for body corporates. [Schedule 3, items 3 and 46, section 912DA of the Corporations Act 2001 and section 53A of the Credit Act]

4.100 The amendments provide certainty as to when the notification time frame commences, that is, it commences when the change of control takes effect.
4.101 In imposing a strict liability offence for non-compliant conduct, the Attorney General’s Department Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers has been considered and applied. The ASIC Enforcement Review Taskforce report found that the timely reporting about changes of controllers of licensees is required to ensure ongoing compliance with the fit and proper test. A strict liability offence is appropriate as it is likely to enhance enforcement by deterring non-reporting of a change of controller. A strict liability offence is also appropriate to ensure integrity of the financial regulatory regime.

4.102 To comply with this obligation, applicants are expected to implement systems and procedures to ensure they are aware of changes in control in a timely manner.

False and misleading statements

Aligning the consequences for making false or misleading statements in documents provided to ASIC (recommendation 29) (AFSL and credit licensing)

4.103 Currently, the AFS and Australian credit licence regimes contain different sets of obligations that direct licensees to ensure that documents provided to ASIC do not contain false or misleading statements. The consequences for breaching these obligations also differ under each regime.

4.104 Section 225 of the Credit Act sets out a number of civil penalty provisions and offences relating to the lodgement of documents with ASIC. The section applies to any document required, lodged or submitted to ASIC under the Credit Act, and includes documents relating to Australian credit licence applications. Under section 225, a person must not make, or authorise the making of, a statement in a document that is:

- false in a material particular or materially misleading;
- omitted from the document that makes it materially misleading;
- based on information that is false in a material particular or materially misleading, or omitted information that makes the document materially misleading.

4.105 Section 1308 of the Corporations Act 2001 also contains specific offences in relation to false or misleading statements. Subsection 1308(2) is an offence relating to knowingly making misleading statements in documents required under the Corporations Act 2001 or submitted to ASIC. Subsection 1308(4) is an offence provision relating to misleading statements in documents submitted to ASIC without taking reasonable steps, and subsection 1308(8) is an offence provision relating to
knowingly misleading statements in applications for a CS facility, AFSL or market licence.

4.106 The amendments rewrite the existing provisions about false or misleading statements in section 1308 of the Corporations Act 2001 and false and misleading documents in section 225 of the Credit Act. These changes strengthen the provisions relating to false and misleading conduct under the Corporations Act 2001 and the Credit Act. They also greatly improve consistency between the provisions and provide ASIC with a broader range of enforcement tools to prosecute for non-compliance.

4.107 While the effect of the re-written Credit Act provisions remains broadly the same, the changes result in some substantive changes to the provisions in the Corporations Act 2001. These changes are consistent with the ASIC Enforcement Review Taskforce’s recommendations about increasing the applicable criminal penalties and introducing civil penalty provisions under the Corporations Act 2001 to ensure consistency with the Credit Act.

**Corporations Act 2001 amendments**

4.108 The amendments to the Corporations Act 2001 relate to previous section 1308 of that Act. The amendments repeal that section and replace it with re-written provisions.

4.109 The amendments relocate the previous strict liability offence about publishing false or misleading statements about share capital to a separate section. [Schedule 3, item 58, section 1308B of the Corporations Act 2001]

4.110 This restructure ensures the re-written section 1308 can focus on the same types of offences for materially false or misleading documents that are covered by the Credit Act. The change does not affect the way the offence applies.

4.111 The penalty for committing this offence continues to be 20 penalty units. [Schedule 3, item 60, Schedule 3 (table items item dealing with subsection 1308B(1) of the Corporations Act 2001)]

4.112 The penalty is subject to section 4D of the Crimes Act 1914, meaning that the specified amounts are the maximum penalties that can be imposed.

4.113 The amendments do not include the specific offence relating to false or misleading statements in applications made to ASIC. Such statements are now covered by the general offences, consistent with the ASIC Enforcement Review Taskforce’s recommendation.

**Re-written fault-based offence**

4.114 The amendments re-write the existing offence for false or misleading documents contained in previous subsection 1308(2). The new
offence is substantially the same as the previous offence, but is restructured to improve readability. Under the re-written provision, a person commits an offence if:

- a document is required under or for the purposes of the *Corporations Act 2001*, or is lodged with or submitted to ASIC; and
- the person makes a statement in the document, omits a matter or thing from the document, or authorises such statement or omission; and
- the person knows that the document is materially false or misleading because of the statement or omission.

*[Schedule 3, item 58, subsection 1308(1) of the Corporations Act 2001]*

4.115 Consistent with the previous offence, the re-written offence is fault-based. For an individual to commit an offence, it is therefore necessary to demonstrate that the person had knowledge that a document was materially false or misleading because of the statement or omission that they made or authorised.

4.116 The amendments describe the circumstances in which a document is materially false or misleading for the purposes of the re-written section 1308. These circumstances are explained below.

4.117 The amendments also specify that a person cannot be proceeded against for both the fault-based offence and another offence in consequence of a regulation made under section 1364 of the *Corporations Act 2001*. *[Schedule 3, item 58, subsection 1308(2) of the Corporations Act 2001]*

4.118 This provision prevents a person from being prosecuted for multiple offences but does not dictate which offence should be proceeded with in the case that another offence applies. The provision is consistent with previous provision that applied in relation to the equivalent fault-based offence.

4.119 As with the previous offence, the penalty for committing this offence is 5 years imprisonment. *[Schedule 3, item 60, Schedule 3 (table items dealing with subsection 1308(1) of the Corporations Act 2001)]*  

4.120 This original penalty was consistent with the penalties for the equivalent offence in the Credit Act and so does not need to be changed to give effect to the ASIC Enforcement Review Taskforce’s recommendation about aligning penalties under the two regimes.

4.121 The penalty is subject to section 4D of the *Crimes Act 1914*, meaning that the specified amounts are the maximum penalties that can be imposed.
Strict liability offence for failing to take reasonable steps

4.122 The amendments re-write the existing offence of failing to take reasonable steps in previous subsection 1308(3) and convert it to a strict liability offence. Applying the offence as a strict liability offence is consistent with the approach to the equivalent offence in the Credit Act and gives effect to the ASIC Enforcement Review Taskforce’s recommendation for aligning the respective regimes.

4.123 Under the re-written provision, a person will commit an offence of strict liability if:

- a document is required under or for the purposes of the Corporations Act 2001, or is lodged with or submitted to ASIC; and
- the person makes a statement in the document, omits a matter or thing from the document, or authorises the statement or omission; and
- the document is materially false or misleading because of the statement or omission; and
- the person did not take all reasonable steps to ensure that the document was not materially false or misleading because of the statement or omission.

(Schedule 3, item 58, subsection 1308(3) of the Corporations Act 2001)

4.124 The first two elements of the offence are identical to the fault-based offence. They provide for the types of documents that are within scope of the offence, and the role that the person played in respect of the document. The other two elements differ as they do not require the person to have knowingly taken an action in respect of the document. Rather, a person commits an offence of strict liability under this provision if a statement or omission causes a document to be materially false or misleading, and the person did not take all reasonable steps to ensure that this did not occur.

4.125 The questions of whether a document is materially false or misleading and whether a person took reasonable steps are to be objectively determined without having regard to a fault element. As with the fault-based offence, the provision (explained below) about when a document is materially false or misleading is relevant for this offence.

4.126 In imposing this strict liability offence, the Attorney General’s Department Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers has been considered and applied. A strict liability offence is appropriate as it will greatly enhance enforcement of provision, and greatly improve compliance with the fundamental policy.
objective of the provision of ensuring that persons taking all reasonable steps to ensure that documents are not false or misleading.

4.127 The penalty for committing this offence is 20 penalty units. [Schedule 3, item 60, Schedule 3 (table items item dealing with subsection 1308(3) of the Corporations Act 2001)]

4.128 The amount of the penalty is within the range that is generally considered appropriate for strict liability offences in the Attorney General’s Department Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. It is also consistent with the penalties for the equivalent offence in the Credit Act and so gives effect to the ASIC Enforcement Review Taskforce’s recommendation about aligning penalties under the two regimes.

4.129 The penalty is subject to section 4D of the Crimes Act 1914, meaning that the specified amounts are the maximum penalties that can be imposed.

Removing offence-specific defences

4.130 The amendments do not replicate the offence-specific defences that were previously contained in subsections 1308(10) to (13) of the Corporations Act 2001. These defences set out particular circumstances that a person could prove in order to demonstrate that they had taken reasonable steps to ensure that a document was not false or misleading. The defences essentially acted as safe-harbours that could apply even where a person had not objectively taken all reasonable steps. Their removal enables the Court to take into account all facts and circumstances in determining whether a person has taken all reasonable steps. The removal of these defences ensures greater consistency between the provisions of the Corporations Act 2001 and the equivalent provisions of the Credit Act, which do not contain equivalent defences.

4.131 Removing these exceptions also gives effect to recommendation 7.3 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, where the Commissioner noted that exceptions and qualifications to generally applicable rules of conduct make the law more complex. This additional prescription can leave regulated entities ‘with little more than a box-ticking task’, and creates an incentive to comply with the letter, rather than the spirit, of the law.

Civil penalties

4.132 The amendments introduce new civil penalty provisions that mirror the fault-based and strict liability offences. The grounds for contravening these civil penalty provisions are identical to the grounds for committing the equivalent offence. [Schedule 3, item 58, subsections 1308(4) and (5) of the Corporations Act 2001]
These penalty provisions are ‘uncategorised’ for the purposes of the section 1317E, meaning that it is neither a corporation/scheme penalty provision nor a financial services civil penalty provision. [Schedule 3, item 59, subsections 1317E(3) table item for subsection 1308(4) and (5) of the Corporations Act 2001]

The pecuniary penalty applicable to the contravention of these types of civil penalty provisions is set out in the standard penalty provisions in subsection 1317G if the Corporations Act 2001. A standard maximum penalty of 5,000 penalty units is applicable to individuals, which is consistent with the penalties for the equivalent civil penalty provisions in the Credit Act. The standard maximum penalty that can be applied to bodies corporate is 50,000 penalty units. These penalties can also be increased where the Court can determine a benefit derived or detriment avoided because of the contravention, or in the case of bodies corporate based the penalty on the annual turnover of the body corporate.

