2019‑2020‑2021

The Parliament of the

Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

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| **EXPOSURE DRAFT** |

Financial Accountability Regime Bill 2021

No. , 2021

(Treasury)

A Bill for an Act to provide for strengthened accountability obligations for certain financial entities, and for related purposes

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A Bill for an Act to provide for strengthened accountability obligations for certain financial entities, and for related purposes

The Parliament of Australia enacts:

Chapter 1—Introduction

Part 1—Preliminary provisions

1 Short title

This Act is the *Financial Accountability Regime Act 2021*.

2 Commencement

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

| Commencement information | | |
| --- | --- | --- |
| Column 1 | Column 2 | Column 3 |
| Provisions | Commencement | Date/Details |
| 1. The whole of this Act | The day after this Act receives the Royal Assent |  |

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Objects of this Act

The objects of this Act are:

(a) to provide for accountability obligations for certain financial entities; and

(b) to provide for accountability obligations for persons who hold certain positions, or have certain responsibilities, related to those financial entities.

4 Act binds the Crown

(1) This Act binds the Crown in each of its capacities.

(2) This Act does not make the Crown liable to be prosecuted for an offence.

5 Extension to external Territories

This Act extends to every external Territory.

6 Extra‑territorial application

This Act extends to acts, omissions, matters and things outside Australia.

Part 2—Interpretation

7 Definitions

In this Act:

***accountable entity***: see section 8.

***accountable person***: see sections 9 and 10.

***ADI*** has the same meaning as in the *Banking Act 1959*.

Note: ADI is short for authorised deposit‑taking institution.

***affected person***: see section 86.

***annual turnover***, of an accountable entity during a 12‑month period, has the same meaning as in section 761A of the *Corporations Act 2001*.

***APRA*** means the Australian Prudential Regulation Authority.

***APRA staff member*** has the same meaning as in the *Australian Prudential Regulation Authority Act 1998*.

***ASIC*** means the Australian Securities and Investments Commission.

***ASIC staff member*** means a staff member (within the meaning of the *Australian Securities and Investments Commission Act 2001*) of ASIC.

***Australia***, when used in a geographical sense, includes the external Territories.

***authorised NOHC***:

(a) of an ADI—means an authorised NOHC (within the meaning of the *Banking Act 1959*) of the ADI; and

(b) of a general insurer—means an authorised NOHC (within the meaning of the *Insurance Act 1973*) of the general insurer.

Note: NOHC is short for non‑operating holding company.

***benefit derived and detriment avoided*** has the same meaning as in the *Corporations Act 2001*.

***civil penalty order*** has the same meaning as in the Regulatory Powers Act.

***civil penalty provision*** has the same meaning as in the Regulatory Powers Act.

***connected entity***, in relation to an RSE licensee, means a connected entity (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of the RSE licensee.

***constitutionally covered body***: see section 12.

***constitutional corporation*** means a corporation to which paragraph 51(xx) of the Constitution applies.

***decision‑maker*** for a reviewable decision means:

(a) if APRA made the reviewable decision—APRA; or

(b) if ASIC made the reviewable decision—ASIC.

***enhanced notification threshold***: see subsection 29(3).

***financial year***, in relation to an accountable entity or significant related entity:

(a) if the accountable entity or significant related entity is a company that is registered under the *Corporations Act 2001*—has the same meaning as in that Act; or

(b) if:

(i) the accountable entity or significant related entity is not a company that is registered under the *Corporations Act 2001*; and

(ii) the accountable entity or significant related entity is incorporated or registered under another law; and

(iii) a definition of ***financial year*** applies in relation to that other law;

has the same meaning as in that other law; or

(c) in any other case—means a period of 12 months starting on 1 July.

***foreign accountable entity*** means:

(a) a foreign ADI (within the meaning of the *Banking Act 1959*); or

(b) a foreign general insurer (within the meaning of the *Insurance Act 1973*); or

(c) an eligible foreign life insurance company (within the meaning of the *Life Insurance Act 1995*) that is registered under section 21 of the *Life Insurance Act 1995.*

***general insurer*** has the same meaning as in the *Insurance Act 1973*.

***internal decision reviewer***: see subsection 89(1).

***investigator*** means a person the Regulator appoints under subsection 42(1).

***lawyer*** means a duly qualified legal practitioner and, in relation to a person, means such a practitioner acting for the person.

***life company*** means a company that is registered under section 21 of the *Life Insurance Act 1995*.

***minimum deferral period***, for variable remuneration of an accountable person, has the meaning given by subsection 26(1).

***Minister rules*** means the rules made under subsection 99(1).

***officer*** has the meaning given by section 9 of the *Corporations Act 2001*.

***private health insurer*** has the same meaning as in the *Private Health Insurance (Prudential Supervision) Act 2015*.

***reconsideration decision*** means a decision made under subsection 89(2).

***registered NOHC***, of a life company, means a registered NOHC (within the meaning of the *Life Insurance Act 1995*) of the life company.

Note: NOHC is short for non‑operating holding company.

***Regulator*** means either APRA or ASIC, but, if the context requires the reference to be particularly to one of those bodies, then Regulator means that body.

Note: However, ASIC may only exercise powers and perform functions under this Act in relation to certain persons (see subsection 33(2)).

***Regulator rules*** means the rules made under subsection 100(1).

***Regulatory Powers Act*** means the *Regulatory Powers (Standard Provisions) Act 2014*.

***related***: the question whether 2 bodies corporate are ***related*** to each other is to be determined for the purposes of this Act in the same way as for the purposes of the *Corporations Act 2001*.

***relevant group***,of an accountable entity, means the accountable entity and its significant related entities.

***remuneration***, of an accountable person, has a meaning affected by subsection 23(3).

***reviewable decision***: see section 86.

***RSE licensee*** means a constitutional corporation or a body corporate that:

(a) holds an RSE licence granted under section 29D of the *Superannuation Industry (Supervision) Act 1993*; and

(b) is not the trustee of a fund that is an exempt public sector superannuation scheme (within the meaning of that Act).

***significant related entity*** has the meaning given by section 11.

***subsidiary***: the question whether a body corporate is a ***subsidiary*** of another body corporate is to be determined for the purposes of this Act in the same way as for the purposes of the *Corporations Act 2001*.

***this Act*** includes:

(a) the Minister rules; and

(b) the Regulator rules; and

(c) the Regulatory Powers Act as it applies in relation to this Act.

***variable remuneration*** has the meaning given by section 24.

8 Meaning of *accountable entity*

ADIs and authorised NOHCs of ADIs

(1) A body corporate is an ***accountable entity*** if both of the following apply to the body corporate:

(a) it is an ADI or an authorised NOHC of an ADI;

(b) it is a constitutionally covered body.

Note: For when a body corporate is a ***constitutionally covered body***, see section 12.

(2) The ADI or authorised NOHC is an ***accountable entity*** from the start of the later of:

(a) 1 July 2022; and

(b) the day that is 6 months after the commencement of this Act.

Other bodies corporate

(3) A body corporate is an ***accountable entity*** if all of the following apply to the body corporate:

(a) it is:

(i) a general insurer; or

(ii) an authorised NOHC of a general insurer; or

(iii) a life company; or

(iv) a registered NOHC of a life company; or

(v) a private health insurer; or

(vi) an RSE licensee;

(b) it is a constitutionally covered body;

(c) it is included in a class of bodies corporate specified in an instrument made under subsection (5).

(4) The body corporate is an ***accountable entity*** from the start of the later of:

(a) the day that is 6 months after the instrument commences; and

(b) the day (if any) specified in the instrument in relation to that class of bodies corporate.

