
FINANCIAL REGULATOR REFORM (NO. 1) BILL 2019: BANNING ORDERS

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
AFCA	Australian Financial Complaints Authority
ASIC	Australian Securities Investments Commission
ASIC Enforcement Review	ASIC Enforcement Review Taskforce Report
Corporations Act	<i>Corporations Act 2001</i>
Credit Act	<i>National Consumer Credit Protection Act 2009</i>

Chapter 1

Banning Orders

Outline of chapter

1.1 The amendments in Schedule # 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.

1.2 The amendments implement the recommendations in Chapter 6 of the *ASIC Enforcement Review Taskforce Report*¹ (the ASIC Enforcement Review) that was presented to the Government in December 2017.

Context of amendments

The establishment of the ASIC Enforcement Review Taskforce

1.3 On 19 October 2016, the Government established the ASIC Enforcement Review Taskforce in response to recommendation 29 of the Financial System Inquiry.

1.4 The 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.

1.5 In reviewing the matters outlined in its terms of reference, the Taskforce made a number of recommendations to:

- address gaps or deficiencies to allow more effective enforcement of the 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

¹ <https://static.treasury.gov.au/uploads/sites/1/2018/04/ASIC-Enforcement-Review-Report.pdf>

- promote a competitive and stable financial system that contributes to Australia’s productivity and growth.

The Taskforce’s findings

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

1.7 The Taskforce grouped its recommendations into eight broad themes. These include:

- 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 licencing 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.

Extending ASIC’s banning powers

1.8 Division 8 of Part 7.6 of the Corporations Act 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.

1.9 Chapter 6 of the ASIC Enforcement Review (ASIC’s power to ban senior individuals in the financial sector) contained recommendations to foster public confidence in the integrity of individuals who work in the financial sector.

1.10 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).

1.11 These recommendations address two deficiencies in ASIC's existing banning powers that were identified in the ASIC Enforcement Review 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

1.12 The first issue relates to the scope of ASICs existing banning powers under the Corporations Act 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.

1.13 The second issue relates to the grounds on which ASIC can make a banning order. ASIC can only make banning orders where there has been poor conduct in the provision of financial services or engagement in credit activities. This means that the existing provisions do not necessarily authorise ASIC to ban a director or senior manager of a financial services or credit business who is demonstrated to be unfit to fulfil their role or has a culture of non-compliance with financial services laws.

1.14 On 16 April 2018, the Government agreed to all of the recommendations set out above at paragraph 1.10.

Summary of new law

1.15 The amendments in Schedule # 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 a person's culture of non-compliance with financial service laws and the management or oversight of the conduct of a financial services or credit business.

1.16 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.

² http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf

³ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/index

1.17 The amendments achieve these outcomes by modifying the existing provisions for banning orders in Division 8 of Part 7.6 of the Corporations Act (for the 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

<i>New law</i>	<i>Current law</i>
<i>Banning orders made under the Corporations Act</i>	
<p>ASIC may make a banning order against a person under the Corporations 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:</p> <ul style="list-style-type: none"> - provide financial services; - perform functions as an officer of an entity that carries on a financial services business; - control an entity that carries on a financial services business. <p>ASIC may also make a banning order against a person that:</p> <ul style="list-style-type: none"> - is insolvent under administration or a Chapter 5 body corporate; - has, at least twice, been an officer of more than one corporation that was unable to pay its debts; - has, at least twice, been linked to a refusal or failure to give effect to an AFCA determination; or - has an officer who ASIC has made, or could make, one or more banning orders against. 	<p>ASIC may make a banning order against a person under the Corporations Act in certain circumstances, including where ASIC has reason to believe that the person:</p> <ul style="list-style-type: none"> - is ‘not of good fame or character’; or - is ‘not adequately trained, or is not competent’, to provide financial services. <p>ASIC may also make a banning order against a person who is an insolvent under administration.</p>
In working out whether a person is a fit and proper person for the	In working out whether a person is of good fame or character for the