When a document is materially false or misleading

The amendments describe the circumstances in which a document is materially false or misleading for the purposes of the rewritten section 1308. A document is materially false or misleading if:

• it includes a statement that is false in a material particular or materially misleading;

• it includes a statement that is based on information that is false in a material particular or materially misleading, or contains an omission that renders the document materially misleading;

• a matter or thing is omitted from the document, and that omission results in the document being false in a material particular or materially misleading.

These allow statements made in, and omissions from, a document to be taken into account in working out whether a document is materially false or misleading. The question of whether a statement or document is false or misleading is a question of fact and degree that will depend on the nature of the statement or omission.

This provision synthesises the details that were previously in subsections 1308(3) and (5). Those provisions provided particulars about when a person was taken to know that a statement was false or misleading. The new provision also covers documents containing statements that are based on information that is false in a material particular or materially misleading. The references to matters or things that are omitted from the document itself are based on previous subsection 225(2) of the Credit Act. This expansion is appropriate to ensure alignment between the two sets of provisions, and addresses the fact that
an omission can cause the document to be misleading in the same way as a misleading statement.

Other provisions

4.138 The amendments also re-write a number of provisions that were previously contained in subsections 1308(6), (7) and (9). These provisions apply for the purposes of the re-written section 1308 and relate to:

- when a document is authorised;
- the incorporation of documents; and
- when certain notices are taken to be required for the purposes of the Act or taken to be misleading in a material respect.

4.139 The rule about authorisations is relevant to the elements of the offences and civil penalty provisions that relate to an individual authorising the making of a statement in a document or the omission of any matter of thing from a document.

4.140 For the purposes of the re-written section 1308, a person is taken to have authorised such a statement or omission if they vote in favour of a resolution approving, or otherwise approve the document. [Schedule 3, item 58, subsection 1308(7) of the Corporations Act 2001]

4.141 This provision is based on the equivalent provision in previous subsection 1308(6) and in subsection 225(6) of the Credit Act. While it provides clarity for particular types of authorisations, the circumstances covered by the rule are not exhaustive. As such, it is open for a person to have authorised a document for the purposes of section 1308 if they have actually authorised the document in another manner.

4.142 The rule about the incorporation of documents is relevant for determining when a document is required to be provided by the Act.

4.143 The rule treats a statement, report or document as being part of a report provided under section 314 or laid before a company at an annual general meeting if it relates to the affairs of the company or of a subsidiary and is attached to or included to such a report. [Schedule 3, item 58, subsection 1308(8) of the Corporations Act 2001]

4.144 The rule is based on the equivalent provision in previous subsection 1308(7).

4.145 The rules about notices apply to notices under subsection 708AA(2) (which relates to an offer of a body’s securities), subsection 708A(5) (which relate to certain sale offers that no not need disclosure), and notices under subsections 1012DAA(2) or 1012DA(5) (which relate to certain notices in place of product disclosure statements). These rules are identical to the rules contained in previous subsection 1308(9).
4.146 Notices to which these rules apply are taken to be notices that are required for the purposes of the Act. [Schedule 3, item 58, paragraph 1308(9)(a) of the Corporations Act 2001]

4.147 Notices to which these rules apply are also taken to be misleading in a material respect if they fail to comply with the specifying the matters that must be included in the notices. These provisions are paragraphs 708AA(7)(d), 708A(6)(e), 1012DA(7)(e) and 1012DA(6)(f), respectively. [Schedule 3, item 58, paragraph 1308(9)(b) of the Corporations Act 2001]

4.148 These matters are essential to ensuring that the notices are not misleading. The combination of the interpretive rules for notices means that a failure to include the matters specified in the above provisions will satisfy the first two grounds for each of the offences and civil penalty provisions.

**Credit Act amendments**

4.149 The amendments to the Credit Act relate to section 225 of that Act. The amendments repeal that section and replace it with re-written provisions. These amendments mirror the re-written provisions in the Corporations Act 2001, with some departures to reflect the differences in scope and architecture of the two Acts.

**Re-written fault-based offence**

4.150 The amendments re-write the existing offence for false or misleading documents contained in previous subsections 225(3) and (4) of the Credit Act.

4.151 The new offence is substantially the same as the previous offence, but is restructured to improve readability. Consistent with the re-written provision in the Corporations Act 2001, a person commits an offence under the re-written provision if:

- a document is required under or for the purposes of the Credit Act, or is lodged with or submitted to ASIC; and

- the person makes a statement in the document, omits a matter or thing from the document, or authorises the statement or omission; and

- the person knows that the document is materially false or misleading because of the statement or omission.

[Schedule 3, item 61, subsection 225(1) of the Credit Act]

4.152 As with the previous offence, the re-written offence is fault-based. For an individual to commit an offence, it is therefore necessary to demonstrate that the person had knowledge that a document was
materially false or misleading because of the statement or omission that they made or authorised.

4.153 The amendments describe the circumstances in which a document is materially false or misleading for the purposes of the re-written section 225. These circumstances are explained below.

4.154 As with the previous offence, the penalty for committing this offence is 5 years imprisonment. [Schedule 3, item 61, subsection 225(1) of the Credit Act]

4.155 The penalty is subject to section 4D of the Crimes Act 1914, meaning that the specified amounts are the maximum penalties that can be imposed.

Re-written strict liability offence for failing to take reasonable steps

4.156 The amendments re-write the existing offence of strict liability for failing to take reasonable steps contained in previous subsection 225(6). The re-written penalty is structured differently to the previous penalty, but is broadly the same in its effect.

4.157 Under the re-written provision, a person will commit an offence of strict liability if:

- a document is required under or for the purposes of the Credit Act, or is lodged with or submitted to ASIC; and
- the person makes a statement in the document, omits a matter or thing from the document, or authorises the statement or omission; and
- the document is materially false or misleading because of the statement or omission; and
- the person did not take all reasonable steps to ensure that the document was not materially false or misleading because of the statement or omission.

[Schedule 3, item 61, subsection 225(2) of the Credit Act]

4.158 The first two elements of the offence are identical to the fault-based offence. They provide for the types of documents that are within scope of the offence, and the role that the person played in respect of the document. The other two elements differ as they do not require the person to have knowingly taken an action in respect of the document. Rather, a person commits an offence of strict liability under this provision if a statement or omission causes a document to be materially false or misleading, and the person did not take all reasonable steps to ensure that this did not occur.

4.159 The questions of whether a document is materially false or misleading and whether a person took reasonable steps are to be
objectively determined without having regard to a fault element. As with the fault-based offence, the provision explained below about when a document is materially false or misleading are relevant for this offence.

4.160 In imposing this strict liability offence, the Attorney General’s Department Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers has been considered and applied. A strict liability offence is appropriate as it will greatly enhance enforcement of provision, and greatly improve compliance with the fundamental policy objective of the provision of ensuring that persons taking all reasonable steps to ensure that documents are not false or misleading.

4.161 The penalty for committing this offence is 20 penalty units. [Schedule 3, item 61, subsection 225(2) of the Credit Act]

4.162 The penalty is subject to section 4D of the Crimes Act 1914, meaning that the specified amounts are the maximum penalties that can be imposed.

Civil penalties

4.163 The amendments replicate the existing penalty provisions contained in subsections 225(3) and (4) of the Credit Act. The grounds for contravening these civil penalty provisions are identical to the grounds for committing the equivalent offence. [Schedule 3, item 61, subsections 225(3) and (4) of the Credit Act]

4.164 The penalties applicable to the contravention of these civil penalty provisions is 5,000 penalty units. This is the same penalty that applied for the equivalent civil penalty provisions in the previous provision.

When a document is materially false or misleading

4.165 The amendments describe the circumstances in which a document is materially false or misleading for the purposes of the rewritten 225. A document is materially false or misleading if:

- it includes a statement that is false in a material particular or materially misleading;
- it includes a statement that is based on information that is false in a material particular or materially misleading, or contains an omission that renders the document materially misleading;
- the document itself contains an omission that results in the document being false in a material particular or materially misleading.

4.166 These allow statements made in, and omissions from, a document to be taken into account in working out whether a document is
materially false or misleading. The question of whether a statement or document is false or misleading is a question of fact and degree that will depend on the nature of the statement or omission.

4.167 This provision is consistent with the substantive explanations contained in the previous offences. Consistent with the approach in the amendments to the Corporations Act 2001, these elements have been moved to a separate provision to improve readability.

Authorisations

4.168 The amendments also re-write provision related to authorisations that was previously contained in subsections 225(8). This rule is relevant to the elements of the offences and civil penalty provisions that relate to an individual authorising the making of a statement in a document or the omission of any matter of thing from a document.

4.169 For the purposes of the re-written section 225, a person is taken to have authorised such a statement or omission if they vote in favour of a resolution approving, or otherwise approve, the document. [Schedule 3, item 61, subsection 1308(6) of the Credit Act]

4.170 While the rule provides clarity for particular types of authorisations, the circumstances covered by the rule are not exhaustive. As such, it is open for a person to have authorised a document for the purposes of section 225 if they have actually authorised the document in another manner.

4.171 In contrast to the Corporations Act 2001 amendments, the amendments to the Credit Act do not introduce the other provisions about incorporating documents or for notices. These provisions are not required as the types of documents to which they relate under the Corporations Act 2001 are not relevant to the Credit Act.

Application and transitional provisions

Existing AFS licensees

4.172 The amendments apply to existing AFS licensees on and after the commencement day of the amendments. [Schedule 3, item 32, section 1665 of the Corporations Act 2001]

4.173 This ensures that ASIC is able to monitor the controllers of existing AFS licensees and request relevant information, and carry out enforcement action as required. Existing AFS licensees will not be required to provide information to ASIC unless requested.