Minister may declare classes of bodies corporate

(5) The Minister may, by legislative instrument:

(a) declare one or more classes of bodies corporate for the purposes of paragraph (3)(c); and

(b) specify a day from which bodies corporate in that class are accountable entities for the purposes of paragraph (4)(b).

9 Meaning of *accountable person*

Accountable persons of accountable entities

(1) An individual is an ***accountable person*** of an accountable entity if:

(a) either of the following applies:

(i) in the case of an accountable entity other than an RSE licensee—the person holds a position in the accountable entity or in another body corporate of which the accountable entity is a subsidiary;

(ii) in the case of an accountable entity that is an RSE licensee—the person holds a position in the accountable entity or in another body corporate of which the accountable entity is a connected entity; and

(b) because of that position, the person has actual or effective senior executive responsibility:

(i) for management or control of the accountable entity; or

(ii) for management or control of a significant or substantial part or aspect of the operations of the accountable entity or the accountable entity’s relevant group.

Note 1: For the definitions of ***connected entity***, ***relevant group*** and ***subsidiary***, see section 7.

Note 2: This section is subject to section 10 (when a person is not an accountable person).

Prescribed responsibilities

(2) An individual is also an ***accountable person*** of an accountable entity if the person:

(a) holds a position in, or relating to, the accountable entity; and

(b) because of that position has a responsibility, relating to the accountable entity, of a kind specified by the Minister rules for the purposes of this paragraph*.*

(3) For the purposes of paragraph (2)(b), the Minister rules may specify a kind of responsibility by reference to:

(a) a level of responsibility; or

(b) responsibility for a matter.

Prescribed positions

(4) An individual is also an ***accountable person*** of an accountable entity if the person holds a position in, or relating to, the accountable entity that is of a kind specified by the Minister rules for the purposes of this subsection. For the purposes of this Act, the person’s responsibilities are taken to include the responsibilities associated with that position.

Accountable persons of foreign accountable entities

(5) An individual is an ***accountable person*** of an accountable entity that is a foreign accountable entity if the person:

(a) has a responsibility of a kind mentioned in subsection (1) or (2); or

(b) holds a position of a kind mentioned in subsection (4);

in relation to a branch of the accountable entity that is operating in Australia.

Accountable persons of significant related entities

(6) An individual is an ***accountable person*** of a significant related entity of an accountable entity if:

(a) the person holds a position in the significant related entity; and

(b) because of that position, the person has actual or effective senior executive responsibility:

(i) for management or control of the accountable entity; or

(ii) for management or control of a significant or substantial part or aspect of the operations of the accountable entity or the accountable entity’s relevant group.

Note: For the definitions of ***relevant group*** and ***significant related entity***, see section 7.

10 When a person is not an *accountable person*

When persons are not **accountable persons**

(1) A person is not an ***accountable person*** of an accountable entity, or of a significant related entity, if each of the person’s responsibilities that would (apart from this subsection) cause the person to be an accountable person is either:

(a) a responsibility excluded under subsection (2) in relation to that accountable entity or that significant related entity; or

(b) a responsibility excluded under subsection (3) in relation to a class of accountable entities or significant related entities that includes that accountable entity or that significant related entity.

(2) For the purpose of paragraph (1)(a), the Regulator may, by written notice given to an accountable entity or a significant related entity, exclude specified responsibilities.

(3) For the purpose of paragraph (1)(b), the Regulator rules may exclude specified responsibilities relating to:

(a) a class of accountable entities specified in the instrument; or

(b) a class of significant related entities specified in the instrument.

Relationship with other provisions

(4) This section applies despite section 9.

Notice not a legislative instrument

(5) A notice under subsection (2) is not a legislative instrument.

11 Meaning of *significant related entity*

Significant related entities of accountable entities other than RSE licensees

(1) Subject to subsection (2), a body corporate is a ***significant related entity*** of an accountable entity that is not an RSE licensee if all of the following apply to the body corporate:

(a) it is a subsidiary of the accountable entity;

(b) it, or its business or activities, has (or is likely to have) an effect on the accountable entity, or the business or activities of the accountable entity, that is material and substantial;

(c) it is a constitutionally covered body;

(d) it is not an accountable entity itself.

Note 1: For the definition of ***subsidiary***, see section 7.

Note 2: For when a body corporate is a ***constitutionally covered body***, see section 12.

(2) A body corporate is not a ***significant related entity*** of an accountable entity (the ***first accountable entity***) if:

(a) the body corporate is also a subsidiaryof another accountable entity; and

(b) that other accountable entity is a subsidiary of the first accountable entity.

Example: Company A is a subsidiary of the authorised NOHC of an ADI, and also a subsidiary of the ADI. Both the ADI and the authorised NOHC are accountable entities. Under this subsection:

(a) if the business of Company A has a material and substantial effect on both the ADI and the authorised NOHC—Company A would be a significant related entity only in relation to the ADI; but

(b) if the business of Company A did not have a material and substantial effect on the ADI—Company A would not be a significant related entity in relation to either the ADI or the authorised NOHC.

Significant related entities of accountable entities that are RSE licensees

(3) A body corporate is a ***significant related entity*** of an accountable entity that is an RSE licensee if all of the following apply to the body corporate:

(a) it is a connected entity of the accountable entity;

(b) it, or its business or activities, has (or is likely to have) an effect on the accountable entity, or the business or activities of the accountable entity, that is material and substantial;

(c) it is a constitutionally covered body;

(d) it is not an accountable entity itself.

Note: For the definition of ***connected entity***, see section 7.

Material and substantial effect

(4) For the purposes of paragraphs (1)(b) and (3)(b), in determining whether a body corporate has (or is likely to have) an effect on an accountable entity, or the business or activities of an accountable entity, that is material and substantial, the following matters may be taken into account:

(a) the nature of the body corporate’s business or activities;

(b) the scale of the body corporate’s business or activities;

(c) the nature and extent of any interdependency between the body corporate and the accountable entity;

(d) any organisational, financial or administrative arrangements between the body corporate and the accountable entity;

(e) any other relevant matter.

12 Meaning of *constitutionally covered body*

(1) A body corporate is a ***constitutionally covered body*** if any of the following apply to the body corporate:

(a) it is a constitutional corporation;

(b) it carries on the business of banking (within the meaning of paragraph 51(xiii) of the Constitution), other than State banking not extending beyond the limits of the State concerned;

(c) it carries on the business of insurance (within the meaning of paragraph 51(xiv) of the Constitution), other than State insurance not extending beyond the limits of the State concerned;

(d) it is the trustee of a superannuation fund (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) the sole or primary purpose of which is the provision of old‑age pensions (within the meaning of paragraph 51(xxiii) of the Constitution).

(2) A body corporate is also a ***constitutionally covered body*** if:

(a) the conduct of the body corporate affects (or is capable of affecting) the activities, functions, relationships or business of another body corporate; and

(b) the other body corporate is covered by subsection (1).

Chapter 2—Obligations under the Financial Accountability Regime

Part 2—Obligations of accountable entities and accountable persons

Division 1—Accountable entities

13 Obligations of accountable entities

(1) An accountable entity must comply with:

(a) its accountability obligations under Part 3; and

(b) its key personnel obligations under Part 4; and

(c) its deferred remuneration obligations under Part 5; and

(d) its notification obligations under Part 6.

Note: Failure to comply with an obligation under this Chapter is a contravention of a civil penalty provision (see section 76).

(2) Subsection (1) does not apply to:

(a) an accountable entity that:

(i) the Minister has exempted under section 14; or

(ii) is included in a class of accountable entities that the Minister has exempted under section 14; or

(b) a foreign accountable entity, except to the extent that it operates a branch of the foreign accountable entity in Australia.

