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FINANCIAL REGULATOR REFORM (NO. 1) BILL 2019: (LICENSING)  
FINANCIAL REGULATOR REFORM (NO. 1) BILL 2019: (PENALTIES)

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EXPOSURE DRAFT EXPLANATORY MATERIALS



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# **Glossary**

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

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
AFS	Australian financial services
credit licence	Australian credit licence
ASIC	Australian Securities and 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>
Taskforce	ASIC Enforcement Review Taskforce



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# Chapter 1

## Licensing & Penalties

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### Outline of chapter

1.1 Schedule 1 to the Financial Regulator Reform (No. 1) Bill 2019: (Licensing) and Schedule 1 to the Financial Regulator Reform (No. 1) Bill 2019: (Penalties) amend the Corporations Act and Credit Act to strengthen ASIC's licensing powers and the offences for false and misleading documents, in response to a number of recommendations from the ASIC Enforcement Review.

1.2 The amendments implement the recommendations in Chapter 5 of the *ASIC Enforcement Review Taskforce Report*<sup>1</sup> (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 a recommendation 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
- 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 enhance 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;

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

- 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 AFS licence holder's or credit licensee's systems and conduct.

## **Strengthening ASIC's licensing regime**

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

1.9 ASIC is also responsible for granting a credit licence under Part 2-2 of the *National Consumer Credit Protection Act 2009*.

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

1.11 In particular, the Financial System Inquiry identified limitations in ASIC's ability to:

- assess the suitability of entities that control an AFS or 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.

1.12 In response to the identified issues, the Taskforce made the following recommendations in Chapter 5 of its report:

- align the assessment requirements for Australian Financial Services and credit licence applications;
- 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;
- licensees will be penalised if they fail to notify ASIC of an actual change of their controllers within 30 business days;
- align the consequences for making a false and misleading statement provided to ASIC in AFS and credit contexts;
- ASIC may refuse to grant a licence if the applicant makes a materially false and misleading statement in an application; and
- ASIC will be given the power to cancel a licence if the licensee fails to commence financial services activities within six months.

1.13 On 16 April 2018, the Government agreed to all of the above recommendations.

1.14 The Bills implement the recommendations from Chapter 5 of the Taskforce's report to strengthen ASIC's powers to enforce the licensing regimes and ensure integrity on licence applications and the ongoing obligations of licensees.

## **Summary of new law**

1.15 The amendments update the requirements for obtaining an 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 also make a number of changes to the AFS licence and 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.

1.16 The amendments make a number of other improvements to the AFS licence and 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). The amendments also align the consequences for making false or misleading statements in documents provided to ASIC in AFS licence and credit licence contexts.

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

<i>New law</i>	<i>Current law</i>
<b><i>Licence application</i></b>	
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.	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.
No equivalent	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.
To grant a 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.	To grant a 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.
ASIC may request information from an applicant in relation to an application for an AFS licence or a credit licence. The application is deemed to be withdrawn if the applicant does not provide the information.	ASIC may request information from an applicant in relation to an application for a credit licence. The application is deemed to be withdrawn if the applicant does not provide the information.