4.174 The following specific application provisions also apply:
• information provided in connection with an application under existing provision paragraph 913B(1)(ca) of the *Corporations Act 2001* will be subject to the new provision regarding ASIC’s power to suspend or cancel a licence where the information provided in relation to the application was false or misleading;

• the requirement to notify ASIC of a change in control within 30 business days after the entity starts to control, or stops controlling the licensee applies on or after commencement; and

• the requirements to start providing financial services within 6 months of an AFS licence being granted, and to notify ASIC where such services are not provided, apply to existing licensees. However the 6 month periods for each requirement start on commencement.

*[Schedule 3, item 32, section 1665 of the Corporations Act 2001]*

**AFS licence applications made before commencement**

4.175 The amendments apply to AFS licence applications made, but not granted, before commencement. That is, an applicant will be required to provide further information in order to satisfy the new tests that apply from commencement.

4.176 ASIC will work with existing applicants during the transition period to ensure that the applicant is clear on the information that must be provided.

**Existing credit licensees**

4.177 The amendments apply to existing credit licensees on and after the commencement day of the amendments. *[Schedule 3, item 55, section 2 of Schedule 9 to the Credit Act]*

4.178 This ensures that ASIC is able to monitor the controllers of existing credit licensees and request relevant information, and carry out enforcement action as required. Existing credit licensees will not be required to provide information to ASIC unless requested.

4.179 The following specific application provisions also apply:

• information provided in connection with an application under existing provision subsection 37(4) of the Credit Act will be subject to the new provision regarding ASIC’s power to suspend or cancel a licence where the information provided in relation to the application was false or misleading;
• the requirement to notify ASIC of a change in control within 30 business days after the entity starts to control, or stops controlling the licensee applies on or after commencement; and

• the requirements to start engaging in credit activities within 6 months of an Australian credit licence being granted, and to notify ASIC where such activities are not engaged in, apply applies to existing licensees. However the 6 month periods for each requirement starts on commencement.

   [Schedule 3, item 55, section 2 of Schedule 9 to the Credit Act]

**Australian credit licence applications made before commencement**

4.180 The amendments apply to Australian credit licence applications made, but not granted, before commencement. That is, an applicant will be required to provide further information in order to satisfy the new tests that apply from commencement.

4.181 ASIC will work with existing applicants during the transition period to ensure that the applicant is clear on the information that must be provided.

**False and misleading documents**

4.182 The amendments to the *Corporations Act 2001* and Credit Act in respect of false and misleading documents commence from the day after the Act containing the amendments received Royal Assent.
Chapter 5
Banning orders

Outline of chapter

5.1 The amendments in Schedule 4 to the Bill expand the scope of ASIC’s powers to ban a person from performing functions in a financial services or credit business. These changes ensure that ASIC is appropriately empowered to remove individuals from continued involvement in the financial sector, particularly those in senior positions of control and influence, and expand the grounds on which ASIC can issue banning orders.

5.2 The amendments implement the recommendations in Chapter 6 of the ASIC Enforcement Review Taskforce Report\(^5\) (the ASIC Enforcement Review) that was presented to the Government in December 2017.

Summary of new law

5.3 The amendments in Schedule 4 to the Bill implement Recommendation 31 of the ASIC Enforcement Review by expanding the grounds on which ASIC can make a banning order against a person. These changes allow ASIC to take into account a broader range of activities related to non-compliance with financial service laws and the management or oversight of the conduct of a financial services or credit business.

5.4 The amendments also implement Recommendation 30 of the ASIC Enforcement Review by empowering ASIC to make additional types of banning orders to prohibit a person from controlling or performing any or particular functions in relation to a financial services or credit business.

5.5 The amendments achieve these outcomes by modifying the existing provisions for banning orders in Division 8 of Part 7.6 of the Corporations Act 2001 (for financial services) and the equivalent provisions in Part 2-4 of the Credit Act (for credit activities).

## Comparison of key features of new law and current law

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
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<tbody>
<tr>
<td><strong>Banning orders made under the Corporations Act 2001</strong></td>
<td><strong>Banning orders made under the Corporations Act 2001</strong></td>
</tr>
<tr>
<td>ASIC may make a banning order against a person under the <em>Corporations Act 2001</em> in certain circumstances, including where ASIC has reason to believe that the person is ‘not a fit and proper person’, or is ‘not adequately trained or is not competent’ to do any of the following:</td>
<td>ASIC may make a banning order against a person under the <em>Corporations Act 2001</em> in certain circumstances, including where ASIC has reason to believe that the person:</td>
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<tr>
<td>- provide financial services;</td>
<td>- is ‘not of good fame or character’; or</td>
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<tr>
<td>- perform functions as an officer of an entity that carries on a financial services business;</td>
<td>- is ‘not adequately trained, or is not competent’, to provide financial services.</td>
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<tr>
<td>- control an entity that carries on a financial services business.</td>
<td>ASIC may also make a banning order against a person who is an insolvent under administration.</td>
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<td>ASIC may also make a banning order against a person that:</td>
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<tr>
<td>- is insolvent under administration or a Chapter 5 body corporate;</td>
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<tr>
<td>- has, at least twice, been an officer of a corporation that was unable to pay its debts; or</td>
<td></td>
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<tr>
<td>- has, at least twice, been linked to a refusal or failure to give effect to an AFCA determination.</td>
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In working out whether a person is a fit and proper person for the purposes of the *Corporations Act 2001*, ASIC must have regard to the same matters that are relevant under the Credit Act. These matters include:

<table>
<thead>
<tr>
<th>In working out whether a person is of good fame or character for the purposes of the <em>Corporations Act 2001</em>, ASIC must have regard to:</th>
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<tbody>
<tr>
<td>- any conviction that the person has had in the last 10 years for offences that involve dishonesty;</td>
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<tr>
<td>- whether the person has had an Australian financial services license that was suspended or cancelled;</td>
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</table>
### Banning orders

<table>
<thead>
<tr>
<th><strong>New law</strong></th>
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<tr>
<td>had an Australian financial services license or Australian credit license that was suspended or cancelled;</td>
<td>and</td>
</tr>
<tr>
<td>- whether a banning order or disqualification order has previously been made against the person under the <em>Corporations Act 2001</em> or the Credit Act;</td>
<td>- whether a banning order or disqualification order has previously been made against the person.</td>
</tr>
<tr>
<td>- whether the person has ever been a Chapter 5 body corporate or an insolvent under administration;</td>
<td>-</td>
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<tr>
<td>- whether the person has been disqualified from managing corporations; and</td>
<td></td>
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<tr>
<td>- whether the person has been banned from engaging in a credit activity under a State or Territory law.</td>
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A banning order or a disqualification order made against a person under the *Corporations Act 2001* may specify that the person is prohibited from doing any of the following:

- providing any financial services;
- providing specified financial services in specified circumstances or capacities;
- controlling an entity that carries on a financial services business;
- performing any function involved in carrying on a financial services business;
- performing specified functions involved in carrying on a financial services business.

A banning order or a disqualification order made against a person under the *Corporations Act 2001* may specify that the person is prohibited from doing any of the following:

- providing any financial services;
- providing specified financial services in specified circumstances or capacities.
### Banning orders made under the Credit Act

<table>
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<th>New law</th>
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<tr>
<td>ASIC may make a banning order against a person under the Credit Act in certain circumstances, including where ASIC has reason to believe that the person is ‘not a fit and proper person’, or is ‘not adequately trained or is not competent’ to do any of the following:</td>
<td>ASIC may make a banning order against a person under the Credit Act in certain circumstances, including where:</td>
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<tr>
<td>- engage in credit activities;                                          - ASIC has reason to believe that the person is ‘not a fit and proper person’ to engage in credit activities;</td>
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<tr>
<td>- perform functions as an officer of another person that engages in credit activities;</td>
<td>or</td>
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<tr>
<td>- control another person that engages in credit activities.            - the person is insolvent, other than a person who is the trustee of a trust.</td>
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<td>- is insolvent;</td>
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</tbody>
</table>
### Detailed explanation of new law

#### Amendments to Corporations Act 2001

5.6 All legislative references in this section of this Chapter are to the *Corporations Act 2001*, unless otherwise specified.

**Expanded grounds for making banning orders**

5.7 Section 920A specifies the grounds on which ASIC may make a banning order against a person in relation to financial services.

5.8 The existing grounds include where ASIC has reason to believe that a person is ‘not of good fame or character’, is ‘not adequately trained, or is not competent, to provide a financial service or financial services’ or is ‘an insolvent under administration’.

5.9 The amendments update the existing grounds to authorise ASIC to make a banning order against a person where ASIC has reason to believe that:

- the person is not a fit and proper person to provide financial services;
• the person is not a fit and proper person to perform functions as an officer of an entity that carries on a financial services business;
• the person is not a fit and proper person to control an entity that carries on a financial services business;
• the person is not adequately trained, or is not competent, to provide financial services;
• the person is not adequately trained, or is not competent, to perform functions as an officer of an entity that carries on a financial services business; or
• the person is not adequately trained, or is not competent, to control an entity that carries on a financial services business.

[Schedule 4, item 9, paragraphs 920A(1)(d) and (da)]

5.10 In addition to these changes, the amendments authorise ASIC to make a banning order against a person if:
• the person has been linked to a refusal or failure to give effect to an AFCA determination on more than one occasion;
• on more than one occasion, the person has been an officer of a corporation that was unable to pay its debts; or
• the person is a Chapter 5 body corporate or an insolvent under administration.

[Schedule 4, items 8 and 10, paragraphs 920A(1)(bb) and (j) and (k)]

5.11 The expanded grounds authorise ASIC to make banning orders against officers who control, manage or oversee the conduct of a financial services business. In the context of these amendments, the term ‘officer’ has the same meaning as elsewhere in the Corporations Act 2001, and will generally include senior managers.