(3) Subsection (1) does not apply to an accountable entity and an obligation to the extent that the accountable entity is not required to comply with the obligation because of subsection 15(2).

14 Minister may exempt accountable entities

Exemption of particular accountable entities

(1) The Minister may, by written notice given to an accountable entity, exempt the accountable entity from compliance with this Chapter.

Class exemptions

(2) The Minister may, by legislative instrument, exempt a class of accountable entities from compliance with this Chapter.

Notice not a legislative instrument

(3) A notice under subsection (1) is not a legislative instrument.

15 Inconsistency with corresponding foreign laws

(1) If the Regulator is satisfied that an accountable entity would contravene a law of a foreign country if the accountable entity were to comply with a particular obligation under section 13, the Regulator may:

(a) give a written notice specifying that obligation to the accountable entity; and

(b) specify in the notice:

(i) the extent to which the accountable entity need not comply with that obligation; and

(ii) conditions to which the notice is subject.

Note: A decision not to specify an obligation, or to specify conditions, is a reviewable decision (see Part 5 of Chapter 3).

(2) An accountable entity is not required to comply with that obligation:

(a) to the extent compliance would result in the accountable entity contravening that law of a foreign country; or

(b) if the notice specifies the extent to which the accountable entity need not comply with that obligation—to the extent so specified;

if the conditions (if any) specified in the notice are complied with.

(3) A notice under subsection (1) is not a legislative instrument.

Division 2—Accountable persons

16 Obligations of accountable persons

(1) An accountable person must comply with their accountability obligations under Part 3 in relation to each of the responsibilities that cause the person to be an accountable person of an accountable entity or a significant related entity.

(2) Subsection (1) does not apply to an accountable person to the extent that the person is an accountable person of an accountable entityto which section 13 does not apply because of subsection 13(2).

(3) Subsection (1) does not apply to an accountable person and an obligation to the extent that the accountable person is not required to comply the obligation because of subsection 17(2).

17 Inconsistency with corresponding foreign laws

(1) If the Regulator is satisfied that an accountable person of an accountable entity, or of a significant related entity, would contravene a law of a foreign country if the person were to comply with a particular obligation under section 16, the Regulator may:

(a) give a written notice specifying that obligation to the accountable person; and

(b) specify in the notice:

(i) the extent to which the accountable person need not comply with that obligation; and

(ii) conditions to which the notice is subject.

Note: A decision not to specify an obligation, or to specify conditions, is a reviewable decision (see Part 5 of Chapter 3).

(2) An accountable person is not required to comply with that obligation:

(a) to the extent that compliance would result in the accountable person contravening that law of a foreign country; or

(b) if the notice specifies the extent to which the accountable person need not comply with that obligation—to the extent so specified;

if the conditions (if any) specified in the notice are complied with.

(3) The Regulator must give a copy of the notice to the accountable entity or significant related entity.

(4) A notice under subsection (1) is not a legislative instrument.

Part 3—Accountability obligations

18 The accountability obligations of an accountable entity

The accountability obligations of an accountable entity are to take reasonable steps to:

(a) conduct its business with honesty and integrity, and with due skill, care and diligence; and

(b) deal with the Regulator in an open, constructive and cooperative way; and

(c) in conducting its business, prevent matters from arising that would (or would be likely to) adversely affect the accountable entity’s prudential standing or prudential reputation; and

(d) ensure that each of its accountable persons meets their accountability obligations under section 19; and

(e) ensure that each of its significant related entities complies with paragraphs (a), (b), (c) and (d) as if the significant related entity were an accountable entity.

Note: See also section 20 (taking reasonable steps).

19 The accountability obligations of an accountable person

(1) The accountability obligations of an accountable person of an accountable entity, or of a significant related entity of an accountable entity, are to conduct the responsibilities of their position as an accountable person:

(a) by acting with honesty and integrity, and with due skill, care and diligence; and

(b) by dealing with the Regulator in an open, constructive and cooperative way; and

(c) by taking reasonable steps in conducting those responsibilities to prevent matters from arising that would (or would be likely to) adversely affect the prudential standing or prudential reputation of the accountable entity; and

(d) by taking reasonable steps in conducting those responsibilities to ensure that the accountable entity complies with any of the following that applies in relation to the accountable entity:

(i) this Act;

(ii) the *Banking Act 1959*;

(iii) the credit legislation (within the meaning of the *National Consumer Credit Protection Act 2009*);

(iv) the *Financial Sector (Collection of Data) Act 2001*;

(v) the financial services law (within the meaning of section 761A of the *Corporations Act 2001*);

(vi) the *Insurance Act 1973*;

(vii) the *Life Insurance Act 1995*;

(viii) the *Private Health Insurance (Prudential Supervision) Act 2015*;

(ix) the *Superannuation Industry (Supervision) Act 1993*;

(x) any regulations or other instruments, directions or orders, made under a law mentioned in subparagraphs (i) to (ix).

Example:Cherie is an accountable person of an ADI and has senior executive responsibility for management of the ADI’s financial resources. Cherie must take reasonable steps to ensure that the management of those resources complies with the requirements under the laws, orders and directions mentioned in subparagraphs (d)(i) to (x) that apply in relation to financial resource management.

Note: See also section 20 (taking reasonable steps).

(2) If more than one of the accountable persons of an accountable entity, or of a significant related entity of an accountable entity, have the same responsibility mentioned in section 9 in relation to the accountable entity or significant related entity, all of those accountable persons have the accountability obligations jointly in relation to that responsibility.

Note: Under section61, the Regulator may direct an accountable entity to reallocate a responsibility of an accountable person.

20 Taking reasonable steps

Without limiting what constitutes the taking of reasonable steps in relation to a matter for the purposes of this Part, the taking of reasonable steps in relation to that matter includes:

(a) having appropriate governance, control and risk management in relation to that matter; and

(b) having safeguards against inappropriate delegations of responsibility in relation to that matter; and

(c) having appropriate procedures for identifying and remediating problems that arise or may arise in relation to that matter; and

(d) taking appropriate action to ensure compliance in relation to that matter; and

(e) taking appropriate action in response to non‑compliance, or suspected non‑compliance, in relation to that matter.

Part 4—Key personnel obligations

21 The key personnel obligations of an accountable entity

(1) The key personnel obligations of an accountable entity are:

(a) subject to subsections (2) and (3), to ensure that the responsibilities of the accountable persons of the accountable entity and its significant related entities cover:

(i) all parts or aspects of the operations of the accountable entity’s relevant group; and

(ii) each of the responsibilities to which subsection 9(2) applies; and

(b) to ensure no accountable person of the accountable entity is prohibited under section 22; and

(c) to comply with any directions the Regulator gives to the accountable entity under section 61; and

(d) to take reasonable steps to ensure that each of the accountable entity’s significant related entities complies with paragraphs (b) and (c) as if the significant related entity were an accountable entity.

Note: For the definition of ***relevant group***, see section 7.

(2) Paragraph (1)(a) does not apply in relation to a responsibility excluded by the Regulator under subsection 10(2) or (3).

(3) If the accountable entity is a foreign accountable entity, the accountable entity’s obligation under paragraph (1)(a) is taken to be an obligation to ensure that the responsibilities of the accountable entity’s accountable persons cover:

(a) all parts or aspects of the operations of each branch of the accountable entity operating in Australia; and

(b) for each of those branches, each of the responsibilities to which subsection 9(2) applies.

22 People prohibited from being an accountable person

(1) A person is prohibited from being an accountable person if the person:

(a) is not registered under the register established under section 37; or

(b) is disqualified under section 39.

