

EXPOSURE DRAFT

EXPOSURE DRAFT

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Inserts for
**Financial Sector Reform (Hayne Royal
Commission Response—Stronger
Regulators (2020 Measures)) Bill 2020:
FSRC rec 7.2 (ASIC directions)**

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Schedule 1	The day after this Act receives the Royal Assent.	

EXPOSURE DRAFT

Schedule 1—ASIC directions

Part 1—Main amendments to Corporations Act

Corporations Act 2001

1 After Division 6 of Part 7.6

Insert:

Division 7—ASIC directions to financial services licensees

Subdivision A—Directions to financial services licensees

918 ASIC may give direction to financial services licensee

- (1) ASIC may make a direction under subsection (3) if any of the following conditions are met:
 - (a) ASIC has reason to suspect that a financial services licensee has engaged, or is engaging, in conduct that constitutes a contravention of a financial services law;
 - (b) ASIC has reason to suspect that a financial services licensee will engage in conduct that would constitute a contravention of a financial services law.
- (2) If the conditions in either or both of paragraphs (1)(a) and (b) are met in respect of 2 or more contraventions, the direction may relate to any or all of those contraventions.
- (3) ASIC may direct the licensee in writing to engage in conduct specified in the direction in order to:
 - (a) if paragraph (1)(a) applies—address the contravention; and
 - (b) if paragraph (1)(b) applies—prevent the contravention; and
 - (c) in any case—prevent a similar or related contravention.
- (4) Without limiting the scope of subsection (3), the direction may direct the licensee to engage in specified conduct:
 - (a) during a specified period; or
 - (b) by or until a specified time; or
 - (c) until a specified condition is met.

EXPOSURE DRAFT

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- 1 (5) Without limiting the scope of subsections (3) and (4), the conduct
2 to be engaged in as specified in the direction may include any of
3 the following:
- 4 (a) to not authorise persons as authorised representatives of the
5 licensee;
 - 6 (b) to not accept new clients;
 - 7 (c) to not transfer a specified asset to another person;
 - 8 (d) to conduct a review or audit of the activities or records of an
9 authorised representative of the licensee;
 - 10 (e) to appoint, engage or deploy any of the following to carry out
11 specified tasks:
 - 12 (i) a specified person;
 - 13 (ii) a person in a specified class of persons;
 - 14 (iii) a person who is nominated in writing by the licensee
15 and approved by ASIC under subsection 918E(2);
 - 16 (iv) a person in a specified class of persons, who is
17 nominated in writing by the licensee and approved by
18 ASIC under subsection 918E(2);
 - 19 (f) if paragraph (1)(a) applies:
 - 20 (i) to assess the extent of the contravention; and
 - 21 (ii) to identify persons who have suffered loss or damage as
22 a result of the contravention; and
 - 23 (iii) to establish and implement a specified program to
24 compensate those persons;
 - 25 (g) to take specified steps that are ancillary to conduct mentioned
26 in the previous paragraphs of this subsection;
 - 27 (h) any other conduct of a kind specified in the regulations.
- 28 (6) Without limiting the scope of subparagraph (5)(f)(iii), the
29 specification of the program mentioned in that subparagraph:
- 30 (a) may set out features of the program at a broad or detailed
31 level; and
 - 32 (b) may set out any of the following features:
 - 33 (i) assessing the extent of the loss or damage suffered by
34 persons as a result of the contravention;
 - 35 (ii) notifying those persons of aspects of the program;
 - 36 (iii) providing compensation to those persons without the
37 need for them to take any action (such as making
38 claims);
 - 39 (iv) any other feature that ASIC considers appropriate.
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EXPOSURE DRAFT

1 (7) Despite section 46AA of the *Acts Interpretation Act 1901*, a
2 direction under subsection (3) may provide for a matter by
3 applying, adopting or incorporating, with or without modification,
4 any matter contained in an instrument or other writing as in force
5 or existing from time to time.

6 (8) A direction under subsection (3) is not a legislative instrument.

7 **918A Publication of direction**

8 ASIC must publish a copy of a direction under subsection 918(3)
9 on its website as soon as practicable after making it.

10 **918B When direction takes effect**

11 A direction under subsection 918(3) takes effect when it is given to
12 the financial services licensee in respect of which it was made.