Fit and proper person

5.12 The amendments replace the existing ‘good fame or character’ ground with ones that apply when ASIC has reason to believe that a person is not a ‘fit and proper person’:
• to provide one or more financial services;
• to perform one or more functions as an officer of an entity that carries on a financial services business; or
• to control an entity that carries on a financial services business.

[Schedule 4, item 9, paragraph 920A(1)(d)]
5.13 The revised grounds allow ASIC to focus directly on a person’s suitability and professional capability to control or undertake particular activities in relation to a financial services business.

5.14 These additional grounds address a key part of the deficiency identified in Chapter 6 of the ASIC Enforcement Review. Where those grounds form the basis for a decision to make a banning order, it would generally be expected that they would be reflected in the type of order that is issued. For example, if an order was made because ASIC considered that a person was not fit and proper to perform functions as an officer of an entity, it would be expected that the order would prohibit the person from performing such functions. Where appropriate, the order may also prohibit a person from performing other functions in a financial services business that are related to those grounds, such as similar functions within a business that are undertaken by a person in a capacity other than as an ‘officer’.

5.15 While the new grounds are capable of a broader examination of a person’s characteristics, they apply to particular activities (that is, the provision of financial services or functions as an officer, or control of an entity). In this respect, they are more targeted than the previous good fame or character ground.

5.16 A number of existing defined terms in the Corporations Act 2001 are relevant to determining whether a person is fit and proper to provide financial services or perform functions as an officer of an entity that carries on a financial services business.

5.17 In particular, the term ‘financial service’ is defined in Division 4 of Part 7.1 of the Corporations Act 2001. The definition details the types of conduct concerning advice, products and services that constitute a financial service. The term ‘financial services business’ is defined by section 761A and means the business of providing financial services. The meaning of ‘carry on a financial services business’ is affected by section 761C, which refers to the general rules for determining when a person carries on a business of a particular kind. The term ‘officer’ is defined in relation to different types of entities by section 9 and includes senior managers.

5.18 The Corporations Act 2001 also explains the meaning of ‘control’ in relation to a body corporate licensee. The amendments update this definition so that it can be applied more generally to bodies corporate and other entities in working out whether there is a ground for ASIC to make a banning order, and if so, the types of orders that can be made. The changes to this definition are explained in further detail below.
5.19 ASIC must have regard to the same matters that are relevant in working out whether a person is a fit and proper person for the purposes of the licensing regime. These matters are explained in further detail in the explanatory materials in Chapter 4 for the amendments in Schedule 3.

Not adequately trained or competent

5.20 The amendments also authorise ASIC to make a banning order where it has reason to believe that a person is not adequately trained, or is not competent, to perform one or more functions as an officer of an entity that carries on a financial services business, or to control such an entity. [Schedule 4, item 9, subparagraphs 920A(1)(da)(ii) and (iii)]

5.21 These grounds focus on the professional capabilities that a person has in respect of the functions that they are required to undertake as an officer of a financial services business, or to control such a business. As with the amendments about persons who are not fit and proper to undertake particular activities, a number of defined terms are relevant to these new grounds. In particular, the terms ‘officer’ and ‘financial services business’ are defined by section 9 and section 761A of the Corporations Act 2001, respectively. The meaning of ‘carry on a financial services business’ is affected by section 761C, which refers to the general rules for determining when a person carries on a business of a particular kind. The updated definition of ‘control’ is also relevant to the new grounds and is described below.

5.22 The new grounds supplement the existing ground for making a banning order where ASIC has reason to believe that a person is not adequately trained, or is not competent, to provide financial services. The existing test for providing financial services is rewritten as one of the grounds for persons that are not adequately trained or not competent. [Schedule 4, item 9, subparagraph 920A(1)(da)(i)]

5.23 The threshold for whether a person is not adequately trained or is not competent remains the same as under the existing test, and is applied equally to both the new limbs for functions as an officer and control, and the re-written limb for providing financial services.

Failure to give effect to an AFCA determination

5.24 The amendments authorise ASIC to make a banning order against a person that has been ‘linked to a refusal or failure to give effect to a determination made by AFCA’ on more than one occasion. The ground only applies to AFCA determinations relating to a complaint that relates to a financial services business, or credit activities within the meaning of the Credit Act. [Schedule 4, item 10, paragraph 920A(1)(j)]

5.25 As noted in Chapter 6 of the ASIC Enforcement Review, authorising ASIC to make a banning order where an entity has refused or
failed to comply with an AFCA determination reflects the importance of complying with those determinations.

5.26 Part 7.10A of the *Corporations Act 2001* enables the Minister to authorise an external dispute resolution scheme where the Minister is satisfied that the scheme will meet certain mandatory requirements. This scheme is known as the ‘AFCA scheme’ and the operator of the scheme is known AFCA. AFCA is empowered to make determinations in relation to complaints that are made under the scheme. Where AFCA becomes aware that a party to the complaint has refused or failed to give effect to such a determination, AFCA is required to give particulars of the refusal or failure to one or more of APRA, ASIC, or the Commissioner of Taxation.

5.27 The amendments explain that a person is ‘linked to a refusal or failure to give effect to a determination made by AFCA’ if they are:

- the entity that failed or refused to give effect to an AFCA determination;
- an officer of the entity between the time when AFCA made the determination and the time that AFCA gave the particulars about the failure or refusal to comply to ASIC;
- if the entity that refused or failed to give effect to the AFCA determination is an individual – a person that is substantially or significantly involved in the management of a financial services business or credit activity carried on by the entity; or
- if the entity that refused or failed to give effect to AFCA determination is the multiple trustees of a trust – one of the trustees of the trust.

[Schedule 4, item 5, section 910C]

5.28 Bringing an officer of an entity within the scope of the new ground allows ASIC to make banning orders against individual officers who manage or oversee the conduct of a financial services business or an entity that engages in credit activities that has been involved in multiple refusals or failures to comply with an AFCA determination.

5.29 The ground applies to a person that is substantially or significantly involved in the management of a financial services business or credit activity carried on by an individual. This allows the ground to apply to a person that has direct or considerable involvement in the management or oversight of the conduct of an individual’s financial services business or credit activities.

5.30 As with the changes for the other grounds, applying this ground to AFCA determinations related to both financial services businesses and credit activities ensures that failures or refusals to comply with a determination in relation to one regime can be taken into account in
applying the ground in the other regime. Including both regimes in the concept of ‘linked to a refusal or failure to give effect to a determination made by AFCA’ that is inserted into the Corporations Act 2001 also facilitates the direct use of that concept in the equivalent ground in the Credit Act.

**Officer of a corporation that has failed to pay its debts**

5.31 The amendments create a new ground for making a banning order against a person who has, in the last 7 years, been the officer of two or more corporations that have been wound up. For this ground to apply, a liquidator of the company must have lodged a report under subsection 533(1) about the corporation’s inability to pay its debts, and the person must have been an officer of the corporation:

- when the corporation carried on a financial services business or engaged in credit activities; and
- either at the time the corporation was wound up, or within 12 months before it was wound up.

([Schedule 4, items 10 and 13, paragraph 920A(1)(k) and subsection 920A(1C)])

5.32 This new ground targets officers who have been involved in two or more failed companies, including those engaged in phoenixing-related activities. The new ground is consistent with ASIC’s existing power under section 206F to disqualify a person from managing corporations.

5.33 Applying the ground to officers of corporations that carried on a financial services business or that engaged in credit activities means that banning orders can be made under the Corporations Act 2001, even if the corporation engaged in credit activities rather than carried on a financial services business. In conjunction with parallel amendments to the Credit Act, this ensures appropriate coverage between the two Acts. The changes to the Credit Act are described in further detail below.

5.34 The requirement that a liquidator of the company must have lodged a report in relation to a company under subsection 533(1) about the corporation’s inability to pay its debts ensures that the ground is appropriately targeted at companies that may have engaged in phoenixing-related activities. In contrast to the timing requirements for the person being an officer of the company, it does not matter whether the liquidator’s report was lodged within 12 months of the person ceasing to be an officer. Liquidator’s reports must be lodged by a liquidator where it appears to the liquidator that the company is unable to pay its unsecured creditors more than 50 cents in the dollar of its outstanding debts.

5.35 Reports lodged under subsection 533(1) include reports lodged under that subsection as applied by section 526-35 of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, which ensures that
certain ‘winding up provisions’ contained in the Corporations Act 2001 apply appropriately to corporations covered by that Act. [Schedule 4, item 13, paragraph 920A(1C)(c)]

Chapter 5 body corporate or insolvent under administration

5.36 The amendments extend the existing ground for persons who become insolvent under administration to also include persons that are a ‘Chapter 5 body corporate’. [Schedule 4, item 8, paragraph 920A(1)(bb)]

5.37 The expression ‘insolvent under administration’ is defined in section 9 in a way that only applies to natural persons. As a result, the existing ground can apply to an individual who carries on a financial services business if they become insolvent, but not to a company.

5.38 The amendments address this gap by extending the ground to include persons that are a ‘Chapter 5 body corporate’. This concept is defined by section 9 and is the concept for bodies corporate that correspond to insolvent persons under administration.

Additional types of banning orders

5.39 The amendments in Schedule 4 rewrite and update the provisions specifying the activities and functions that may be prohibited by a banning order.

5.40 Under the rewritten provisions, ASIC can make one or more banning orders against a person that prohibit the person from doing one or more of the following:

- providing any financial services;
- providing specified financial services in specified circumstances or capacities;
- controlling, whether alone or in concert with one or more other entities, an entity that carries on a financial services business;
- performing any function involved in the carrying on of a financial services business; and
- performing specified functions involved in the carrying on of a financial services business.

[Schedule 4, item 17, subsection 920B(1)]

5.41 The existing provisions were limited to prohibiting a person from providing any financial services or specified financial services. ASIC’s ability to make an order prohibiting these activities is not affected by the re-written provisions.