(2) However, if a person becomes an accountable person of an accountable entity, or of a significant related entity of an accountable entity, by filling a temporary or unforeseen vacancy, paragraph (1)(a) does not apply to the person until the person has been an accountable person for:

(a) 90 days; or

(b) such other period as is determined under subsection (3) or prescribed by the Regulator rules.

(3) The Regulator may, by written notice given to an accountable entity or significant related entity, determine a period for the purposes of paragraph (2)(b).

(4) If a determination made under subsection (3) is inconsistent with Regulator rules made for the purposes of paragraph (2)(b), the determination prevails and the Regulator rules, to the extent of the inconsistency, do not have any effect.

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

Part 5—Deferred remuneration obligations

23 The deferred remuneration obligations of an accountable entity

(1) The deferred remuneration obligations of an accountable entity are:

(a) to ensure that, in relation to the variable remuneration of an accountable person of the accountable entity:

(i) the payment of a portion of that variable remuneration is deferred for a period; and

(ii) the amount of that portion is at least the amount required under subsection 25(1); and

(iii) that period is not shorter than the minimum deferral period (see section 26); and

(b) to have a remuneration policy in force that requires that, if the person has failed to comply with their accountability obligations under section 19, the person’s variable remuneration is to be reduced by an amount that is proportionate to the failure; and

(c) to ensure that, if the remuneration policy requires the variable remuneration to be reduced because of that failure, the amount of the reduction is not paid or transferred to the person; and

(d) to take reasonable steps to ensure that, if variable remuneration may become payable to an accountable person of a significant related entity of the accountable entity, the significant related entity complies with paragraphs (a), (b) and (c) as if the significant related entity were an accountable entity.

(2) A reduction of variable remuneration:

(a) need not be a reduction of variable remuneration relating to a period in which the failure occurred; and

(b) may be a reduction to zero.

(3) ***Remuneration***, of an accountable person, includes:

(a) in relation to an accountable person of an accountable entity—any remuneration that:

(i) is an amount paid or payable, or property transferred or transferrable, to the accountable person by a related body corporate of the accountable entity; and

(ii) relates wholly or partly to the responsibilities that cause the person to be an accountable person of the accountable entity; or

(b) in relation to an accountable person of a significant related entity—any remuneration that:

(i) is an amount paid or payable, or property transferred or transferrable, to the accountable person by a related body corporate of the significant related entity; and

(ii) relates wholly or partly to the responsibilities that cause the person to be an accountable person of the significant related entity.

Note: For when bodies corporate are ***related***, see section 7.

24 Meaning of *variable remuneration*

(1) The ***variable remuneration*** of an accountable person of an accountable entity or a significant related entity:

(a) means so much of the accountable person’s total remuneration as is:

(i) conditional on the achievement of objectives; and

(ii) not remuneration of a kind prescribed by the Regulator rules for the purposes of this subparagraph; and

(b) includes so much of the accountable person’s total remuneration as is remuneration of a kind determined under paragraph (3)(a) or prescribed by the Regulator rules.

(2) However, remuneration of a kind determined under paragraph (3)(b) is not ***variable remuneration*** of an accountable person of an accountable entity or a significant related entity.

(3) The Regulator may, by written notice given to an accountable entity or a significant related entity, determine that:

(a) remuneration of a particular kind, of one or more accountable persons, or of a class of accountable persons, of the accountable entity or significant related entity, is variable remuneration; or

(b) remuneration of a particular kind, of one or more accountable persons, or of a class of accountable persons, of the accountable entity or significant related entity, is not variable remuneration.

Note: A decision that remuneration is, or is not, variable remuneration is a reviewable decision (see Part 5 of Chapter 3).

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

(5) Regulator rules made for the purposes of paragraph (1)(b), or a determination given under paragraph (3)(a), may also identify the day, or a way of working out the day, on which the minimum deferral period for the variable remuneration starts.

25 Minimum amount of variable remuneration to be deferred

(1) The amount of an accountable person’s variable remuneration that is required to be deferred under subparagraph 23(1)(a)(ii) is 40% of the accountable person’s variable remuneration for the financial year in which the minimum deferral period for the variable remuneration starts.

Note 1: For when the minimum deferral period starts, see section 26.

Note 2: For the applicable financial year, see subsection (5) of this section.

Working out value of variable remuneration

(2) For the purposes of this section, the value of variable remuneration of an accountable person that has been deferred is taken to be:

(a) if a written notice given under subsection (3) determines a way to work out that value—the value worked out in that way; or

(b) if paragraph (a) does not apply and the Regulator rules prescribe a way to work out that value—the value worked out in that way; or

(c) if paragraphs (a) and (b) do not apply—what would have been the value of that remuneration if it had instead been paid or transferred to the person at the start of the minimum deferral period for the variable remuneration.

(3) The Regulator may, by written notice given to an accountable entity or a significant related entity, determine the way to work out, for the purposes of this section, the value of variable remuneration of accountable persons of the accountable entity or significant related entity.

Note: A decision that the value of variable remuneration is to be worked out in a particular way is a reviewable decision (see Part 5 of Chapter 3).

Notice not a legislative instrument

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

Financial year

(5) In determining an amount of an accountable person’s variable remuneration for the purposes of this section, use the financial year of the accountable entity or significant related entity of which the person is an accountable person.

Note: See section 7 for the definition of ***financial year***.

26 Minimum deferral period for variable remuneration

(1) The ***minimum deferral period*** for the variable remuneration of an accountable person of an accountable entity or a significant related entity is the period:

(a) starting on the day determined under subsection (2) or (3); and

(b) ending on the day determined under subsection (4).

When the deferral period starts

(2) The minimum deferral period for the variable remuneration of an accountable person starts (subject to subsection (3)) on the later of the following days:

(a) the day after the day on which the decision was first made that the person’s total remuneration would be wholly or partly conditional on the achievement of objectives;

(b) if the achievement of those objectives (as first decided) is to be measured by reference to a particular period—the day that period starts.

(3) However, if:

(a) the variable remuneration is remuneration of a kind determined under paragraph 24(3)(a), or prescribed by the Regulator rules for the purposes of paragraph 24(1)(b); and

(b) the determination provides, or the Regulator rules provide, for when the minimum deferral period for the variable remuneration starts;

then the minimum deferral period starts on the day so provided.

When the minimum deferral period ends

(4) The minimum deferral period for the variable remuneration of an accountable person ends on the earliest day worked out under an applicable item of the following table.

| End of minimum deferral period | | |
| --- | --- | --- |
|  | Column 1 | Column 2 |
| Item | If… | the period ends on… |
| 1 | it is the last day of the period of 4 years after the start of the minimum deferral period | (a) that last day, unless paragraph (b) applies; or  (b) if, on the day determined under paragraph (a), the accountable entity or significant related entity considers that the accountable person is likely to have failed to comply with their accountability obligations under section 19—the later day on which the entity determines whether or not the person has failed to comply |
| 2 | the accountable person ceases to be an accountable person because of the person’s death, serious incapacity, serious disability or serious illness | (a) the day on which the person so ceases, unless paragraph (b) applies; or  (b) if, on the day determined under paragraph (a), the accountable entity or significant related entity is not yet satisfied on reasonable grounds that the person has complied with the person’s accountability obligations under section 19:  (i) the day on which the entity is so satisfied (whether the compliance occurred on or before the entity being so satisfied); or  (ii) if the day mentioned in subparagraph (i) does not occur—the day determined under item 1 |
| 3 | a circumstance determined under subsection (5), or prescribed by the Regulator rules for the purposes of this item, exists or occurs in relation to the accountable person | (a) the day on which the circumstance occurs or begins to exist, unless paragraph (b) applies; or  (b) if, on the day determined under paragraph (a), the accountable entity or significant related entity is not yet satisfied on reasonable grounds that the person has complied with the person’s accountability obligations under section 19:  (i) the day on which the entity is so satisfied (whether the compliance occurred on or before the entity being so satisfied); or  (ii) if the day mentioned in subparagraph (i) does not occur—the day determined under item 1 |

Note: In relation to item 1, if the accountable entity or significant related entity determines that the person has failed to comply, the remuneration policy must require the amount of variable remuneration paid or transferred to the person to be reduced by an amount that is proportionate to the failure: see paragraph 23(1)(b).