<p>An applicant for an AFS licence or a credit licence must confirm with ASIC that there have been no material changes to the information provided in relation to their application, or inform ASIC of any material changes of the information.</p>	<p>No equivalent.</p>
<p>ASIC may refuse to grant an AFS licence or credit licence, or may cancel such a licence, if the application for the licence was false in a material particular or materially misleading.</p>	<p>ASIC may cancel an AFS licence or credit licence if the application for the licence was false in a material particular or materially misleading.</p>
<p><b><i>Licence requirements and obligations</i></b></p>	
<p>ASIC may suspend or cancel an AFS licence if the licensee does not provide a financial service within 6 months of the licence being granted, or if the licensee ceases to carry on a financial service business.</p>	<p>ASIC may suspend or cancel an AFS licence if the licensee ceases to carry on a financial service business.</p>
<p>An AFS licensee or credit licensee who requests a variation of their licence must satisfy the fit and proper person test in order for ASIC to grant a varied licence.</p>	<p>No equivalent.</p>
<p>ASIC may vary or revoke an AFS licence or credit licence if it is no longer satisfied that the licensee, its officers, or controllers no longer satisfy the ‘fit and proper person’ requirement.</p>	<p>ASIC may vary or revoke an AFS licence or credit licence if it is no longer satisfied that the licensee, or certain officers, no longer satisfy the respective ‘good fame or character’ or ‘fit and proper person’ requirements.</p>
<p>An AFS licensee or credit licensee must notify ASIC of a change of control within 30 days of the change. A failure to notify ASIC of a change in control is an offence of strict liability.</p>	<p>An AFS licensee or credit licensee must notify ASIC of a change of control within 10 business days of become aware of the change.</p>
<p><b><i>False and misleading documents</i></b></p>	
<p>Broadly equivalent offences for false and misleading documents apply under the Corporations Act 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.</p> <p>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.</p> <p>A person commits an offence of strict liability if the person did not take reasonable steps to ensure that the document was not materially</p>	<p>Offences for false and misleading documents apply under the Corporations Act to persons who make statements in documents, omit a matter or thing from the document, or authorise such statements or omissions.</p> <p>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.</p> <p>The Corporations Act does not contain equivalent civil penalty provisions.</p>

<p>false or misleading because of the statement or omission.</p> <p>Equivalent civil penalty provisions apply to both types of offences.</p>	<p>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.</p> <p>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.</p> <p>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.</p> <p>Equivalent civil penalty provisions apply to both types of both offences.</p>
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## Detailed explanation of new law

### Licence application

1.17 This section of the explanatory memorandum relates to the amendments described in the Financial Regulator Reform (No. 1) Bill 2019: (Licensing).

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

1.18 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’.

1.19 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.

1.20 The 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.

1.21 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

1.22 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 1, item 4, subsection 913B(1)(c) and paragraph 913BA(1)(a) of the Corporations Act]*

##### Body corporate applicant

1.23 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 1, item 4, paragraph 913B(1)(c) and paragraph 913BA(1)(a) of the Corporations Act]*

1.24 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 1, items 4 and 7, paragraph 913B(1)(c) and paragraph 913BA(1)(b) of the Corporations Act]*

1.25 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 is broader than the concept of ‘responsible officer’. *[Schedule 1, item 1, section 9 of the Corporations Act, definition of ‘responsible officer’]*

1.26 An ‘officer’ is defined in section 9 of the Corporations Act. 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.

1.27 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 propriety 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

1.28 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 1, items 4 and 7, paragraph 913B(1)(c) and subparagraph 913BA(1)(c)(i) of the Corporations Act]*

1.29 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 1, items 4 and 7, paragraph 913B(1)(c) and subparagraph 913BA(1)(c)(ii) of the Corporations Act]*

1.30 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.

1.31 The fit and proper test, as it applies to a partnership and a trust, 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)).

1.32 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*

1.33 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)).

1.34 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 1, items 4 and 7, paragraph 913B(1)(e) and section 913BA of the Corporations Act]*

***Credit licensing***

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

**Individual applicant**

1.36 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 1, items 33 and 40, paragraph 37(1)(c) and paragraph 37A(1)(a) of the Credit Act]*

**Body corporate applicant**

1.37 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 1, items 33 and 40, paragraph 37(1)(c) and paragraph 37A(1)(b) of the Credit Act]*

1.38 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 1, items 33 and 40, paragraph 37(1)(c) and paragraph 37A(1)(b) of the Credit Act]*

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

**Partnership or trust applicant**

1.40 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 1, items 33 and 40, paragraph 37(1)(c) and subparagraph 37A(1)(c)(i) of the Credit Act]*

1.41 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 1, items 33 and 40, paragraph 37(1)(c) and subparagraph 37A(1)(c)(ii)]*

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

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

1.43 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.

1.44 Under current practices, ASIC requires new applicants to identify its controller/s on an AFS or 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.

1.45 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’*

1.46 **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 the amendments in both the banning and licensing regimes, and is explained in the explanatory memorandum for the amendments to the banning regime.

*AFS licensing*

1.47 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 1, item 7, paragraph 913BA(1)(d) of the Corporations Act*]

1.48 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 1, item 7, paragraph 913BA(1)(e) of the Corporations Act*]

**Example 1.1**

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. 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.