<p>purposes of the Corporations Act, ASIC must have regard to the same matters that are relevant under the Credit Act.</p> <p>These matters include:</p> <ul style="list-style-type: none"> - whether the person has been convicted of an offence in the last 10 years; - whether the person has had an Australian financial services license or Australian credit license that was suspended or cancelled; - whether a banning order or disqualification order has previously been made against the person under the Corporations Act or the Credit Act; - whether the person has ever been a Chapter 5 body corporate or an insolvent under administration; - whether the person has been disqualified from managing corporations; and - whether the person has been banned from engaging in a credit activity under a State or Territory law. 	<p>purposes of the Corporations Act, ASIC must have regard to:</p> <ul style="list-style-type: none"> - any conviction that the person has had in the last 10 years for offences that involve dishonesty; - whether the person has had an Australian financial services license that was suspended or cancelled; and - whether a banning order or disqualification order has previously been made against the person.
<p>A banning order or a disqualification order made against a person under the Corporations Act may specify that the person is prohibited from doing any of the following:</p> <ul style="list-style-type: none"> - providing any financial services; - providing specified financial services in specified circumstances; - controlling an entity that carries on a financial services business; 	<p>A banning order or a disqualification order made against a person under the Corporations Act may specify that the person is prohibited from doing any of the following:</p> <ul style="list-style-type: none"> - providing any financial services; - providing specified financial services in specified circumstances.

<ul style="list-style-type: none"> - performing any function involved in carrying on a financial services business; - performing specified functions involved in carrying on a financial services business. 	
<p><i>Banning orders made under the Credit Act</i></p>	
<p>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:</p> <ul style="list-style-type: none"> - engage in credit activities; - perform functions as an officer of another person that engages in credit activities; - control another person that engages in credit activities. <p>ASIC may also make a banning order against a person that:</p> <ul style="list-style-type: none"> - is insolvent; - has, at least twice, been an officer of more than one corporation that was unable to pay its debts; - has, at least twice, been linked to a refusal or failure to give effect to an AFCA determination; or - has an officer who ASIC has made, or could make, one or more banning orders against. 	<p>ASIC may make a banning order against a person under the Credit Act in certain circumstances, including where:</p> <ul style="list-style-type: none"> - ASIC has reason to believe that the person is ‘not a fit and proper person’ to engage in credit activities; or - the person is insolvent, other than a person who is the trustee of a trust.
<p>A banning order or disqualification order made against a person under the Credit Act may specify that the person is prohibited from doing any of the following:</p> <ul style="list-style-type: none"> - engaging in any credit activities; 	<p>A banning order or disqualification order made against a person under the Credit Act may specify that the person is prohibited from doing any of the following:</p> <ul style="list-style-type: none"> - engaging in any credit activities;

<ul style="list-style-type: none"> - engaging in specified credit activities in specified circumstances; - controlling another person that engages in credit activities; - performing any function involved in another person engaging in credit activities; - performing specified functions involved in another person engaging in credit activities. 	<ul style="list-style-type: none"> - engaging in specified credit activities in specified circumstances.
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Detailed explanation of new law

Amendments to Corporations Act

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

Expanded grounds for making banning orders

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

1.20 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’.

1.21 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;
- the person is not adequately trained, or is not competent, to control an entity that carries on a financial services business.

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

1.22 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 comply with 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;
- the person is not an individual and ASIC has issued, or could issue, a banning order in relation to one of its officers; or
- the person is a Chapter 5 body corporate or an insolvent under administration.

[Schedule #, items 8 and 10, paragraphs 920A(1)(bb) and (j) to (l)]

1.23 The expanded grounds authorise ASIC to make banning orders against officers who control, manage or oversee the conduct of a financial services business that exhibits systematic non-compliance with financial services laws or other regulatory requirements. In the context of these amendments, the term ‘officer’ has the same meaning as elsewhere in the Corporations Act, and will generally include senior managers.

Fit and proper person

1.24 The primary consideration for the existing ground about a person not being of good fame or character focusses on a person’s inherent moral qualities. This focus means that the test is not primarily concerned with a person’s professional capacity, suitability, or history of compliance with regulatory requirements (although a person’s fame or character may be affected by such matters).