5.42 The additional prohibitions against a person controlling, or performing functions in respect of, a financial services business reflect the
expanded grounds on which banning orders can be made. These additional prohibitions implement Recommendation 30 of the ASIC Enforcement Review.

5.43 As with the amendments described above in relation to the grounds on which banning orders can be made, existing terms that are defined in the Corporations Act 2001 are relevant to the types of activities that a banning order may prohibit.

5.44 The re-written provision also puts beyond doubt that a single order against a person can contain multiple prohibitions, rather than separate orders having to be made in respect of each prohibition.

Control of a financial services business

5.45 The updated meaning of control described below is relevant in applying a prohibition in a banning order against a person controlling another person that carries on a financial services business.

5.46 Prohibiting a person from controlling a financial services business ensures that a banning order can have effective application to a person that does not directly provide financial services or perform specific functions as an officer of an entity that carries on a financial services business, but that nevertheless is in a position to influence or direct the activities of such an entity.

5.47 Prohibiting a person from controlling another entity in concert with one or more other entities ensures that a banning order against control cannot be circumvented by splitting decision making or control functions between entities. The key element of the prohibition is that control is exercised ‘in concert’ with other entities. While it is not necessary for such other entities to satisfy the specific definition of ‘associate’ in section 10 to 17, it is necessary that there be some co-ordination or controlling arrangement between the entities.

Functions in relation to a financial services business

5.48 Prohibiting a person from performing any function involved in another person carrying on a financial services business provides a blanket ban on that person’s involvement in such a business. The prohibition includes any activities that the person might undertake as an officer, manager, employee, or contractor, or activities undertaken in any other capacity. [Schedule 4, item 17, paragraph 920B(1)(d)]

5.49 This general prohibition mirrors the original prohibition on providing any financial services.

5.50 ASIC is also authorised to prohibit a person from performing specified functions involved in the carrying on of a financial services business. [Schedule 4, item 17, paragraph 920B(1)(e)]
5.51 This prohibition mirrors the original prohibition on specified financial services. The prohibition allows ASIC to take a targeted and flexible approach regarding specified activities, for example as a senior manager, while still permitting them to undertake other activities.

5.52 The specified functions involved in the carrying on of a financial services business could include, but are not limited to, any function in which a person has responsibility for:

- managing or supervising the provision of financial services or a particular financial service;
- managing conflicts of interest;
- ensuring compliance with financial services laws or a particular financial services law (including setting compliance standards, supervising compliance with those standards, reporting non-compliance and imposing sanctions);
- allocating and maintaining adequate resources to carry on the business or maintaining competence to carry on the business;
- ensuring that those providing financial services on behalf of the business are adequately trained and competent to do so;
- managing risk;
- internal or external dispute resolution;
- design of financial products;
- selection or assessment of financial products; or
- distribution, marketing or promotion of financial products.

Periods to which a banning order can apply

5.53 The amendments rewrite the provision dealing with the period over which a banning order can apply.

5.54 Consistent with the previous provision, ASIC is generally authorised to impose a banning order either permanently, or for a specified period. [Schedule 4, item 17, paragraph 920B(2)(b)]

5.55 However, the amendments introduce a 5 year limit on prohibitions in a banning order that is made solely on the ground of a person being an officer of more than one corporation that was unable to pay its debts. [Schedule 4, item 17, paragraph 920B(2)(a)]

5.56 This limit is consistent with the one that applies to disqualifying a person from managing corporations in section 206F and is appropriate and proportionate for banning orders made against a person solely on the same basis. The time limit does not apply where a banning order is made
on multiple grounds, even if one of those grounds is that the person has
been an officer of more than one corporation that was unable to pay its
debts.

5.57 As a single banning order can contain multiple prohibitions,
ASIC is also permitted to impose different periods in respect of each
prohibition specified in a banning order. This approach assists ASIC in
tailoring the prohibitions specified in a banning order to the particular
facts and circumstances of a case.

Administrative Appeals Tribunal review

5.58 The amendments in Schedule 4 to the Bill do not affect a
person’s right to apply to the Administrative Appeals Tribunal for a
review of a decision by ASIC under Division 8 of Part 7.6 in respect of a
banning order.

5.59 These review rights continue to be provided under
section 1317B and apply to decisions in respect of a banning order under
the amended provisions. These decisions include the decision to make a
banning order and the prohibitions contained in such an order.

Disqualification orders

5.60 Section 921A permits ASIC to apply to the Court to make an
order in relation to a person if ASIC cancels an Australian financial
services licence held by the person, or makes a banning order against the
person that is to operate permanently.

5.61 Where the application is based on a permanent banning order,
the Court may make an order disqualifying the person from providing any
financial services, or specified financial services in specified
circumstances or capacities. These orders mirror the types of prohibitions
that can be specified in a banning order.

5.62 The amendments expand the types of order that the Court can
make in relation to an application based on a banning order. These
amendments ensure continued alignment with the expanded types of
prohibitions that ASIC can specify in a banning order.

5.63 Consistent with those prohibitions, the Court can make one or
more orders disqualifying a person, either permanently or for a specified
period, from doing any of the following:

- controlling, whether alone or in concert with one or more
  other entities, an entity that carries on a financial services
  business;
- performing any function involved in the carrying on of a
  financial services business; or
• performing specified functions involved in the carrying on of a financial services business.

[Schedule 4, item 18, paragraph 921A(2)(a)]

5.64 The particulars of these orders are the same as those that are relevant for the equivalent prohibitions in the banning orders that ASIC can make. Although the amendments re-write the provision that contained the original orders that the Court could make in respect of the provision of financial services, the way that those orders apply is unchanged.

Consequential and minor amendments

5.65 The amendments in Schedule 4 make a number of consequential and minor amendments that support the substantive amendments to the Corporations Act 2001.

5.66 The amendments insert the term ‘banning order’ in the dictionary in section 9. The term is defined by reference to its new location in subsection 920A(1). [Schedule 4, items 1 and 7, section 9 (definition of ‘banning order’) and subsection 920A(1)]

5.67 The relocation of the ‘banning order’ definition also means that the original definition in subsection 920B(1) is removed as part of the rewrite of that subsection. [Schedule 4, items 16 and 17, section 920B (heading) and subsection 920B(1)]

5.68 As a result of these definitional changes, the amendments remove specific references to banning orders being made ‘under section 920A’ in a number of provisions that refer to banning orders. This is done on the basis that the new definition of banning order includes the fact that such orders are made under section 920A. [Schedule 4, item 19 to 21, paragraphs 1200G(6)(c), 1317P(1)(e), 1349(1)(j), 1349(3)(h) and 1349(4)(e)]

5.69 The amendments update the definition of ‘control’ in the dictionary in section 9. These changes specify that control, when used in Part 7.6 of the Corporations Act 2001, has the meaning given by section 910B. In all other provisions, the term continues to have the meaning given by section 50AA. The amendments also repeal the previous definition of control contained in the specific dictionary for Part 7.6 of the Corporations Act 2001. [Schedule 4, items 2 and 4, sections 9 (definition of ‘control’) and 910A (definition of ‘control’)]

5.70 The amendments also make a number of editorial changes to the provisions related to banning orders in Division 8 of Part 7.6 of the Corporations Act 2001. These amendments make minor wording changes and insert subheadings into various provisions to improve their readability. [Schedule 4, items 6, 12, 14 and 16, subsection 920A(1), subsection 920A(1B), subsection 920A(3), and section 920B (heading)]
Amendments to the Credit Act

5.71 All legislative references in this section of this Chapter are to the Credit Act, unless otherwise specified.

Expanded grounds for making banning orders

5.72 Section 80 specifies the grounds on which ASIC may make a banning order against a person in relation to credit activities.

5.73 The existing grounds include where ASIC has reason to believe that a person is ‘not a fit and proper person to engage in credit activities’ or where a person, other than the trustee of a trust, becomes insolvent.

5.74 Consistent with the changes in respect of banning orders under the Corporations Act 2001, the amendments update the existing grounds in the Credit Act to authorise ASIC to make a banning order against a person where ASIC has reason to believe that:

- the person is not a fit and proper person to perform functions as an officer of another person who engages in credit activities;
- the person is not a fit and proper person to control another person that engages in credit activities;
- the person is not adequately trained, or is not competent, to engage in one or more credit activities;
- the person is not adequately trained, or is not competent, to perform functions as an officer of another person who engages in credit activities; or
- the person is not adequately trained, or is not competent, to control another person that engages in credit activities.

[Schedule 4, item 30, paragraphs 80(1)(f) and (fa)]

5.75 In addition to these changes, the amendments authorise ASIC to make a banning order against a person where:

- the person has been linked to a refusal or failure to give effect to an AFCA determination on more than one occasion;
- on more than one occasion, the person has been an officer of a corporation that was unable to pay its debts; or
- the person becomes insolvent, irrespective of whether they are the trustee of a trust.

[Schedule 4, items 29 and 30, paragraphs 80(1)(b), (fb) and (fc)]

5.76 The expanded grounds authorise ASIC to make banning orders against officers who control, manage or oversee the engaging in credit
activities that exhibits non-compliance with financial services laws or other regulatory requirements. As with the equivalent changes to the Corporations Act 2001, the term ‘officer’ includes senior managers.

Fit and proper person

5.77 In contrast to the existing grounds for making banning orders under the Corporations Act 2001, there is already a ground in the Credit Act for when ASIC has reason to believe that a person is not a fit and proper person. This ground currently applies in relation to a person engaging in credit activities.

5.78 The amendments expand the grounds on which ASIC can issue a banning order to include when it has reason to believe that a person is not a ‘fit and proper person’:

- to perform one or more function as an officer of another person that engages in credit activities; or
- to control another person that engages in credit activities.