1.49 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 1, item 7, paragraph 913BA(1)(f) of the Corporations Act]*

1.50 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 1, item 7, paragraph 913BA(2) of the Corporations Act]*

*Credit licensing*

1.51 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 1, items 33 and 40, paragraph 37(1)(c) and paragraph 37A(1)(d) of the Credit Act]*

1.52 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 1, item 40, paragraph 37A(1)(e) of the Credit Act]*

1.53 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 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 1, item 40, paragraph 37A(1)(f) of the Credit Act]*

1.54 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 1, item #, paragraph 37A(2) of the Credit Act]*

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

1.55 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 Taskforce and align the two licensing regimes. The fit and proper tests are also consistent with the fit and proper tests for the banning order regimes in the Corporations Act and Credit Act, which are updated by the amendments described in Chapter 2.

1.56 The amendments align the fit and proper test factors across both the AFS and credit licensing regimes and are set out below.

1.57 ASIC must consider the following matters for the purposes of applying the fit and proper test, in each of the AFS and credit licensing regimes:

- whether the person has had a AFS or credit licence suspended or cancelled;
- whether a banning or disqualification order has been made by a court under Subdivision B of Division 8 Corporations Act or Part 2-4 of the Credit Act;
- if the person is an individual, whether the individual has been disqualified from managing corporations under Part 2D.6 of the Corporations Act;
- whether there has been a ban from engaging in any credit activity under a State or Territory law;
- whether the person has ever been linked to a refusal or failure to give effect to a determination made by AFCA;
- whether the person has ever been insolvent (see paragraph below for further details);

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

*[Schedule 1, items 7 and 40, section 913BB of the Corporations Act, section 37B of the Credit Act]*

1.58 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 for banning orders. Those amendments ensure that being linked to a refusal or failure to give effect to a determination is a ground on which a banning order may be made. Including this concept in the grounds for determining whether a person is a fit and proper person to hold a licence under the AFS and credit regimes ensures consistency between the respective banning and licensing regimes. The concept is explained in further detail in Chapter 2.

*Meaning of ‘insolvent’*

1.59 The test for insolvency depends of the type of person the fit and proper test is being applied to, as follows:

- if the person is an individual, whether the person has even been an insolvent under administration;
- if the person is a body corporate, whether the body corporate has even been a Chapter 5 body corporate;
- if the person is a partnership – whether a creditor’s petition or a debtor’s petition has ever been presented against the partnership under Division 2 or 3 of Part IV of the *Bankruptcy Act 1966*;
- if the person is the multiple trustees of a trust:
  - for the AFS licensing regime – whether an individual trustee has ever been an insolvent under administration or a body corporate trustee has ever been a Chapter 5 body corporate; and
  - for the credit licensing regime – whether a trustee of the trust has even been insolvent.

*[Schedule 1, items 7 and 40, paragraphs 913BB(e) to (g) of the Corporations Act, paragraphs 37B(e) to (g) of the Credit Act]*

1.60 The differences between the test for multiple trustees of a trust between the AFS licensing regime and the credit licensing regime reflect the way the respective Acts deal with insolvency of trustees.

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

1.61 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).

1.62 If an applicant for a 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).

1.63 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.

1.64 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 1, items 5 and 39, paragraphs 913B(3)(a) and (b) of the Corporations Act and subsection 37(5) of the Credit Act]*

1.65 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*.

1.66 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 of extend the time specified in the request. *[Schedule 1, items 5 and 39, subsection 913B(4A) of the Corporations Act and subsection 37(6) of the Credit Act]*

1.67 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 1, items 5 and 51, subsection 913B(4) of the Corporations Act and paragraph 106(b) of the Credit Act]*

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

1.68 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.

1.69 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 1, items 5 and 38, subsection 913B(3)(c) of the Corporations Act and subsection 37(4)(c) of the Credit Act]*

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

1.70 ASIC is currently able to cancel an AFS or 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 and paragraph 55(1)(d) of the Credit Act).

1.71 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.

1.72 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 1, items 5 and 34, subsection 913B(2) of the Corporations Act 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)***

1.73 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.

1.74 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.