1.25 The amendments replace the existing 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 #, item 9, paragraph 920A(1)(d)]

1.26 The revised grounds allow ASIC to focus directly on a person's suitability and capability to control or undertake particular activities in relation to a financial services business.

1.27 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 people in a capacity other than as an 'officer'.

1.28 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 ground, which applied to a person's general character.

1.29 A number of existing defined terms in the Corporations Act 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.

1.30 In particular, the term 'financial service' is defined in Division 4 of Part 7.1 of the Corporations Act. The definition details the types of 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.

1.31 The Corporations Act 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.

1.32 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. The test is used in a number of places in the Credit Act, including as a ground for making a banning order under section 80.

1.33 In determining when a person is a fit and proper person for the purposes of the new grounds for banning orders in the Corporations Act, 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 in relation to a financial service or a credit business under the Corporations Act or Credit Act, respectively;
- if the person is an individual – whether the person has ever been disqualified from managing corporations under the Corporations Act;
- whether the person has ever been banned from engaging in a credit activity under a law of a State or Territory;
- whether the person has even been a Chapter 5 body corporate or an insolvent under administration;
- 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;
- 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 #, item 11, subsection 920A(1A)]

1.34 These considerations replace those that applied in working out whether a person was of good fame or character, although 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.

1.35 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.

1.36 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 consistent with the equivalent requirement in the Credit Act.

1.37 As with the previous test of whether a person was of good fame or character, 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.

1.38 The amendments specify that ASIC must also 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. The reference to Chapter 5 body corporates is also consistent with other changes to the separate ground for insolvents under administration that are described below. Extending these considerations to a person who is the multiple trustees of a trust ensures that the same considerations apply to each of the trustees.

1.39 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.

1.40 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 to the financial services regulated under Part 7.4 of the Corporations Act, it is appropriate that they also be taken into account in working out for the purpose of the Corporations Act.

1.41 Second, the additional matters about whether a person has been insolvent or disqualified from managing corporations under Part 2D.6 of

the Corporations Act 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.

Not adequately trained or competent

1.42 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 #, item 9, subparagraphs 920A(1)(da)(ii) and (iii)]

1.43 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, 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.

1.44 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 #, item 9, subparagraph 920A(1)(da)(i)]

1.45 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 comply with AFCA determination

1.46 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 about an act or omission in the course of carrying on a financial services business, or engaging in credit activities within the meaning of the Credit Act.

[Schedule #, item 10, paragraph 920A(1)(j)]

1.47 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.

1.48 Part 7.10A of the Corporations Act 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.

1.49 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 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.

[Schedule #, item 5, section 910C]

1.50 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.

1.51 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.

1.52 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 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

1.53 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 #, items 10 and 13, paragraph 920A(1)(k) and subsection 920A(1C)]

1.54 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.

1.55 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, even if the corporation engaged in credit activities rather than financial services. 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.

1.56 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. Such 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 per cent of its outstanding debts.

1.57 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 apply appropriately to corporations covered by that Act. *[Schedule #, item 7, paragraph 920A(1C)(b)]*

Ban for persons other than individuals and for multiple trustees of a trust

1.58 The amendments introduce a ground that authorises ASIC to make a banning order against a person that is not an individual if one or

more banning orders are in force against its officers who performs functions involved in its financial services business, or ASIC is satisfied that it could make one or more banning orders against such officers. *[Schedule #, item 10, paragraph 920A(1)(l)]*

1.59 The amendments also introduce a further ground that authorises ASIC to make a banning order against a person who is the multiple trustees of a trust. Banning orders can be issued to such persons if one or more banning orders are in force against any of the trustees of the trust, or ASIC is satisfied that it could make one or more banning orders against such trustees. *[Schedule #, item 10, paragraph 920A(1)(m)]*

1.60 These additional grounds allow ASIC to making a banning order directly against an entity where an officer or trustee has engaged in conduct that provides a ground for making a banning order against the officer or trustee. Making a banning order against the entity will affect the activities that can be undertaken by its officers or trustees in performing their functions. However, such officers or trustees are only prohibited from undertaking activities or functions more generally if they also have a banning order made against them.