13 **918C Opportunity for hearings, and consultation with APRA**

14 (1) ASIC must not make a direction under subsection 918(3) in respect
15 of a financial services licensee unless ASIC has given the licensee
16 an opportunity:

17 (a) to appear, or be represented, at a hearing before ASIC that
18 takes place in private; and

19 (b) to make submissions to ASIC on the matter.

20 (2) If a proposed direction under subsection 918(3) will be in respect
21 of a financial services licensee that is a body regulated by APRA,
22 ASIC must not make the direction unless ASIC has consulted
23 APRA.

24 (3) A failure to comply with subsection (2) does not invalidate a
25 direction.

26 **918D Varying and repealing directions**

27 (1) ASIC may, by notice in writing to the financial services licensee in
28 respect of which a direction under subsection 918(3) was made,
29 vary the direction if, at the time of the variation, ASIC considers
30 that the variation is necessary and appropriate.

31 (2) Section 918C (opportunity for hearings, and consultation with
32 APRA) applies to a variation under this section in the same way as
33 it applies to the making of a direction under subsection 918(3).

EXPOSURE DRAFT

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- 1 (3) ASIC may, by notice in writing to the financial services licensee in
2 respect of which a direction under subsection 918(3) was made,
3 revoke the direction if, at the time of the revocation, ASIC
4 considers that the direction is no longer necessary or appropriate.
- 5 (4) ASIC must publish a copy of a variation or revocation under this
6 section on its website as soon as practicable after making it.
- 7 (5) A variation or revocation under this section of a direction takes
8 effect when it is given to the financial services licensee in respect
9 of which the direction was made.

10 **918E ASIC approvals of persons to carry out tasks**

- 11 (1) This subsection applies if:
- 12 (a) ASIC makes a direction under subsection 918(3); and
 - 13 (b) the direction requires the appointment, engagement or
14 deployment of a person in accordance with subparagraph
15 918(5)(e)(iii) or (iv); and
 - 16 (c) the financial services licensee mentioned in that
17 subparagraph nominates, in writing, a person for the purposes
18 of that requirement; and
 - 19 (d) the financial services licensee gives ASIC a copy of the
20 nomination.
- 21 (2) For the purposes of subparagraph 918(5)(e)(iii) or (iv), ASIC may,
22 in writing, decide to approve or to not approve the person
23 nominated.
- 24 (3) ASIC must give the financial services licensee a copy of the
25 decision as soon as practicable after making it.

26 **Subdivision B—Interim directions to financial services licensees**

27 **918F ASIC may give interim direction to financial services licensee**

- 28 (1) ASIC may make an interim direction under subsection (3) if:
- 29 (a) any of the following conditions are met:
 - 30 (i) ASIC has reason to suspect that a financial services
31 licensee has engaged, or is engaging, in conduct that
32 constitutes a contravention of a financial services law;
 - 33 (ii) ASIC has reason to suspect that a financial services
34 licensee will engage in conduct that would constitute a
35 contravention of a financial services law; and
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EXPOSURE DRAFT

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- 1 (b) ASIC considers that a delay in making the interim direction
2 would be prejudicial to the public interest.
- 3 (2) If the conditions in either or both of subparagraphs (1)(a)(i) and (ii)
4 are met in respect of 2 or more contraventions, the interim
5 direction may relate to any or all of those contraventions.
- 6 (3) ASIC may direct the licensee in writing to engage in conduct
7 specified in the interim direction in order to:
8 (a) if subparagraph (1)(a)(i) applies—address the contravention;
9 (b) if subparagraph (1)(a)(ii) applies—prevent the contravention;
10 (c) in any case—prevent a similar or related contravention.
- 11 (4) Without limiting the scope of subsection (3), the interim direction
12 may direct the licensee to engage in specified conduct:
13 (a) during a specified period; or
14 (b) by or until a specified time; or
15 (c) until a specified condition is met.
- 16 (5) Without limiting the scope of subsections (3) and (4), the conduct
17 to be engaged in as specified in the interim direction may include
18 any of the following:
19 (a) to not authorise persons as authorised representatives of the
20 licensee;
21 (b) to not accept new clients;
22 (c) to not transfer a specified asset to another person;
23 (d) to take specified steps that are ancillary to conduct mentioned
24 in the previous paragraphs of this subsection.
- 25 (6) Despite section 46AA of the *Acts Interpretation Act 1901*, an
26 interim direction under subsection (3) may provide for a matter by
27 applying, adopting or incorporating, with or without modification,
28 any matter contained in an instrument or other writing as in force
29 or existing from time to time.
- 30 (7) An interim direction under subsection (3) is not a legislative
31 instrument.