1.75 The 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 credit licence.

1.76 The Taskforce also found there was a lack of certainty as to when a licensee should have commenced business after being granted a licence.

1.77 The amendments implement the 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.

1.78 The amendments also clarify ASIC's power to suspend or cancel a 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.

1.79 The amendments to both regimes are detailed below.

#### *AFS licence*

##### Individual licensee

1.80 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 1, item 12, subsection 915B(1A) of the Corporations Act*]

##### Partnership licensee

1.81 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 1, item 14, subsection 915B(2A)*]

##### Body corporate licensee

1.82 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 1, item 22, subsection 915B(3A)*]

##### Trustees of a trust licensee

1.83 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 1, item 27, subsection 915B(4A)*]

#### *Credit licence*

1.84 The amendments clarify that ASIC may cancel a credit licence if the licensee does not engage in credit activities authorised by the licence within six months after the licence is granted. [*Schedule 1, item 47, subsection 54(1A) of the Credit Act*]

*'Provide a financial service covered by the licence' and 'engage in credit activities authorised by the licence'*

1.85 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.

1.86 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 Taskforce.

1.87 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.

1.88 The 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.

***Fit and proper test – applies to a licence variation request (AFS and credit licensing)***

1.89 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 and paragraph 45(2)(b) of the Credit Act).

1.90 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.

1.91 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 not 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 1, items 8, 9, 41 and 42, subsection 914A(1) and section 914B of the Corporations Act and subsection 45(1) and section 46A of the Credit Act]*

***Fit and proper test – suspension or cancellation of licence where ASIC no longer satisfied of the fit and proper test (AFS and credit licensing)***

1.92 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), 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).

1.93 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 1, items 13, paragraph 915C(1)(b) of the Corporations Act and item 26 and paragraph 55(1)(b) of the Credit Act]*

1.94 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 1, items 2 and 43, paragraph 912C(1)(c) of the Corporations Act and subsection 49(1) of the Credit Act]*

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

1.95 Currently, a condition of an AFS or 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, 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.

1.96 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 1, items 3 and 44, section 912DA of the Corporations Act and section 53A of the Credit Act*]

1.97 The amendments provide certainty as to when the notification time frame commences, that is, it commences when the change of control takes effect.

1.98 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 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.

1.99 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)***

1.100 This section of the explanatory memorandum relates to the amendments described in the Financial Regulator Reform (No. 1) Bill 2019: (Penalties).

1.101 Currently, the AFS and 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.

1.102 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 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;

1.103 Section 1308 of the Corporations Act 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 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.

1.104 The Taskforce recommended a number of changes to align the consequences for making false or misleading statements in documents provided to ASIC in the AFS and credit licensing contexts. These recommendations included removing the specific provision in the Corporations Act 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.

1.105 The amendments give effect to these recommendations. These changes strengthen the provisions relating to false and misleading conduct under the Corporations Act 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.

1.106 The amendments rewrite the existing provisions about false or misleading statements in section 1308 of the Corporations Act and false and misleading documents in section 225 of the Credit Act. In contrast to the original provisions the re-written provisions are closely aligned, with some differences to account for the different structures of their respective Acts.

1.107 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. These changes are consistent with the Taskforce's recommendations about increasing the applicable criminal penalties and introducing civil penalty provisions under the Corporations Act to ensure consistency with the Credit Act.

### ***Corporations Act amendments***

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

1.109 The amendments relocate the previous strict liability offence about publishing false or misleading statements about share capital to a separate section. [*Schedule 1, item 3, section 1308B of the Corporations Act*]

1.110 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.

1.111 The penalty for committing this offence continues to be 20 penalty units. [*Schedule 1, item 5, Schedule 3 (table items item dealing with subsection 1308B(1) of the Corporations Act*)]

1.112 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.

1.113 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 Taskforce's recommendation.

### ***Re-written fault-based offence***

1.114 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, 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 1, item 3, subsection 1308(1) of the Corporations Act]*

1.115 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.

1.116 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.

1.117 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. *[Schedule 1, item 3, subsection 1308(2) of the Corporations Act]*

1.118 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.

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

1.120 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 Taskforce's recommendation about aligning penalties under the two regimes.

1.121 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*

1.122 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 Taskforce's recommendation for aligning the respective regimes.