1.61 These additional grounds are consistent with other changes to the licensing provisions in response to the recommendations in Chapter 5 to the ASIC Enforcement Review. Those changes require ASIC to refuse to grant a financial services licence to a person that is not an individual where any of its officers, partners or trustees (as applicable) are not a fit and proper person to perform their functions in relation to the non-individual. Those changes also require ASIC to refuse to grant a financial services licence to a person that is not an individual where any of its controllers are not a fit and proper person to control a financial services business.

Chapter 5 body corporate or insolvent under administration

1.62 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 #, item 8, paragraph 920A(1)(bb)]*

1.63 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.

1.64 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

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

1.66 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 another person carrying on a financial services business; and
- performing specified functions involved in another person the carrying on of a financial services business.

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

1.67 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.

1.68 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.

1.69 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 are relevant to the types of activities that a banning order may prohibit.

1.70 In particular, the term 'financial service' is defined in Division 4 of Part 7.1 of the Corporations Act. The definition details the types of 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.

1.71 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

1.72 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.

1.73 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.

1.74 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

1.75 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 #, item 17, paragraph 920B(1)(d)*]

1.76 This general prohibition mirrors the original prohibition on providing any financial services. Given the broad nature of the prohibition, it is expected that it would be used if the grounds on which a banning order were made involved particularly serious or egregious actions.

1.77 ASIC is also authorised to prohibit a person from performing specified functions involved in the carrying on of a financial services business. [*Schedule #, item 17, paragraph 920B(1)(e)*]

1.78 This prohibition mirrors the original prohibition on specified financial services. The prohibition allows ASIC to take a targeted and flexible approach from undertaking specified activities, for example as a senior manager or financial officer, while still permitting them to undertake other activities.

1.79 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; or
- distribution, marketing or promotion of financial products.

Periods to which a banning order can apply

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

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

1.82 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 #, item 17, paragraph 920B(2)(a)*]

1.83 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.

1.84 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

1.85 The amendments in Schedule # 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 7.2 in respect of a banning order.

1.86 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

1.87 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.

1.88 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.

1.89 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.

1.90 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 #, item 18, paragraph 921A(2)(a)]

1.91 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

1.92 The amendments in Schedule # make a number of consequential and minor amendments that support the substantive amendments to the Corporations Act.

1.93 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 #, items 1 and 7, section 9 (definition of ‘banning order’) and subsection 920A(1)*]

1.94 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 #, items 16 and 17, section 920B (heading) and subsection 920B(1)*]

1.95 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 #, item 19 to 21, paragraphs 1200G(6)(c), 1317P(1)(e), 1349(1)(j), 1349(3)(h) and 1349(4)(e)*]

1.96 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, 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. [*Schedule #, items 2 and 4, sections 9 (definition of ‘control’) and 910A (definition of ‘control’)*]

1.97 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. These amendments make minor wording changes and insert subheadings into various provisions to improve their readability. [*Schedule #, items 6, 12, 14 and 16, subsection 920A(1), subsection 920A(1B), subsection 920A(3), and section 920B (heading)*]

Amendments to the Credit Act

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

Expanded grounds for making banning orders

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

1.100 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.

1.101 Consistent with the changes in respect of banning orders under the Corporations Act, 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 #, item 30, paragraphs 80(1)(f) and (fa)]

1.102 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 comply with 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;
- the person is not an individual and ASIC has issued, or could issue, a banning order in relation to one of its officers; or
- the person becomes insolvent, irrespective of whether they are the trustee of a trust.

[Schedule #, items 29 to 31, paragraphs 80(1)(b), (fb), (fc) and (i)]

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

Fit and proper person

1.104 In contrast to the existing grounds for making banning orders under the Corporations Act, 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.

1.105 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 #, item 30, paragraph 80(1)(f)]

1.106 The revised grounds allow ASIC to focus on a person’s suitability to control or undertake particular activities in relation to a credit business. 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, 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).

1.107 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 and includes senior managers.

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

1.109 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. These matters are the same as those that were relevant to working out whether a person is a fit and proper person to engage in credit activities for the purposes of the Credit Act.