(5) The Regulator may, by written notice given to an accountable entity, determine circumstances for the purposes of item 3 of the table in subsection (4) in relation to either or both of the following:

(a) the accountable entity;

(b) one or more significant related entities of the accountable entity.

Notice not a legislative instrument

(6) A notice under subsection (5) is not a legislative instrument.

27 Exemption for small amounts of variable remuneration

(1) Paragraph 23(1)(a) does not apply in relation to the variable remuneration of an accountable person for a financial year if the amount of the person’s variable remuneration that is required, or would apart from this section be required, under subparagraph 23(1)(a)(ii) to be deferred for that financial year is less than:

(a) the amount (if any) prescribed by the Minister rules; or

(b) if no amount is prescribed for the purposes of paragraph (a)—$50,000.

Financial year

(2) For the purposes of subsection (1), use the financial year of the accountable entity or significant related entity of which the person is an accountable person.

Note: See section 7 for the definition of ***financial year***.

28 Exemption for variable remuneration payable for temporary performance

(1) This section applies if:

(a) a person becomes an accountable person of an accountable entity or a significant related entity by filling a temporary or unforeseen vacancy; and

(b) the person is not registered under Division 1 of Part 3 of Chapter 3.

(2) Paragraph 23(1)(a) does not apply in relation to the variable remuneration of the accountable person for the period that starts when the person becomes an accountable person and ends after:

(a) 90 days; or

(b) if another period determined under subsection 22(3) or (4) applies in relation to the accountable person—that other period.

Part 6—Notification obligations

29 The notification obligations of an accountable entity

Core notification obligations

(1) The notification obligations of an accountable entity are:

(a) to notify the Regulator of an event mentioned in section 30:

(i) within the period, after the event, provided under subsection (5) of this section; and

(ii) in accordance with the requirements under subsection (6) of this section; and

(b) to take reasonable steps to ensure that each of its significant related entities complies with paragraph (a) as if the significant related entity were an accountable entity.

Enhanced notification obligations

(2) In addition to subsection (1), if the accountable entity meets the enhanced notification threshold under subsection (3), then the notification obligations of the accountable entity are:

(a) to give to the Regulator a document complying with section 31 (an ***accountability statement***) for each of its accountable persons; and

(b) to ensure that the Regulator is notified of any material change to the information contained in the accountability statement for each of its accountable persons:

(i) within the period, after the change, provided under subsection (5); and

(ii) in accordance with the requirements under subsection (6); and

(c) to give to the Regulator a document complying with section 32 (an ***accountability map***) within the period, after the body corporate starts being an accountable entity in accordance with subsection 8(2) or (4), provided under subsection (5) of this section; and

(d) to ensure that the Regulator is notified of any material change to the information contained in the accountability map:

(i) within the period, after the change, provided under subsection (5); and

(ii) in accordance with the requirements under subsection (6); and

(e) to take reasonable steps to ensure that each of its significant related entities complies with paragraphs (a) and (b) as if the significant related entity were an accountable entity.

Enhanced notification threshold

(3) For the purposes of subsection (2), the Minister rules may set out how to determine when an accountable entity meets the ***enhanced notification threshold***.

(4) Without limiting subsection (3), the Minister rules may do either or both of the following:

(a) specify a method for working out the enhanced notification threshold;

(b) specify different methods for working out the enhanced notification threshold for different circumstances.

Period for compliance

(5) For the purposes of subparagraphs (1)(a)(i) and (2)(b)(i) and (d)(i) and paragraph (2)(c), the period is:

(a) 30 days; or

(b) such other period (if any) prescribed by the Regulator rules.

Requirements for notice

(6) For the purposes of subparagraphs (1)(a)(ii) and (2)(b)(ii) and (d)(ii), the notice must:

(a) be in the form approved in writing by the Regulator; and

(b) contain the information that the form requires.

30 Events for which the Regulator must be notified

For the purposes of paragraph 29(1)(a), the following events must be notified to the Regulator by an accountable entity:

(a) a person ceasing to be an accountable person of the accountable entity or of a significant related entity of the accountable entity;

(b) the dismissal or suspension of an accountable person of the accountable entity, or of a significant related entity of the accountable entity, because the person has failed to comply with their accountability obligations under section 19;

(c) the reduction of the variable remuneration of an accountable person of the accountable entity, or of a significant related entity of the accountable entity, because the person has failed to comply with their accountability obligations under section 19;

(d) the accountable entity reasonably believes that:

(i) the accountable entity has breached its accountability obligations under section 18 or its key personnel obligations under section 21; or

(ii) an accountable person of the accountable entity, or of a significant related entity of the accountable entity, has breached their accountability obligations under section 19;

(e) a material change occurs to information relating to an accountable person of an accountable entity, or a significant related entity of an accountable entity, that is contained on the register established under section 37.

31 Accountability statements

For the purposes of paragraph 29(2)(a), an accountability statement for an accountable person of an accountable entity, or of a significant related entity, must:

(a) contain a comprehensive statement of:

(i) the part or aspect of the operations of the accountable entity, or of the significant related entity, for which the accountable person has actual or effective responsibility for management or control; and

(ii) the responsibilities of the accountable person, including any responsibilities to which paragraph 21(1)(a) or subsection 21(3) applies, as the case requires; and

(iii) the matters (if any) prescribed by the Regulator rules; and

(b) include a statement by the accountable person declaring that:

(i) the content of the accountability statement is accurate; and

(ii) the accountable person understands their accountability obligations under section 19.

32 Accountability map

For the purposes of paragraph 29(2)(c), an accountability map of an accountable entity must contain the following information:

(a) the names of all of the accountable persons of the accountable entity and each of its significant related entities;

(b) details of the reporting lines and lines of responsibility of those accountable persons;

(c) sufficient information to identify an accountable person for each of the responsibilities to which paragraph 21(1)(a) or subsection 21(3) applies (as the case requires);

(d) information (if any) prescribed by the Regulator rules.

Chapter 3—Administration

Part 2—The Regulator

Division 1—Arrangements for administration

33 Administration of this Act

(1) Subject to this section, APRA and ASIC each have the general administration of this Act.

Note: Generally, APRA and ASIC are not referred to in these provisions and the Regulator is used instead (see the definition of ***Regulator*** in section 7).

(2) Despite subsection (1), the powers and functions conferred on ASIC by the provisions of this Act are conferred only in relation to the following persons:

(a) accountable entities that hold an Australian financial services licence (within the meaning of the *Corporations Act 2001*) or an Australian credit licence (within the meaning of the *National Consumer Credit Protection Act 2009*);

(b) significant related entities of accountable entities mentioned in paragraph (a);

(c) accountable persons of accountable entities mentioned in paragraph (a) or of significant related entities mentioned in paragraph (b).

Note: This also affects the operation of the Regulatory Powers Act (see the definition of ***this Act*** in section 7).

(3) Subsection (2) does not apply in relation to the making of a legislative instrument.

(4) The Minister may, by legislative instrument, give APRA or ASIC directions about the performance or exercise of its functions or powers under this Act.

34 Arrangement for administration

(1) APRA and ASIC must enter into an arrangement relating to the administration of this Act.

(2) The arrangement must include provisions relating to the matters (if any) specified in the Minister rules.