918G When direction takes effect

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33 An interim direction under subsection 918F(3) takes effect when it
34 is given to the financial services licensee in respect of which it was
35 made.

EXPOSURE DRAFT

1 918H Expiry of interim direction

- 2 (1) Subsection (2) applies if ASIC makes an interim direction under
3 subsection 918F(3) in respect of a financial services licensee
4 because a condition in subparagraph 918F(1)(a)(i) or (ii) was met
5 in relation to a contravention of a financial services law.
- 6 (2) The interim direction ceases to have effect at the earlier of the
7 following times:
8 (a) the end of the period of 21 days starting on the day on which
9 the interim direction takes effect;
10 (b) if ASIC makes a direction after that day under
11 subsection 918(3) in respect of the financial services licensee
12 because a condition in paragraph 918(1)(a) or (b) was met in
13 relation to the contravention mentioned in subsection (1)—
14 the time the direction takes effect.
- 15 (3) To avoid doubt, subsection (1) does not prevent ASIC from
16 repealing the interim direction under section 918J.

17 918J Varying and repealing interim directions

- 18 (1) ASIC may, by notice in writing to the financial services licensee in
19 respect of which an interim direction under subsection 918F(3) was
20 made, vary the interim direction if, at the time of the variation,
21 ASIC considers that the variation is necessary and appropriate.
- 22 (2) ASIC may, by notice in writing to the financial services licensee in
23 respect of which an interim direction under subsection 918F(3) was
24 made, revoke the interim direction if, at the time of the revocation,
25 ASIC considers that the interim direction is no longer necessary or
26 appropriate.
- 27 (3) A variation or revocation under this section of an interim direction
28 takes effect when it is given to the financial services licensee in
29 respect of which the interim direction was made.

30 Subdivision C—Enforcement

31 918K Civil penalty provision—licensees not to contravene directions 32 and interim directions

33 A financial services licensee that has been directed by ASIC under
34 subsection 918(3) or 918F(3) must not engage in conduct in
35 contravention of the direction.

EXPOSURE DRAFT

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

918L Compliance with conditions of Australian financial services licence

- (1) Subsection (2) applies if:
 - (a) ASIC has made a direction under subsection 918(3) or an interim direction under subsection 918F(3) in respect of a financial services licensee; and
 - (b) the licensee engages in conduct that is necessary to comply with the direction.
- (2) The licensee does not fail to comply with the conditions on its Australian financial services licence merely because it engages in that conduct.

EXPOSURE DRAFT

1 **Part 2—Main amendments to National Consumer**
2 **Credit Protection Act**

3 *National Consumer Credit Protection Act 2009*

4 **2 After Part 2-3**

5 Insert:

6 **Part 2-3A—ASIC directions to licensees**

7 **Division 1—Introduction**

8 **78A Guide to this Part**

9 This Part is about ASIC’s power to give licensees directions or
10 interim directions in relation to suspected contraventions or future
11 contraventions of the credit legislation.

12 Division 2 deals with directions. ASIC must not make a direction
13 in respect of a licensee unless ASIC has given the licensee an
14 opportunity for a hearing and to make submissions.

15 Division 3 deals with interim directions. An interim direction
16 ceases to have effect no later than 21 days after it is made.

17 Division 4 deals with enforcement of directions. A licensee that
18 has been given a direction must not engage in conduct in
19 contravention of the direction.

20 **Division 2—Directions to licensees**

21 **78B ASIC may give direction to licensee**

- 22 (1) ASIC may make a direction under subsection (3) if any of the
23 following conditions are met:
- 24 (a) ASIC has reason to suspect that a licensee has engaged, or is
25 engaging, in conduct that constitutes a contravention of the
26 credit legislation;