1.110 In determining when a person is not a fit and proper person for the purposes of the new grounds for banning orders in the Credit Act, 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, suspended or cancelled;
- whether the person has ever had a banning order in relation to a financial service or a credit business under the Corporations Act or Credit Act, respectively;
- if the person is an individual – whether the person has ever been disqualified from managing corporations under the Corporations Act;
- whether the person has ever been banned from engaging in a credit activity under a law of a State or Territory;
- 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 #, item 32, subsection 80(2)]

1.111 As with the previous test, none of these matters are determinative, but each must be taken into account by ASIC when it forms its view about whether a person is not fit and proper to engage in credit activities, or to control or perform functions as an officer of another person that engages in such activities.

1.112 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. *[Schedule #, item 32, paragraph 80(2)(e)]*

1.113 The requirement that ASIC must take into account Part VIIC of the *Crimes Act 1914* was contained in the previous provision. 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.

1.114 As noted above in relation to the Corporations Act, aligning the two provisions ensures ongoing consistency between the regimes under each Act. This approach ensures that ASIC can consider whether a person has had a banning order or a disqualification order made against them under the Corporations Act.

Not adequately trained or competent

1.115 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 #, item 30, paragraph 80(1)(fa)]

1.116 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 a credit business, or to control such a business. 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. 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.

Failure to comply with AFCA determination

1.117 Consistent with the new ground in the Corporations Act, 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 about an act or omission in the course of engaging in credit activities, or carrying on a financial services business (within the meaning of the Corporations Act).

[Schedule #, item 30, paragraph 80(1)(fb)]

1.118 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.

1.119 Part 7.10A of the Corporations Act 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.

1.120 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, 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 the complaint leading to the order was made 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.

1.121 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.

1.122 The ground also applies to a person that is substantially or significantly involved in the management of 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 the financial services business or credit activities.

Officer of a corporation that has failed to pay its debts

1.123 Consistent with the changes to the Corporations Act, 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 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) 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 #, items 30 and 32, paragraph 80(1)(fc) and subsection 80(3)]

1.124 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 to disqualify a person from managing corporations.

1.125 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, this ensures appropriate coverage between the two Acts.

1.126 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 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. Such 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 per cent of its outstanding debts.

1.127 Reports lodged under subsection 533(1) of the Corporations Act 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 apply appropriately to corporations covered by that Act.
[Schedule #, item 32, paragraph 80(3)(b)]

Ban for persons other than individuals and for multiple trustees of a trust

1.128 The amendments introduce a further ground that authorises ASIC to make a banning order against a person that is not an individual if one or more banning orders are in force against its officers who perform functions involved in its financial services business, or ASIC is satisfied that it could make one or more banning orders against such officers.

[Schedule #, item 31, paragraph 80(1)(i)]

1.129 The amendments also introduce a further ground that authorises ASIC to make a banning order against a person who is the multiple trustees of a trust. Banning orders can be issued to such persons if one or more banning orders are in force against any of the trustees of the trust, or ASIC is satisfied that it could make one or more banning orders against such trustees. [*Schedule #, item 31, paragraph 80(1)(j)*]

1.130 The additional grounds allow ASIC to making a banning order against an entity where its officer or trustee has engaged in conduct that provides a ground for making a banning order against the officer or trustee.

1.131 This additional ground is consistent with other changes to banning orders under the Corporations Act. The ground is also consistent with changes to the licensing provisions in response to the recommendations in Chapter 5 to the ASIC Enforcement Review. Those changes require ASIC to refuse to grant a financial services licence to a person that is not an individual where any of its officers, partners or trustees (as applicable) are not a fit and proper person to perform their functions in relation to the non-individual. Those changes also require ASIC to refuse to grant a financial services licence to a person that is not an individual where any of its controllers are not a fit and proper person to control a financial services business.

Chapter 5 body corporate or insolvent under administrations

1.132 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 #, item 29, paragraph 80(1)(b)*]

1.133 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

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

1.135 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, an entity that engages in credit activities;
- performing any function involved in another person engaging in credit activities; and
- performing specified functions involved in another person engaging in credit activities.