(3) APRA and ASIC must each publish the arrangement on its website*.*

(4) If the arrangement is not entered into within 6 months after the commencement of this Act, the Minister may, by notifiable instrument, determine arrangements between APRA and ASIC relating to the administration of this Act.

(5) A failure to comply with this section does not invalidate the performance or exercise of a function or power by APRA or ASIC.

35 Agreement about exercise of powers

(1) Subject to this section, neither APRA nor ASIC may perform a function or exercise a power under this Act without the agreement of the other.

(2) Subsection (1) does not apply in relation to any of the following:

(a) the performance or exercise of a function or power under a provision of:

(i) Division 1 of Part 3 of this Chapter (which is about registration of accountable persons); or

(ii) Part 4 of this Chapter (which is about regulatory powers and enforcement) other than section 60 or 61 (which are about directions);

(b) a power exercisable only by APRA in relation to a person because of the effect of subsection 33(2); or

(c) the performance or exercise of a function or power under the Regulatory Powers Act as it applies in relation to this Act.

(3) A failure to comply with subsection (1) does not invalidate the performance or exercise of a function or power.

Division 2—Information sharing

36 Disclosure of information and documents between APRA and ASIC

(1) APRA and ASIC may share with each other information that is disclosed or obtained, or a document that is given or produced, under or for the purposes of this Act.

Note: In this subsection, ***this Act*** includes the Regulatory Powers Act (see section 7).

(2) If either APRA or ASIC (***the recipient***) obtains information, or gives or produces a document, that is covered by subsection (3), it must disclose the information, or give a copy of the document, to the other.

(3) For the purposes of subsection (2), the information and documents are the following:

(a) information provided to the recipient under Part 6 of Chapter 2 (notification obligations);

(b) information provided to the recipient under Division 1 of Part 3 of this Chapter (registration of accountable persons);

(c) a notice given by the recipient to another person under this Act;

(d) information or a document (if any) prescribed by the Minister rules.

(4) If either APRA or ASIC discloses information or gives a document under subsection (1) or (2) to the other, it need not notify any other person that it plans to disclose the information or give the document, or that it has done so.

Note: Information disclosed, or documents produced, under this section is authorised under section 56 of the *Australian Prudential Regulation Authority Act 1998* and section 127 of the *Australian Securities and Investments Commission Act 2001* (which are about secrecy obligations).

Part 3—Registration and disqualification of accountable persons

Division 1—Registration of accountable persons

37 Register of accountable persons

(1) The Regulator must establish and keep a register of accountable persons.

(2) The register may be kept by electronic means.

(3) The register is not a legislative instrument.

(4) The register must contain, for each accountable person:

(a) the person’s name; and

(b) the date of the person’s registration as an accountable person; and

(c) the date the person ceases to be an accountable person; and

(d) details of any disqualification of the person under section 39; and

(e) details of any variation or revocation of disqualification under section 40; and

(f) such other information as the Regulator considers appropriate.

38 Registration of a person as an accountable person

(1) An accountable entity may apply to the Regulator to register a person as an accountable person.

(2) The application must:

(a) be in the form approved in writing by the Regulator; and

(b) contain the information that the form requires; and

(c) include a signed declaration that the accountable entity is satisfied the person is suitable to be an accountable person; and

(d) if the accountable entity is required under section 29 to give an accountability statement complying with section 31—include the accountability statement for the person.

(3) The Regulator may, by written notice given to the accountable entity, request the accountable entity to give to the Regulator further information in relation to the application.

(4) The Regulator must, within the period provided under subsection (5), register a person as an accountable person if:

(a) the application meets the requirements of subsection (2); and

(b) the accountable entity gives to the Regulator any further information requested under subsection (3) in relation to the application;

unless the accountable entity withdraws the application before the day of registration.

(5) The period for registration under subsection (4) is the period of 21 days after the later of:

(a) the day the application is made; or

(b) if the Regulator requests the accountable entity to give further information under subsection (3) in relation to the application—the day the accountable entity gives the further information to the Regulator.

Division 2—Disqualification of accountable persons

39 Regulator may disqualify an accountable person

Disqualification by the Regulator

(1) The Regulator may disqualify a person from being or acting as an accountable person, for a period that the Regulator considers appropriate, if the Regulator is satisfied that:

(a) theperson has not complied with their accountability obligations under section 19; and

(b) having regard to the seriousness of the non‑compliance, the disqualification is justified.

Note: A decision to disqualify a person is a reviewable decision (see Part 5 of Chapter 3).

(2) For the purposes of subsection (1), the Regulator may disqualify a person from being or acting as an accountable person of one or more of the following:

(a) a particular accountable entity;

(b) a particular significant related entity of an accountable entity;

(c) a class of accountable entities;

(d) a class of significant related entities of accountable entities;

(e) any accountable entity;

(f) any significant related entity of an accountable entity.

Written notice

(3) The Regulator must give written notice of a disqualification to:

(a) the person; and

(b) if (apart from this section) the person is an accountable person of an accountable entity—the accountable entity; and

(c) if (apart from this section) the person is an accountable person of a significant related entity of an accountable entity—both the accountable entity and the significant related entity.

(4) A disqualification takes effect on the day specified in the notice (which must be at least 7 days after it is given).

(5) Before disqualifying a person, the Regulator must give written notice to each person mentioned in paragraphs (3)(a) to (c), giving each of them an opportunity to make submissions on the matter.

(6) If a submission is made to the Regulator in response to the notice, the Regulator must have regard to the submission and may discuss any matter contained in the submission with such persons as it considers appropriate for the purpose of making a decision under this section.

(7) A notice given under subsection (5) must state that any submissions made in response to the notice may be discussed by the Regulator with any other persons as mentioned in subsection (6).

Notice not a legislative instrument

(8) A notice under subsection (3) or (5) is not a legislative instrument.

40 Regulator may vary or revoke a disqualification

(1) The Regulator may vary or revoke a disqualification made under section 39 on its own initiative or on application by a person disqualified under that section.

Note: A decision to vary or revoke a disqualification, or to refuse to vary or revoke a disqualification, is a reviewable decision (see Part 5 of Chapter 3).

(2) A variation or revocation of a disqualification takes effect on the day on which it is made.

(3) The Regulator must give the person written notice of:

(a) a variation or revocation of a disqualification; or

(b) if the person applied for a disqualification to be varied or revoked—a refusal to vary or revoke the disqualification.

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

41 Allowing a person disqualified by the Regulator to act as an accountable person

(1) An accountable entity or a significant related entity contravenes this subsection if:

(a) a person is disqualified under section 39 from being, or acting as, an accountable person of the accountable entity or significant related entity; and

(b) the person is, or acts as, an accountable person of the accountable entity or significant related entity; and

(c) the accountable entity or significant related entity allows the person to be, or act as, an accountable person.

Note: An accountable entity may also contravene a civil penalty provision if it fails to ensure that its accountable persons are not prohibited from being accountable persons (see sections 22 and 76).

Fault‑based offence

(2) An accountable entity or a significant related entity commits an offence if it contravenes subsection (1).

Penalty: 250 penalty units.

Strict liability offence

(3) An accountable entity or a significant related entity commits an offence of strict liability if it contravenes subsection (1).

Penalty: 60penalty units.

Part 4—Regulatory powers and enforcement

Division 1—Investigations

42 Regulator may arrange for investigation and report

Appointment of investigator

(1) The Regulator may, in writing, appoint a person (the ***investigator***) to investigate and report in relation to an accountable entity or a significant related entity if the Regulator reasonably believes that:

(a) the accountable entity or the significant related entity has contravened a provision of this Act; or

(b) an accountable person of the accountable entity, or of the significant related entity, has contravened a provision of this Act.