[Schedule 4, item 30, paragraph 80(1)(f)]

5.79 The revised grounds allow ASIC to focus on a person’s suitability to control or undertake particular activities in relation to the engaging in of credit activities. These changes address a key part of the deficiency identified in Chapter 6 of the ASIC Enforcement Review. As with the similar changes to the Corporations Act 2001, where the new grounds form the basis for a decision to make a banning order, it would generally be expected that they would be reflected in the type of order that is issued (for example, if an order was made because ASIC considered that a person was not fit and proper to perform functions as an officer of an entity, it would be expected that the order would prohibit the person from performing such functions).

5.80 The term ‘credit activity’ is defined by section 6. The definition explains when a person engages in a credit activity and details the types of services and arrangements that constitute such an activity. The term ‘officer’ is defined by reference to the same term in section 9 of the Corporations Act 2001 and includes senior managers.

5.81 The amendments also add a definition for ‘control’ that is identical to the updated definition in the Corporations Act 2001. This definition explains the meaning of ‘control’ in relation to bodies corporate and other entities. The new definition is explained in further detail below.

5.82 The amendments update provisions specifying the matters that ASIC must have regard to in working out whether a person is a fit and proper person for the purposes of the expanded grounds. ASIC must have regard to the same matters that are relevant in working out whether a person is a fit and proper person for the purposes of the licensing regime.
These matters are explained in further detail in the explanatory materials for the amendments in Schedule 3.

Not adequately trained or competent

5.83 The amendments also authorise ASIC to make a banning order where it has reason to believe that a person is not adequately trained, or is not competent:

- to engage in one or more credit activities;
- to perform one or more functions as an officer of another person that engages in credit activities; or
- to control another person that engages in credit activities.

[Schedule 4, item 30, paragraph 80(1)(fa)]

5.84 These new grounds focus on the professional capabilities that a person has in respect of the functions that they are required to undertake as an officer of another person. As with the amendments about persons that are not fit and proper to undertake particular activities, the term ‘credit activities’ is defined by section 6 and the term ‘officer’ is defined by reference to the same term in section 9 of the Corporations Act 2001. The new definition of ‘control’, described below, is also relevant to the new grounds. The new grounds are based on the equivalent grounds described above for banning orders that are made under the Corporations Act 2001.

Failure to give effect to an AFCA determination

5.85 Consistent with the new ground in the Corporations Act 2001, the amendments authorise ASIC to make a banning order against a person that has been ‘linked to a refusal or failure to give effect to a determination made by AFCA’ on more than one occasion. The ground only applies to AFCA determinations relating to a complaint that relates to credit activities, or a financial services business (within the meaning of the Corporations Act 2001). [Schedule 4, item 30, paragraph 80(1)(fb)]

5.86 As noted in Chapter 6 of the ASIC Enforcement Review, authorising ASIC to make a banning order where an entity has refused or failed to comply with an AFCA determination reflects the importance of complying with those determinations.

5.87 Part 7.10A of the Corporations Act 2001 enables the Minister to authorise an external dispute resolution scheme where the Minister is satisfied that the scheme will meet certain mandatory requirements. This scheme is known as the ‘AFCA scheme’ and the operator of the scheme is known as AFCA. AFCA is empowered to make determinations in relation to complaints that are made under the AFCA scheme. Where AFCA becomes aware that a party to the complaint has refused or failed to give
effect to such a determination, AFCA is required to give particulars of the refusal or failure to one or more of APRA, ASIC, or the Commissioner of Taxation.

5.88 The amendments apply the meaning of the phrase ‘linked to a refusal or failure to give effect to a determination made by AFCA’ in section 910C of the Corporations Act 2001, as described above. This term means that ASIC can make a banning order against:

- the entity that failed or refused to give effect to an AFCA determination;
- an officer of the entity between the time when AFCA made the determination and the time that AFCA gave the particulars about the failure or refusal to comply to ASIC;
- if the entity that refused or failed to comply with the AFCA order is an individual – a person that is substantially or significantly involved in the management of a financial services business or credit activity carried on by the entity; or
- if the entity that refused or failed to comply with the AFCA order is the multiple trustees of a trust – one of the trustees of the trust.

5.89 Bringing an officer of an entity within the scope of the new ground allows ASIC to make banning orders against individual officers who manage or oversee the conduct of a financial services business or an entity that engages in credit activities that has been involved in multiple refusals or failures to comply with an AFCA determination.

5.90 The ground also applies to a person that is substantially or significantly involved in the management of the credit activities engaged in, or a financial services business carried on, by an individual. This allows the ground to apply to a person that has direct or considerable involvement in the management or oversight of the conduct of an individual’s credit activities or financial services business.

Officer of a corporation that has failed to pay its debts

5.91 Consistent with the changes to the Corporations Act 2001, the amendments create a new ground for making a banning order against a person who has, in the last 7 years, been the officer of two or more corporations that have been wound up. For this ground to apply, a liquidator of the company must have lodged a report under subsection 533(1) of the Corporations Act 2001 about the corporation’s inability to pay its debts, and the person must have been an officer of the corporation:
• when the corporation carried on a financial services business (within the meaning of the Corporations Act 2001) or engaged in credit activities; and
• either at the time the corporation was wound up, or within 12 months before it was wound up.

[Schedule 4, items 30 and 31, paragraph 80(1)(fc) and subsection 80(3)]

5.92 This new ground targets officers who have been involved in two or more failed companies, including those engaged in phoenixing-related activities. The new ground is consistent with ASIC’s existing power under section 206F of the Corporations Act 2001 to disqualify a person from managing corporations.

5.93 Applying the ground to officers of corporations that carried on a financial services business or that engaged in credit activities means that banning orders can be made under the Credit Act, even if the corporation carried on a financial services business rather than engaging in credit activities. In conjunction with parallel amendments to the Corporations Act 2001, this ensures appropriate coverage between the two Acts.

5.94 The requirement that a liquidator of the company must have lodged a report in relation to a company under subsection 533(1) of the Corporations Act 2001 about the corporation’s inability to pay its debts ensures that the ground is appropriately targeted at companies that may have engaged in phoenixing-related activities. In contrast to the timing requirements for the person being an officer of the company, it does not matter whether the liquidator’s report was lodged within 12 months of the person ceasing to be an officer. Liquidator’s reports must be lodged by a liquidator where it appears to the liquidator that the company is unable to pay its unsecured creditors more than 50 cent in the dollar of its outstanding debts.

5.95 Reports lodged under subsection 533(1) of the Corporations Act 2001 include reports lodged under that subsection as applied by section 526-35 of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, which ensures that certain ‘winding up provisions’ contained in the Corporations Act 2001 apply appropriately to corporations covered by that Act. [Schedule 4, item 31, paragraph 80(3)(b)]

Persons that become insolvent

5.96 The amendments extend the existing ground for persons that become insolvent to remove the exception for persons that are the trustee of a trust. [Schedule 4, item 29, paragraph 80(1)(b)]

5.97 The term ‘insolvent’ is defined in section 5 and applies to natural persons, bodies corporate and partnerships. The previous
exception for persons was unnecessarily restrictive and its removal allows ASIC to consider the financial circumstances of all persons.

Additional types of banning orders

5.98 The amendments in Schedule 4 rewrite and update the provisions specifying the activities and functions that may be prohibited by a banning order.

5.99 Under the rewritten provisions, ASIC can make one or more banning orders against a person that prohibit the person from doing one or more of the following:

- engaging in any credit activities;
- engaging in specified credit activities in specified circumstances or capacities;
- controlling, whether alone or in concert with one or more other entities, another person that engages in credit activities;
- performing any function involved in the engaging in of credit activities; and
- performing specified functions involved in the engaging in of credit activities.

[Schedule 4, item 36, subsection 81(1)]

5.100 The existing provisions were limited to prohibiting a person from engaging in any credit activities or specified credit activities. ASIC’s ability to make an order prohibiting these activities is not affected by the re-written provisions.

5.101 The additional prohibitions against a person controlling, or performing functions in respect of the engaging in of credit activities reflect the expanded grounds on which banning orders can be made. These additional prohibitions implement Recommendation 30 of the ASIC Enforcement Review.

5.102 As with the amendments described above in relation to the grounds on which banning orders can be made, the term ‘credit activity’ is defined by section 6 of the Credit Act. The term ‘officer’ takes its meaning from section 9 of the Corporations Act 2001.

5.103 The re-written provision also puts beyond doubt that a single order against a person can contain multiple prohibitions, rather than separate orders having to be made in respect of each prohibition.

Control of a person that engages in credit activities

5.104 The updated meaning of control described below is relevant in applying a prohibition in a banning order against person controlling another person that engages in credit activities.
5.105 Prohibiting a person from controlling another person that engages in credit activities ensures that a banning order can have effective application to a person that does not directly engage in credit activities or perform specific functions as an officer of another person that engages in credit activities, but that nevertheless is in a position to influence or direct the activities of such a person.

5.106 Prohibiting a person from controlling another person that engages in credit activities in concert with one or more other entities ensures that a banning order against control cannot be circumvented by splitting decision making or control functions between entities. The key element of the prohibition is that control is exercised ‘in concert’ with other entities, which requires that there be some co-ordination or controlling arrangement between the entities.

Functions in relation to a credit business

5.107 Prohibiting a person from performing any function involved in the engaging in of credit activities provides a blanket ban on that person’s involvement in such activities. The prohibition includes any activities that the person might undertake as an officer, manager, employee, or contractor, or activities undertaken in any other capacity. [Schedule 4, item 36, paragraph 81(1)(d)]

5.108 This general prohibition mirrors the original prohibition on engaging in any credit activities.

5.109 ASIC is also authorised to prohibit a person from performing specified functions involved in the engaging in of credit activities. [Schedule 4, item 36, paragraph 81(1)(e)]

5.110 This prohibition mirrors the original prohibition on specified credit activities. The prohibition allows ASIC to take a targeted and flexible approach regarding specified activities, for example as a senior manager, while still permitting them to undertake other activities.