1.123 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, 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 1, item 3, subsection 1308(3) of the Corporations Act]*

1.124 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.

1.125 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.

1.126 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.

1.127 The amendments do not replicate the offence-specific defences that were previously contained in subsections 1308(10) to (13). 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. These 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, and reduces the incentive for persons to comply with the letter, rather than the spirit, of the law. The removal of these defences also ensures greater consistency between the provisions of the Corporations Act and the equivalent provisions of the Credit Act, which do not contain equivalent defences.

1.128 The penalty for committing this offence is 20 penalty units. [*Schedule 1, item 5, Schedule 3 (table items item dealing with subsection 1308(3) of the Corporations Act)*]

1.129 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 Taskforce's recommendation about aligning penalties under the two regimes.

1.130 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*

1.131 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 1, item 3, subsections 1308(4) and (5) of the Corporations Act*]

1.132 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 1, item 4, subsections 1317E(3) table item for subsection 1308(4) and (5) of the Corporations Act*]

1.133 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 of the Corporations Act. 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*

1.134 The amendments describe the circumstances in which a document is materially false or misleading for the purposes of the re-written 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.

1.135 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.

1.136 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*

1.137 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.

1.138 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 or thing from a document.

1.139 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 1, item 3, subsection 1308(7) of the Corporations Act]*

1.140 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.

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

1.142 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 1, item 3, subsection 1308(8) of the Corporations Act]*

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

1.144 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 do 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).

1.145 Notices to which these rules apply are taken to be notices that are required for the purposes of the Act. *[Schedule 1, item 3, paragraph 1308(9)(a) of the Corporations Act]*

1.146 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), 1012DAA(7)(e) and 1012DA(6)(f), respectively. *[Schedule 1, item 3, paragraph 1308(9)(b) of the Corporations Act]*

1.147 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***

1.148 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, with some departures to reflect the differences in scope and architecture of the two Acts.

#### ***Re-written fault-based offence***

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

1.150 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, 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 1, item 6, subsection 225(1) of the Credit Act]*

1.151 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.

1.152 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.

1.153 As with the previous offence, the penalty for committing this offence is 5 years imprisonment. *[Schedule 1, item 6, subsection 225(1) of the Credit Act]*

1.154 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***

1.155 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.

- 1.156 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 1, item 6, subsection 225(2) of the Credit Act]*

1.157 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.

1.158 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.

1.159 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.

1.160 The penalty for committing this offence is 20 penalty units. *[Schedule 1, item 6, subsection 225(2) of the Credit Act]*

1.161 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*

1.162 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 1, item 6, subsections 225(3) and (4) of the Credit Act]*

1.163 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*

1.164 The amendments describe the circumstances in which a document is materially false or misleading for the purposes of the re-written 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.

1.165 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.

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

#### *Authorisations*

1.167 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.

1.168 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 1, item 6, subsection 1308(6) of the Credit Act]*

1.169 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.

1.170 In contrast to the Corporations Act amendments, the amendments 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 are not relevant to the Credit Act.

## Application and transitional provisions

### *Existing AFS licensees*

1.171 The amendments apply to existing AFS licensees on and after the commencement day of the amendments. *[Schedule 1, item #, section 1665 of the Corporations Act]*

1.172 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.

1.173 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 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 requirement to start providing financial services 6 months after the licence is granted applies to existing licensees, however the 6 month period starts on commencement.

*[Schedule 1, item #, section 1665 of the Corporations Act]*

***AFS licence applications made before commencement***

1.174 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.

1.175 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***

1.176 The amendments apply to existing credit licensees on and after the commencement day of the amendments. *[Schedule 1, item #, section 2 of Schedule 9 to the Credit Act]*

1.177 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.

1.178 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 requirement to start providing financial services 6 months after the licence is granted applies to existing licensees, however the 6 month period starts on commencement.

*[Schedule 1, item #, section 2 of Schedule 9 to the Credit Act]*

***Credit licence applications made before commencement***

1.179 The amendments apply to 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.

1.180 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***

1.181 The amendments to the Corporations Act and Credit Act in respect of false and misleading documents commence from the day after the Act containing the amendments received Royal Assent.