Requirement to assist investigator

(2) The accountable entity or significant related entity must give the investigator:

(a) access to its books, accounts and documents; and

(b) such information and facilities as the investigator requires to conduct the investigation and produce the report.

(3) A person commits an offence if:

(a) the person is subject to a requirement under subsection (2); and

(b) the person fails to comply with the requirement.

Penalty: 50 penalty units.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(4) If a person does, or fails to do, an act in circumstances that give rise to the person committing an offence against subsection (3), the person commits an offence against that subsection in respect of:

(a) the first day on which the offence is committed; and

(b) each subsequent day (if any) on which the circumstances that gave rise to the person committing the offence continue (including the day of conviction for any such offence or any later day).

Note: This subsection is not intended to imply that section 4K of the *Crimes Act 1914* does not apply to offences against this Act.

(5) Nothing in this section is intended to limit the operation of any other provision of this Act.

43 Investigator may require production of books etc.

(1) If an investigator reasonably believes that a person has custody or control of any books, accounts or documents relevant to the investigator’s investigation, the investigator may, by written notice given to the person, require the person to produce any or all of the books, accounts or documents to the investigator.

(2) The notice must specify the day by which the books, accounts or documents are to be produced (which must be at least 14 days after the day the notice is given to the person).

(3) A person commits an offence if:

(a) the person is required to produce books, accounts or documents in accordance with a notice given to the person under subsection (1); and

(b) the person fails to comply with the requirement.

Penalty: 30 penalty units.

44 Concealing books, accounts or documents relevant to investigation

A person commits an offence if:

(a) the person knows that an investigator is investigating, or is about to investigate, a matter; and

(b) the person:

(i) conceals, destroys, mutilates or alters a book, account or document relating to the matter; or

(ii) if a book, account or document relating to the matter is in a particular State or Territory—takes or sends the book, account or document out of that State or Territory; and

(c) the person intended that the investigation or proposed investigation would be delayed or obstructed as a result of that conduct.

Penalty: Imprisonment for 2 years.

Division 2—Examinations

45 Notice requiring appearance for examination

If an investigator reasonably believes or suspects that a person (the ***examinee***) can give information relevant to the investigator’s investigation, the investigator may, by written notice given to the examinee, require the examinee:

(a) to give the investigator all reasonable assistance in connection with the investigation; and

(b) to appear before the investigator for examination.

Note: Failure to comply with a requirement made under this section is an offence (see section 49).

46 Conduct of examinations

(1) The investigator may examine the examinee on oath or affirmation and may, for that purpose:

(a) require the examinee to either take an oath or make an affirmation; and

(b) administer an oath or affirmation to the examinee.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 49).

(2) The oath or affirmation to be taken or made by the examinee for the purposes of the examination is an oath or affirmation that the statements that the examinee will make will be true.

(3) The investigator may require the examinee to answer a question that is put to the examinee at the examination and is relevant to a matter that the investigator is investigating, or is to investigate.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 49).

(4) The examiner may make an audio, or audio visual, recording of all or any part of the examination.

47 Who may be present at examinations

(1) The examination must take place in private.

(2) The following people may be present at the examination:

(a) the investigator;

(b) the examinee;

(c) the examinee’s lawyer;

(d) either or both of the following:

(i) an APRA staff member approved by APRA to be present;

(ii) an ASIC staff member approved by ASIC to be present;

(e) a person directed by the investigator to be present.

Note: For the definitions of ***APRA staff member*** and ***ASIC staff member***, see section 7.

(3) A person commits an offence if the person:

(a) is present at an examination; and

(b) is not a person mentioned in subsection (2).

Penalty: 30 penalty units.

(4) The examinee’s lawyer may, at such times during the examination as the investigator determines, address the investigator and examine the examinee about matters about which the investigator has examined the examinee.

(5) The investigator may require a person to stop addressing the investigator or examining the examinee if, in the investigator’s opinion, the person is trying to obstruct the examination by exercising rights under subsection (4).

Note: Failure to comply with a requirement made under this subsection is an offence (see section 49).

48 Record of examination

Written record of statements

(1) The investigator must cause a written record (including a transcript of an audio, or audio visual, recording) to be made of statements made at the examination.

(2) The investigator may require the examinee to read the written record, or to have it read to the examinee, and may require the examinee to sign it.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 49).

Copies of record

(3) The investigator must give a copy of a written record to the examinee, without charge, but subject to such conditions (if any) as the investigator imposes.

Use of copies

(4) If the investigator gives a copy of a written record to a person under subsection (3) subject to conditions, the person, or any other person who has possession, custody or control of the copy or a copy of it, must comply with the conditions.

Penalty: Imprisonment for 6 months.

49 Offences

A person commits an offence if:

(a) the person is subject to a requirement under this Division; and

(b) the person refuses or fails to comply with the requirement.

Penalty: 30 penalty units.

Division 3—Evidentiary use of certain material

50 Statements made at an examination—proceedings against examinee

Admissibility of statements made at examination

(1) Subject to this section, a statement that a person makes at an examination of the person is admissible in evidence against the person in a proceeding.

Self‑incrimination exception

(2) The statement is not admissible if the statement is not admissible in evidence against the person under section 83.

Irrelevant statement exception

(3) The statement is not admissible if it is not relevant to the proceeding and the person objects to the admission of evidence of the statement.

Related statement exception

(4) The statement (the ***subject statement***) is not admissible if:

(a) it is qualified or explained by some other statement made at the examination; and

(b) evidence of the other statement is not tendered in the proceeding; and

(c) the person objects to the admission of evidence of the subject statement.

Legal professional privilege exception

(5) The statement is not admissible if:

(a) it discloses matter in respect of which the person could claim legal professional privilege in the proceeding if subsection (1) did not apply in relation to the statement; and

(b) the person objects to the admission of evidence of the statement.

Joint proceedings

(6) Subsection (1) applies in relation to a proceeding against a person even if it is heard together with a proceeding against another person.

Record is prima facie evidence

(7) If a written record of an examination of a person is signed by the person under subsection 48(2)*,* or is authenticated in a manner (if any) specified in the Minister rules, the record is admissible in a proceeding as prima facie evidence of the statements it records.

Admissibility of other evidence

(8) This Division does not limit or affect the admissibility in the proceeding of other evidence of statements made at the examination.

51 Statements made at an examination—other proceedings

Admissibility of absent witness evidence

(1) If direct evidence by a person (the ***absent witness***) of a matter would be admissible in a proceeding, a statement that the absent witness made at an examination of the absent witness and that tends to establish that matter is admissible in the proceeding as evidence of that matter in accordance with subsection (2).

Requirement for admissibility

(2) The statement is admissible:

(a) if it appears to the court or tribunal that:

(i) the absent witness is dead or is unfit, because of physical or mental incapacity, to attend as a witness; or

(ii) the absent witness is outside the State or Territory in which the proceeding is being heard and it is not reasonably practicable to secure their attendance; or

(iii) all reasonable steps have been taken to find the absent witness but they cannot be found; or

(b) if it does not so appear to the court or tribunal—unless another party to the proceeding requires the party tendering evidence of the statement to call the absent witness as a witness in the proceeding and the tendering party does not so call the absent witness.

52 Weight of evidence under section 51

(1) If evidence of a statement made by a person at an examination of the person is admitted under section 51 in a proceeding, in deciding how much weight (if any) to give to the statement as evidence of a matter, regard is to be had to:

(a) the length of period between the statement and the matter to which the statement relates; and

(b) any reason the person may have had for concealing or misrepresenting a material matter; and

(c) any other circumstances from which it is reasonable to draw an inference about the accuracy of the statement.