5.111 The specified functions involved in engaging in of credit activities could include, but are not limited to, any function in which a person has responsibility for:

- managing or supervising the engaging in of credit activities, or of particular credit activities;
- managing conflicts of interest;
- ensuring compliance with credit legislation (including setting compliance standards, supervising compliance with those standards, reporting non-compliance and imposing sanctions);
• allocating and maintaining adequate resources to engage, or maintain competence for engaging, in credit activities;
• ensuring that those engaging in credit activities on behalf of the business are adequately trained and competent to do so;
• managing risk;
• internal or external dispute resolution.

Periods to which a banning order can apply

5.112 The amendments rewrite the provision dealing with the period over which a banning order can apply.

5.113 Consistent with the previous provision, ASIC is generally authorised to impose a banning order either permanently, or for a specified period. [Schedule 4, item 36, paragraph 81(2)(b)]

5.114 However, the amendments introduce a 5 year limit on prohibitions in a banning order that is made solely on the ground of a person being an officer of more than one corporation that was unable to pay its debts. [Schedule 4, item 36, paragraph 81(2)(a)]

5.115 This limit is consistent with the one that applies to banning orders under the Corporations Act 2001 and to disqualification of a person from managing corporations in section 206F of the Corporations Act 2001. As with those provisions, the limit is appropriate and proportionate for banning orders made against a person solely on the same basis. The time limit does not apply where a banning order is made on multiple grounds, even where one of those grounds is that the person has been an officer of more than one corporation that was unable to pay its debts.

5.116 As a single banning order can contain multiple prohibitions, ASIC is also permitted to impose different periods in respect of each prohibition specified in a banning order. This approach assists ASIC in tailoring the prohibitions specified in a banning order to the particular facts and circumstances of a case.

Administrative Appeals Tribunal review

5.117 The amendments in Schedule 4 to the Bill do not affect a person’s right to apply to the Administrative Appeals Tribunal for a review of a decision by ASIC under Part 2-4 in respect of a banning order.

5.118 These review rights continue to be provided under section 327 and apply to decisions in respect of a banning order under the amended provisions. These decisions include the decision to make a banning order and the prohibitions contained in such an order.
Disqualification orders

5.119 Section 86 permits ASIC to apply to the Court to make an order in relation to a person if ASIC cancels a licence of the person, or makes a banning order against the person that is to operate permanently. These provisions mirror the equivalent provisions in the Corporations Act 2001.

5.120 Where the application is based on a permanent banning order, the Court may make an order disqualifying the person from engaging in any credit activities, or specified credit activities, in specified circumstances or capacities. These orders mirror the types of prohibitions that can be specified in a banning order.

5.121 The amendments expand the types of orders that the Court can make in relation to an application based on a banning order. These amendments ensure continued alignment with the expanded types of prohibitions that ASIC can specify in a banning order.

5.122 Consistent with those prohibitions, the Court can make one or more orders disqualifying a person, either permanently or for a specified period, from doing any of the following:

- controlling, whether alone or in concert with one or more other entities, another person that engages in credit activities;
- performing any function involved in the engaging in of credit activities; or
- performing specified functions involved in the engaging in of credit activities.

5.123 The particulars of these orders are the same as those that are relevant for the equivalent prohibitions specified in a banning order that ASIC can make. Although the amendments re-write the provision that contained the original orders that the Court could make in respect of credit activities, the way that those orders apply is unchanged.

Consequential and minor amendments

5.124 The amendments in Schedule 4 make a number of consequential and minor amendments that support the substantive amendments to the Credit Act.

5.125 The amendments update the Guide Material for Part 2-4 so that it covers the expanded grounds and types of banning orders and disqualification orders. [Schedule 4, item 26, section 79]

5.126 The amendments update the term ‘banning order’ in the dictionary in section 5. The term is defined by reference to its new
location in subsection 80(1). [Schedule 4, items 23 and 28, section 5 (definition of ‘banning order’) and subsection 80(1)]

5.127 The relocation of the ‘banning order’ definition also means that the original definition in subsection 81(1) is removed as part of the rewrite of that subsection. [Schedule 4, items 35 and 36, section 81 (heading) and subsection 81(1)]

5.128 The amendments add the term ‘control’ to the dictionary in section 5. This term is defined by reference to the new definition in section 16A, which is described below. [Schedule 4, items 24 and 25, sections 5 (definition of ‘control’) and 16A (definition of ‘control’)]

5.129 The amendments also make a number of editorial changes to the provisions related to banning orders in Part 2-4 of the Credit Act. These amendments make minor wording changes and insert subheadings into various provisions to improve their readability. [Schedule 4, items 27, 32 to 34 and 37, subsection 80(1), paragraphs 80(5)(a) and (6)(a), subsection 80(7), and subsection 86(1)]

Updated meaning of ‘control’

5.130 The amendments update the definition of ‘control’ in the Corporation Act. This updated definition applies for the purposes of banning orders prohibiting a person from controlling an entity that carries on a financial services business.

5.131 The amendments also insert the same definition into section 16A of the Credit Act. As the two definition are identical, the below explanation applies equally to both sets of amendments.

5.132 The previous definition of control in the Corporations Act 2001 applied in relation to a body corporate licensee. The updated definition generalises that definition so that it applies more generally in respect of bodies corporate (including body corporate licensees). [Schedule 4, items 5 and 25, subsection 910B(1) of the Corporations Act 2001 and subsection 16A(1) of the Credit Act]

5.133 The amendments do not otherwise modify the way that the original definition of control in the Corporations Act 2001 applies to an entity that is a body corporate. As such, the definitions in each Act examine:

• the capacity to cast or control more than half of the votes at a general meeting of a body corporate;
• to directly or indirectly hold more than half of the issued share capital of a body corporate;
• the capacity to control the composition of a body corporate’s board or governing body; and
• the capacity to determine the outcome of decisions about a body corporate’s financial and operating policies.

5.134 For the purposes of the definition in the Credit Act, the terms ‘MCI’ and ‘issued’ have the same meaning as in Chapter 7 of the Corporations Act 2001 (which already applies for the purposes of the definition in the Corporations Act 2001). [Schedule 4, item 25 subsection 16A(3) of the Credit Act]

5.135 The amendments introduce an additional limb to the control tests that can be applied to an entity that is not a body corporate.

5.136 This new aspect of the test uses elements of the control test for bodies corporate that are generally applicable to other entities. Under this aspect of the revised definition of control, control of an entity that is not a body corporate is defined as:

• the capacity to control the composition of the entity’s board or governing body; and

• the capacity to determine the outcome of decisions about an entity’s financial and operating policies.

[Schedule 4, items 5 and 25, subsection 910B(2) of the Corporations Act 2001 and subsection 16A(2) of the Credit Act]

5.137 As with the test about capacity to determine the outcome of decisions about a body corporate’s financial and operating policies, the new test for other entities takes into account:

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

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

[Schedule 4, item 5 and 25, paragraph 910B(2)(b) of the Corporations Act 2001 and paragraph 16A(2)(b) of the Credit Act]

5.138 These considerations ensure that actual and substantive influence or capacity to control are taken into account, rather than the formal or legal rights that exist in relation to an entity.

Application and transitional provisions

5.139 The amendments in Part 1 and Part 2 of Schedule 4 to the Bill apply in respect of banning orders and disqualification orders that are made at or after the relevant Part commences. In making such an order, regard may be had to any acts, omissions, states of affairs or matters before, at or after that commencement. [Schedule 4, items 22 and 39]
5.140 These application rules mean that any orders that are made after the time of commencement can apply in respect of matters that arose at an earlier time.

5.141 To support this outcome, the amendments also permit ASIC to vary or cancel any banning orders that were in force immediately before the commencement of the relevant Part in any circumstances that ASIC considers to be appropriate. This means that ASIC does not have to demonstrate that there has been a change in any of the circumstances based on which ASIC made the order. [Schedule 4, items 22 and 39]

5.142 Disapplying the provisions in the Corporations Act 2001 and the Credit Act that require there to be a change in circumstances allows ASIC to update or revoke an existing banning order, where it is appropriate to do so, to bring it in line with the updated rules for making banning orders. For example, this will allow ASIC to add additional prohibitions under an existing order, rather than having to revoke the order and make a new order in each case.

5.143 The amendments specify that a banning order or disqualification order that was made under the previous provisions continues in force, and may be dealt with, as though it had been made under the amended provisions. [Schedule 4, items 22 and 39]

5.144 These savings rules ensure that such orders continue to apply and can be modified or revoked at a later time in accordance with the amended provisions.
Chapter 6
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Harmonising and enhancing ASIC’s search warrant powers

6.1 Schedule 1 to the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview

6.2 Schedule 1 to the Bill strengthens ASIC’s ability to carry out its enforcement functions by modernising and harmonising its search warrant powers, while ensuring appropriate safeguards are in place to balance the imposition on individuals’ property and personal rights.

Human rights implications

6.3 Schedule 1 to the Bill engages the right to protection from unlawful or arbitrary interference with privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR) because it provides ASIC with the ability to seek a search warrant.

6.4 The right in Article 17 may be subject to permissible limitations, where these limitations are authorised by law and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The UN Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

6.5 The purpose of the amendments in Schedule 1 to the Bill are to allow for the disclosure of a thing to facilitate civil penalty and criminal investigations as well as other law enforcement purposes. As this goes to maintaining public order and protecting other rights, the purpose is directed towards a legitimate objective.

6.6 New proposed section 3ZQUA in the ASIC Act and Credit Act supports the right to privacy by limiting access to a thing seized under the
search warrant power by a private litigant except where required under a court order or an order of a tribunal.

6.7 Also in order not to be arbitrary, interferences must be reasonable and necessary in the particular circumstances, as well as proportionate to the objectives they seek to achieve.

6.8 ASIC’s strengthened search warrant powers are reasonable, necessary and proportionate to the achievement of a legitimate objective as the powers allow a constable and ASIC to perform their investigative and enforcement functions.

6.9 The new search warrant provisions are proportionate as ASIC is only able to seek a search warrant for an indictable offence.