EXPOSURE DRAFT

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- 1 (b) ASIC has reason to suspect that a licensee will engage in
2 conduct that would constitute a contravention of the credit
3 legislation.
- 4 (2) If the conditions in either or both of paragraphs (1)(a) and (b) are
5 met in respect of 2 or more contraventions, the direction may relate
6 to any or all of those contraventions.
- 7 (3) ASIC may direct the licensee in writing to engage in conduct
8 specified in the direction in order to:
9 (a) if paragraph (1)(a) applies—address the contravention; and
10 (b) if paragraph (1)(b) applies—prevent the contravention; and
11 (c) in any case—prevent a similar or related contravention.
- 12 (4) Without limiting the scope of subsection (3), the direction may
13 direct the licensee to engage in specified conduct:
14 (a) during a specified period; or
15 (b) by or until a specified time; or
16 (c) until a specified condition is met.
- 17 (5) Without limiting the scope of subsections (3) and (4), the conduct
18 to be engaged in as specified in the direction may include any of
19 the following:
20 (a) to not authorise persons as credit representatives of the
21 licensee;
22 (b) to not accept new clients;
23 (c) to not transfer a specified asset to another person;
24 (d) to conduct a review or audit of the activities or records of a
25 credit representative of the licensee;
26 (e) to appoint, engage or deploy any of the following to carry out
27 specified tasks:
28 (i) a specified person;
29 (ii) a person in a specified class of persons;
30 (iii) a person who is nominated in writing by the licensee
31 and approved by ASIC under subsection 78G(2);
32 (iv) a person in a specified class of persons, who is
33 nominated in writing by the licensee and approved by
34 ASIC under subsection 78G(2);
35 (f) if paragraph (1)(a) applies:
36 (i) to assess the extent of the contravention; and
37 (ii) to identify persons who have suffered loss or damage as
38 a result of the contravention; and
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EXPOSURE DRAFT

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- 1 (iii) to establish and implement a specified program to
2 compensate those persons;
- 3 (g) to take specified steps that are ancillary to conduct mentioned
4 in the previous paragraphs of this subsection;
- 5 (h) any other conduct of a kind specified in the regulations.
- 6 (6) Without limiting the scope of subparagraph (5)(f)(iii), the
7 specification of the program mentioned in that subparagraph:
- 8 (a) may set out features of the program at a broad or detailed
9 level; and
- 10 (b) may set out any of the following features:
- 11 (i) assessing the extent of the loss or damage suffered by
12 persons as a result of the contravention;
- 13 (ii) notifying those persons of aspects of the program;
- 14 (iii) providing compensation to those persons without the
15 need for them to take any action (such as making
16 claims);
- 17 (iv) any other feature that ASIC considers appropriate.
- 18 (7) Despite section 46AA of the *Acts Interpretation Act 1901*, a
19 direction under subsection (3) may provide for a matter by
20 applying, adopting or incorporating, with or without modification,
21 any matter contained in an instrument or other writing as in force
22 or existing from time to time.
- 23 (8) A direction under subsection (3) is not a legislative instrument.

24 **78C Publication of direction**

25 ASIC must publish a copy of a direction under subsection 78B(3)
26 on its website as soon as practicable after making it.

27 **78D When direction takes effect**

28 A direction under subsection 78B(3) takes effect when it is given
29 to the licensee in respect of which it was made.

30 **78E Opportunity for hearings, and consultation with APRA**

31 (1) ASIC must not make a direction under subsection 78B(3) in
32 respect of a licensee unless ASIC has given the licensee an
33 opportunity:

EXPOSURE DRAFT

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- 1 (a) to appear, or be represented, at a hearing before ASIC that
2 takes place in private; and
3 (b) to make submissions to ASIC on the matter.
- 4 (2) If a proposed direction under subsection 78B(3) will be in respect
5 of a licensee that is a body regulated by APRA, ASIC must not
6 make the direction unless ASIC has consulted APRA.
- 7 (3) A failure to comply with subsection (2) does not invalidate a
8 direction.

9 **78F Varying and repealing directions**

- 10 (1) ASIC may, by notice in writing to the licensee in respect of which
11 a direction under subsection 78B(3) was made, vary the direction
12 if, at the time of the variation, ASIC considers that the variation is
13 necessary and appropriate.
- 14 (2) Section 78E (opportunity for hearings, and consultation with
15 APRA) applies to a variation under this section in the same way as
16 it applies to the making of a direction under subsection 78B(3).
- 17 (3) ASIC may, by notice in writing to the licensee in respect of which
18 a direction under subsection 78B(3) was made, revoke the direction
19 if, at the time of the revocation, ASIC considers that the direction
20 is no longer necessary or appropriate.
- 21 (4) ASIC must publish a copy of a variation or revocation under this
22 section on its website as soon as practicable after making it.
- 23 (5) A variation or revocation under this section of a direction takes
24 effect when it is given to the licensee in respect of which the
25 direction was made.