[Schedule #, item 37, subsection 81(1)]

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

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

1.138 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 5 of the Credit Act. The term ‘officer’ takes its meaning from section 9 of the Corporations Act.

1.139 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 credit business

1.140 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.

1.141 Prohibiting a person from controlling an entity 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 an entity engages in credit activities, but that nevertheless is in a position to influence or direct the activities of such an entity.

1.142 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, which requires that there be some co-ordination or controlling arrangement between the entities.

Functions in relation to a credit business

1.143 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 an entity that engages 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 #, item 37, paragraph 81(1)(d)]*

1.144 This general prohibition mirrors the original prohibition on engaging in any credit activities. Given the broad nature of the prohibition, it is expected that it would be used the grounds on which banning order were made involved particularly serious or egregious actions.

1.145 ASIC is also authorised to prohibit a person from performing specified functions involved in the engaging in of credit activities. *[Schedule #, item 37, paragraph 81(1)(e)]*

1.146 This prohibition mirrors the original prohibition on specified credit activities. The prohibition allows ASIC to take a targeted and flexible approach from undertaking specified activities, for example as a senior manager or financial officer, which still permitting them to undertake other activities.

1.147 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 of credit activities, or of particular credit activities;
- managing conflicts of interest;
- ensuring compliance with credit service laws or a particular credit services law (including setting compliance standards, supervising compliance with those standards, reporting non-compliance and imposing sanctions);
- allocating and maintain 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;
- design of financial products; or
- distribution, marketing or promotion of financial products.

Periods to which a banning order can apply

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

1.149 Consistent with the previous provision, ASIC is generally authorised to impose a banning order either permanently, or for a specified period. [*Schedule #, item 27, paragraph 81(2)(b)*]

1.150 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 #, item 27, paragraph 81(2)(a)*]

1.151 This limit is consistent with the one that applies to banning orders under the Corporations Act and to disqualifying of a person from managing corporations in section 206F of the Corporations Act. 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.

1.152 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

1.153 The amendments in Schedule # 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.

1.154 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

1.155 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.

1.156 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.

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

1.158 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.

[Schedule #, item 39, paragraph 86(2)(a)]

1.159 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

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

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

1.162 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 #, items 23 and 28, section 5 (definition of ‘banning order’) and subsection 80(1)]*

1.163 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 #, items 36 and 37, section 81 (heading) and subsection 81(1)]*

1.164 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 #, items 24 and 25, sections 5 (definition of ‘control’) and 16A (definition of ‘control’)]*

1.165 The amendments also make a number of editorial changes to the provisions related to banning orders in Part 2-2 of the Credit Act. These amendments make minor wording changes and insert subheadings into various provisions to improve their readability. *[Schedule #, items 27, 33 to 35 and 38, subsection 80(1), paragraphs 80(5)(a) and (6)(a), subsection 80(7), and subsection 86(1)]*

Updated meaning of ‘control’

1.166 The amendments update the existing definition of ‘control’ contained in section 910B of the Corporations 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.

1.167 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.

1.168 The previous definition of control in the Corporations Act 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 #, items 5 and 25, subsection 910B(1) of the Corporations Act and subsection 16A(1) of the Credit Act]*

1.169 The amendments do not otherwise modify the way that the original definition of control in the Corporations Act 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 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.

1.170 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 (which already applies for the purposes of the definition in the Corporations Act). *[Schedule #, item 25 subsection 16A(3) of the Credit Act]*

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

1.172 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 #, items 5 and 25, subsection 910B(2) of the Corporations Act and subsection 16A(2) of the Credit Act]

1.173 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 #, item 5 and 25, paragraph 910B(2)(b) of the Corporations Act and paragraph 16A(2)(b) of the Credit Act]

1.174 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

1.175 The amendments in Part 1 and Part 2 of Schedule # 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 #, items 22 and 40]*

1.176 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.

1.177 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 #, items 22 and 40]*

1.178 Disapplying the provisions in the Corporations Act 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.

1.179 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 #, items 22 and 40]*

1.180 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.