Conclusion

6.10 Schedule 1 to the Bill is compatible with human rights because to the extent that the Bill may limit human rights, those limitations are reasonable, necessary and proportionate.

Access to Telecommunications Interception Information

6.11 Schedule 2 to the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview

6.12 Schedule 2 to the Bill amends the TIA Act to allow ASIC to receive and use intercepted information for its own investigations and prosecutions of serious offences.

Human rights implications

6.13 Schedule 2 to the Bill engages the right to protection from unlawful or arbitrary interference with privacy under Article 17 of the ICCPR because it provides for information about interception warrants and intercepted information to be communicated to ASIC, and ASIC can communicate the received information to another person who is involved with ASIC’s investigations and subsequent reporting and prosecutions.

6.14 The right in Article 17 may be subject to permissible limitations, where these limitations are authorised by law and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The UN Human
Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

6.15 Schedule 2 to the Bill would not expand the range of offences for which telecommunications intercept warrants could be sought under the TIA Act, the range of evidence that could be obtained pursuant to a telecommunications intercept warrant or broaden the admissibility of lawfully intercepted information obtained under a telecommunications intercept warrant.

6.16 The changes will only permit ASIC to receive information that has already been lawfully intercepted by interception agencies where that information relates, or appears to relate, to a matter that ASIC can investigate involving a serious offence or the likely commission of a serious offence. In addition, when in receipt of information about interception warrants or lawfully intercepted information from an interception agency, ASIC would be subject to the strict limitations and restrictions already in place under the TIA Act.

Conclusion

6.17 Schedule 2 to the Bill is compatible with human rights. To the extent that it limits the right to privacy under Article 17 of the ICCPR, the limitation is reasonable, necessary and proportionate.

6.18 The changes are necessary to ensure ASIC can effectively investigate serious offences and take enforcement action where necessary. This category of offences includes insider trading, market manipulation and financial services fraud, each of which can result in serious harm to the integrity of markets and to the public at large.

6.19 The changes are proportionate to the legitimate objective of strengthening ASIC’s ability to investigate and pursue serious offences. The changes are limited in nature as they do not provide for ASIC to intercept information itself but rather allow ASIC to receive and use information already intercepted by other agencies. The existing safeguards in the TIA Act will continue to apply, ensuring appropriate protection for the privacy of affected individuals.

Licensing and false or misleading documents

6.20 Schedule 3 to the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.
Overview

6.21 Schedule 3 to the Bill amends the Corporations Act 2001 and the National Consumer Credit Protection Act 2009 (Credit Act) to strengthen ASIC’s licensing powers and the offences for false and misleading documents.

6.22 The amendments in Parts 1 and 2 of Schedule 3 generally update the requirements for obtaining an Australian financial services licence and an Australian credit licence to ensure consistency between the respective licensing regimes and to improve their overall operation. These amendments do not engage any applicable human rights or freedoms.

6.23 The amendments in Parts 1 and 2 of Schedule 3 also introduce new obligations on Australian financial services licensees and Australian credit licensees to notify ASIC when they have a change in control or if they do not begin to provide financial services, or engage in credit activities, within 6 months of a licence being granted.

6.24 The amendments in Part 3 of Schedule 3 align the consequences for making false or misleading statements in documents provided to ASIC in the Australian financial services licence and Australian credit licence contexts. The changes align the existing offences that apply under Corporations Act 2001 and the Credit Act by:

- removing the specific offence for false and misleading statements in applications made to ASIC from the Corporations Act 2001;
- removing the offence-specific defences that applied for the existing offences under the Corporations Act 2001;
- re-writing the existing fault-based offences and offences of strict liability that apply under each Act to ensure consistent treatment; and
- introducing new civil penalty provisions in the Corporations Act 2001 that mirror the fault-based and strict liability offences.

6.25 The amendments in Schedule 3 do not engage any applicable human rights of freedoms to the extent that they apply to corporations.

Human rights implications

6.26 Consideration has been specifically given to the guidance in the Parliamentary Joint Committee on Human Rights’ Guidance Note 2: Offence provisions, civil penalties and human rights and to the Attorney General’s Department’s A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, September 2011 edition.
6.27 The impact of the amendments on the following human rights has been considered:

- the right to fair trial under article 14 of ICCPR; and
- the increase of financial penalties for criminal offences and civil penalty provisions.

**Strict liability offences introduced by Parts 1 and 2**

6.28 The amendments introduce offences for failures by an Australian financial services licensee or Australian credit licensee to notify ASIC of a change in control or a failure by the licensee to provide financial services or engage in credit activities within 6 months of a licence being granted. A failure to notify ASIC of these circumstances is an offence of strict liability that gives rise to a maximum penalty of 30 penalty units.

6.29 A strict liability offence is appropriate as it is likely to enhance enforcement by deterring non-reporting of matters that are directly relevant to whether the licensee’s licence should have a particular condition imposed on it, or be revoked. The matters are also within the direct knowledge and control of the licensee. A strict liability offence is also appropriate to ensure integrity of the financial regulatory regime.

6.30 The amount of the penalty is within the range that is generally considered appropriate for strict liability offences in the Attorney General’s Department’s *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

**Re-written offences in Part 3**

6.31 The amendments re-write the existing fault-based offences in the *Corporations Act 2001* and the *Credit Act* for documents that are required to be provided under those Acts, and that are materially false or misleading because of a statement or omission that the person knowingly makes. These offences are substantially the same as the previous offences, but are restricted to improve readability and consistency between the Acts.

6.32 As with the previous offences, the maximum penalty for committing the respective offences is 5 years.

6.33 The amendments also re-write the existing offence for failing to take reasonable steps in providing a materially false or misleading document under the *Corporations Act 2001*, and convert it to a strict liability offence. Applying the offence as a strict liability offence is consistent with the approach to the equivalent offence in the *Credit Act* and gives effect to the ASIC Enforcement Review Taskforce’s recommendation for aligning the respective regimes. The re-written penalty in the *Credit Act* is structured differently to the previous penalty, but is broadly the same in its effect.
6.34 The penalty for committing either strict liability offence is 20 penalty units.

6.35 A strict liability offence is appropriate as it will greatly enhance enforcement of provision, and greatly improve compliance with the fundamental policy objective of the provision of ensuring that persons taking all reasonable steps to ensure that documents are not false or misleading.

6.36 The amount of the penalty is within the range that is generally considered appropriate for strict liability offences in the Attorney General’s Department’s A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. It is also consistent with the penalties for the equivalent offence in the Credit Act and so gives effect to the ASIC Enforcement Review Taskforce’s recommendation about aligning penalties under the two regimes.

**Removal of offence-specific defences by Part 3**

6.37 The amendments do not replicate the offence-specific defences that were previously contained in the Corporations Act 2001. These defences set out particular circumstances that a person could prove in order to demonstrate that they had taken reasonable steps to ensure that a document was not false or misleading. The defences essentially acted as safe-harbours that could apply even where a person had not objectively taken all reasonable steps. Their removal enables the Court to take into account all facts and circumstances in determining whether a person has taken all reasonable steps. The removal of these defences ensures greater consistency between the provisions of the Corporations Act 2001 and the equivalent provisions of the Credit Act, which do not contain equivalent defences.

6.38 Removing these exceptions also gives effect to recommendation 7.3 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, where the Commissioner noted that exceptions and qualifications to generally applicable rules of conduct make the law more complex. This additional prescription can leave regulated entities ‘with little more than a box-ticking task’, and creates an incentive to comply with the letter, rather than the spirit, of the law.

**Civil penalties introduced by Part 3**

6.39 The amendments introduce new civil penalty provisions into the Corporations Act 2001 that mirror the fault-based and strict liability offences. The grounds for contravening these civil penalty provisions are identical to the grounds for committing the equivalent offence.
6.40 These civil penalty provisions are already contained in the Credit Act and are not affected by the amendments in Schedule 3.

6.41 The maximum pecuniary penalty applicable to these contraventions is 5,000 penalty units for individuals, although this can also be increased where the Court can determine a benefit derived or detriment avoided because of the contravention.

6.42 These applicable penalties are the standard penalties that apply to ‘uncategorised’ penalty provisions under the Corporations Act 2001 (which are penalties that are neither a corporation/scheme penalty provision nor a financial services civil penalty provision). The amount of such penalties was increased through Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019.

6.43 As noted in the Statement of Compatibility with Human Rights for the Bill that became that Act, the maximum penalties are justified where consequences of not complying can cause consumer detriment. Not complying with the obligations under the Corporations Act 2001, and other acts, can harm consumers and create distrust in the financial services sector. The maximum penalty is considered appropriate to adequately deter misconduct.

6.44 While the civil penalty amounts are intended to deter misconduct, none of the civil penalty provisions carry a penalty of imprisonment. The civil penalty provisions should not be considered ‘criminal’ for the purpose of human rights law due to their application in a financial services regulatory context. Therefore, the civil penalty provisions do not create criminal offences for the purposes of articles 14 and 15 of the ICCPR.

6.45 Furthermore, the increased penalty for civil penalty provisions will apply to offences that are committed after the Bill commences, and therefore applies prospectively, therefore upholding article 15 of the ICCPR.

Conclusion

6.46 Schedule 3 to the Bill is compatible with human rights because to the extent that the Bill may limit human rights, those limitations are reasonable, necessary and proportionate.

Banning Orders

6.47 Schedule 4 to the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.
Overview

6.48 The amendments in Schedule 4 to the Bill expand the scope of ASIC’s powers to ban a person from performing functions in a financial services or credit business. These changes ensure that ASIC is appropriately empowered to remove individuals from continued involvement in the financial sector, particularly those in senior positions of control and influence, and expand the grounds on which ASIC can issue banning orders.

Human rights implications

6.49 Schedule 4 to the Bill does not engage any of the applicable rights or freedoms.

Conclusion

6.50 Schedule 4 to the Bill is compatible with human rights as it does not raise any human rights issues.