26 **78G ASIC approvals of persons to carry out tasks**

- 27 (1) This subsection applies if:
28 (a) ASIC makes a direction under subsection 78B(3); and
29 (b) the direction requires the appointment, engagement or
30 deployment of a person in accordance with subparagraph
31 78B(5)(e)(iii) or (iv); and
32 (c) the licensee mentioned in that subparagraph nominates, in
33 writing, a person for the purposes of that requirement; and
34 (d) the licensee gives ASIC a copy of the nomination.

EXPOSURE DRAFT

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- 1 (2) For the purposes of subparagraph 78B(5)(e)(iii) or (iv), ASIC may,
2 in writing, decide to approve or to not approve the person
3 nominated.
- 4 (3) ASIC must give the licensee a copy of the decision as soon as
5 practicable after making it.

6 **Division 3—Interim directions to licensees**

7 **78H ASIC may give interim direction to licensee**

- 8 (1) ASIC may make an interim direction under subsection (3) if:
9 (a) any of the following conditions are met:
10 (i) ASIC has reason to suspect that a licensee has engaged,
11 or is engaging, in conduct that constitutes a
12 contravention of the credit legislation;
13 (ii) ASIC has reason to suspect that a licensee will engage
14 in conduct that would constitute a contravention of the
15 credit legislation; and
16 (b) ASIC considers that a delay in making the interim direction
17 would be prejudicial to the public interest.
- 18 (2) If the conditions in either or both of subparagraphs (1)(a)(i) and (ii)
19 are met in respect of 2 or more contraventions, the interim
20 direction may relate to any or all of those contraventions.
- 21 (3) ASIC may direct the licensee in writing to engage in conduct
22 specified in the interim direction in order to:
23 (a) if subparagraph (1)(a)(i) applies—address the contravention;
24 and
25 (b) if subparagraph (1)(a)(ii) applies—prevent the contravention;
26 and
27 (c) in any case—prevent a similar or related contravention.
- 28 (4) Without limiting the scope of subsection (3), the interim direction
29 may direct the licensee to engage in specified conduct:
30 (a) during a specified period; or
31 (b) by or until a specified time; or
32 (c) until a specified condition is met.
- 33 (5) Without limiting the scope of subsections (3) and (4), the conduct
34 to be engaged in as specified in the interim direction may include
35 any of the following:
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EXPOSURE DRAFT

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- 1 (a) to not authorise persons as credit representatives of the
2 licensee;
3 (b) to not accept new clients;
4 (c) to not transfer a specified asset to another person;
5 (d) to take specified steps that are ancillary to conduct mentioned
6 in the previous paragraphs of this subsection.

7 (6) Despite section 46AA of the *Acts Interpretation Act 1901*, an
8 interim direction under subsection (3) may provide for a matter by
9 applying, adopting or incorporating, with or without modification,
10 any matter contained in an instrument or other writing as in force
11 or existing from time to time.

12 (7) An interim direction under subsection (3) is not a legislative
13 instrument.

14 **78J When direction takes effect**

15 An interim direction under subsection 78H(3) takes effect when it
16 is given to the licensee in respect of which it was made.

17 **78K Expiry of interim direction**

18 (1) Subsection (2) applies if ASIC makes an interim direction under
19 subsection 78H(3) in respect of a licensee because a condition in
20 subparagraph 78H(1)(a)(i) or (ii) was met in relation to a
21 contravention of the credit legislation.

22 (2) The interim direction ceases to have effect at the earlier of the
23 following times:

24 (a) the end of the period of 21 days starting on the day on which
25 the interim direction takes effect;

26 (b) if ASIC makes a direction after that day under
27 subsection 78B(3) in respect of the licensee because a
28 condition in paragraph 78B(1)(a) or (b) was met in relation to
29 the contravention mentioned in subsection (1)—the time the
30 direction takes effect.

31 (3) To avoid doubt, subsection (1) does not prevent ASIC from
32 repealing the interim direction under section 78L.

EXPOSURE DRAFT

1 78L Varying and repealing interim directions

- 2 (1) ASIC may, by notice in writing to the licensee in respect of which
3 an interim direction under subsection 78H(3) was made, vary the
4 interim direction if, at the time of the variation, ASIC considers
5 that the variation is necessary and appropriate.
- 6 (2) ASIC may, by notice in writing to the licensee in respect of which
7 an interim direction under subsection 78H(3) was made, revoke the
8 interim direction if, at the time of the revocation, ASIC considers
9 that the interim direction is no longer necessary or appropriate.
- 10 (3) A variation or revocation under this section of an interim direction
11 takes effect when it is given to the licensee in respect of which the
12 interim direction was made.

13 Division 4—Enforcement

14 78M Civil penalty provision—licensees not to contravene directions 15 and interim directions

16 A licensee that has been directed by ASIC under subsection 78B(3)
17 or 78H(3) must not engage in conduct in contravention of the
18 direction.

19 Civil penalty: 5,000 penalty units.

20 78N Compliance with conditions of licence

- 21 (1) Subsection (2) applies if:
- 22 (a) ASIC has made a direction under subsection 78B(3) or an
23 interim direction under subsection 78H(3) in respect of a
24 licensee; and
- 25 (b) the licensee engages in conduct that is necessary to comply
26 with the direction.
- 27 (2) The licensee does not fail to comply with the conditions on its
28 licence merely because it engages in that conduct.

EXPOSURE DRAFT

1 **Part 3—Consequential amendments**

2 *Corporations Act 2001*

3 **3 In the appropriate position in subsection 1317E(3)**

4 Insert:

section 918K

financial services licensee to
comply with ASIC direction or
interim direction

financial services

EXPOSURE DRAFT

1 **Part 4—Application provisions**

2 *Corporations Act 2001*

3 **4 In the appropriate position in Chapter 10**

4 Insert:

5 **Part 10.XX—Transitional provisions relating to**
6 **Part 1 of Schedule 1 to the Financial Sector**
7 **Reform (Hayne Royal Commission**
8 **Response—Stronger Regulators (2020**
9 **Measures)) Act 2020**
10

11 **[1665] Definitions**

12 In this Part:

13 *amending Part* means Part 1 of Schedule 1 to the *Financial Sector*
14 *Reform (Hayne Royal Commission Response—Stronger Regulators*
15 *(2020 Measures)) Act 2020*.

16 *commencement day* means the day the amending Part commences.

17 **[1666] Application**

- 18 (1) A direction under subsection 918(3) (as inserted by the amending
19 Part) may be made on or after the commencement day, regardless
20 of whether the relevant condition mentioned in paragraph 918(1)(a)
21 or (b) (as inserted by the amending Part) for making the direction
22 was met before, on or after the commencement day.
- 23 (2) An interim direction under subsection 918F(3) (as inserted by the
24 amending Part) may be made on or after the commencement day,
25 regardless of whether the relevant condition mentioned in
26 subparagraph 918F(1)(a)(i) or (ii) (as inserted by the amending
27 Part) for making the interim direction was met before, on or after
28 the commencement day.

EXPOSURE DRAFT

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

3 **5 In the appropriate position**

4 Insert:

5 **Schedule XX—Application provisions for**
6 **Part 2 of Schedule 1 to the Financial**
7 **Sector Reform (Hayne Royal**
8 **Commission Response—Stronger**
9 **Regulators (2020 Measures)) Act 2020**
10

11 **1 Definitions**

12 In this Schedule:

13 *amending Part* means Part 2 of Schedule 1 to the *Financial Sector*
14 *Reform (Hayne Royal Commission Response—Stronger Regulators*
15 *(2020 Measures)) Act 2020*.

16 *commencement day* means the day the amending Part commences.

17 **2 Application**

18 (1) A direction under subsection 78B(3) of the National Credit Act (as
19 inserted by the amending Part) may be made on or after the
20 commencement day, regardless of whether the relevant condition
21 mentioned in paragraph 78B(1)(a) or (b) of that Act (as inserted by the
22 amending Part) for making the direction was met before, on or after the
23 commencement day.

24 (2) An interim direction under subsection 78H(3) of the National Credit
25 Act (as inserted by the amending Part) may be made on or after the
26 commencement day, regardless of whether the relevant condition
27 mentioned in subparagraph 78H(1)(a)(i) or (ii) of that Act (as inserted
28 by the amending Part) for making the interim direction was met before,
29 on or after the commencement day.