(2) If the person is not called as a witness in the proceeding:

(a) evidence that would, if the person had been so called, have been admissible in the proceeding for the purpose of destroying or supporting their credibility is so admissible; and

(b) evidence is admissible to show that the statement is inconsistent with another statement that the person has made at any time.

(3) However, evidence of a matter is not admissible under this section if, had the person been called as a witness in the proceeding and denied the matter in cross‑examination, evidence of the matter would not have been admissible if adduced by the cross‑examining party.

53 Objection to admission of statements made at examination

Notice of intention to apply to admit evidence and statements

(1) A party (the ***adducing party***) to a proceeding may, not less than 14 days before the first day of the hearing of the proceeding, give to another party to the proceeding written notice that the adducing party:

(a) will apply to have admitted in evidence in the proceeding specified statements made at an examination; and

(b) for that purpose, will apply to have evidence of those statements admitted in the proceeding.

Notice to set out etc. statements

(2) A notice under subsection (1) must set out, or be accompanied by writing that sets out, the specified statements.

Notice of objection

(3) Within 14 days after a notice is given under subsection (1), the other party may give to the adducing party a written notice:

(a) stating that the other party objects to specified statements being admitted in evidence in the proceeding; and

(b) specifies, in relation to each of those statements, the grounds of objection.

Extension of objection period

(4) The period prescribed by subsection (3) may be extended by the court or tribunal or by agreement between the parties concerned.

Notice etc. to be given to court or tribunal

(5) On receiving a notice given under subsection (3), the adducing party must give to the court or tribunal a copy of:

(a) the notice under subsection (1) and any writing that subsection (2) requires to accompany that notice; and

(b) the notice under subsection (3).

Action by court or tribunal

(6) If subsection (5) is complied with, the court or tribunal may either:

(a) determine the objections as a preliminary point before the hearing of the proceeding begins; or

(b) defer determination of the objections until the hearing.

Right to object to admission of statement

(7) If a notice has been given in accordance with subsections (1) and (2), the other party is not entitled to object at the hearing of the proceeding to a statement specified in the notice being admitted in evidence in the proceedings, unless:

(a) the other party has, in accordance with subsection (3), objected to the statement being so admitted; or

(b) the court or tribunal gives the other party leave to object to the statement being so admitted.

54 Copies of, or extracts from, certain books, accounts and documents

(1) A copy of, or an extract from, a book, account or document to which subsection 42(2) or 43(1) or paragraph 58(5)(f) applies, is admissible in evidence in a proceeding as if the copy were the original book, account or document or the extract were the relevant part of original book, account or document.

(2) A copy of, or an extract from, a book, account or document is not admissible in evidence under subsection (1) unless it is proved that the copy or extract is a true copy of the book, account or document, or of the relevant part of the book, account or document.

(3) For the purposes of subsection (2), a person who has compared:

(a) a copy of a book, account or document with the book, account or document; or

(b) an extract from a book, account or document, with the relevant part of the book, account or document;

may give evidence, either orally or by an affidavit or statutory declaration, that the copy or extract is a true copy of the book, account or document, or relevant part of the book, account or document.

55 Admissibility of investigation report

Subject to section 56, if a copy of a report under subsection 42(1) purports to be certified by the Regulator as a true copy of such a report, the copy is admissible in a proceeding (other than a criminal proceeding) as prima facie evidence of any facts or matters that the report states an investigator to have found to exist.

56 Exceptions to admissibility of investigation report

(1) If a party to a proceeding tenders a copy of a report under subsection 42(1) as evidence against another party, the copy is not admissible under section 55 in the proceeding as evidence against the other party unless the court or tribunal is satisfied that:

(a) a copy of the report has been given to the other party; and

(b) the other party, and the other party’s lawyer, have had a reasonable opportunity to examine that copy and to take its contents into account in preparing the other party’s case.

(2) Before or after the copy tendered in evidence is admitted in evidence, the other party may apply to cross‑examine, in relation to the report, a specified person who, or 2 or more specified persons each of whom:

(a) was concerned in preparing the report or making a finding about a fact or matter that the report states the investigator to have found to exist; or

(b) whether or not pursuant to a requirement made under this Part, gave information, or produced a book, account or document, on the basis of which, or on the basis of matters including which, such a finding was made.

(3) The court or tribunal must grant an application made under subsection (2) unless it considers that, in all the circumstances, it is not appropriate to do so.

(4) The court or tribunal must refuse to admit the copy, or must treat the copy as not having been admitted, if:

(a) the court or tribunal grants the application or applications made under subsection (2); and

(b) one or more persons to whom the application or any of the applications relates:

(i) are unavailable; or

(ii) do not attend to be cross‑examined in relation to the report; and

(c) the court or tribunal is of the opinion that to admit the copy under section 55 in the proceeding as evidence against the other party without the other party having the opportunity to cross‑examine the other person or persons would unfairly prejudice the other party.

57 Material otherwise admissible

Nothing in this Division renders evidence inadmissible in a proceeding in circumstances where it would have been admissible in that proceeding if this Division had not been enacted.

Division 4—Requesting information

58 Regulator may request information

Request for information from accountable entities

(1) The Regulator may request an accountable entity to give to the Regulator information relating to any of the following:

(a) the accountable entity;

(b) a significant related entity of the accountable entity;

(c) an accountable person of the accountable entity, or of a significant related entity of the accountable entity;

(d) a related body corporate of the accountable entity;

(e) a related body corporate of a significant related entity of the accountable entity;

(f) if the accountable entity is an RSE licensee—a connected entity of the accountable entity.

Note 1: Failure to comply with the request is an offence (see section 59).

Note 2: For when bodies corporate are ***related***, see section 7.

Request for information from significant related entities

(2) The Regulator may request a significant related entity of an accountable entity to give to the Regulator information relating to any of the following:

(a) the accountable entity;

(b) the significant related entity;

(c) an accountable person of the significant related entity;

(d) a related body corporate of the significant related entity.

Note 1: Failure to comply with the request is an offence (see section 59).

Note 2: For when bodies corporate are ***related***, see section 7.

Request for information from accountable persons

(3) The Regulator may request an accountable person of an accountable entity, or of a significant related entity, to give to the Regulator information relating to:

(a) the accountable entity; or

(b) the significant related entity.

Note: Failure to comply with the request is an offence (see section 59).

Purposes of request

(4) The Regulator may only request the information for one or more of the following purposes:

(a) performing a function or exercising a power of the Regulator under this Act;

(b) ensuring compliance with this Act;

(c) in relation to non‑compliance, or suspected non‑compliance, with this Act.

Requirements of request

(5) The request:

(a) must be made in writing; and

(b) must state what information must be given to the Regulator; and

(c) may require the information to be verified by statutory declaration; and

(d) must specify a day on or before which the information must be given; and

(e) must contain a statement to the effect that a failure to comply with the request is an offence; and

(f) may include a requirement to produce books, accounts or documents.

(6) The day specified under paragraph (5)(d) must be at least 14 days after the day on which the request was made.

59 Failing to give information

A person commits an offence if:

(a) the person is given a request under section 58; and

(b) the person fails to comply with the request.

Penalty: 200 penalty units.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: See also subsection 4B(3) (body corporate multiplier) and section 4K (continuing and multiple offences) of the *Crimes Act 1914*.

Note 3: See also sections 83 (self‑incrimination) and 84 (legal professional privilege).

Division 5—Regulator’s power to issue directions

Subdivision A—Kinds of directions

60 Direction dealing with non‑compliance

Power of the Regulator to give direction

(1) The Regulator may give an accountable entity a direction of a kind specified in subsection (2) if the Regulator reasonably believes that:

(a) the accountable entity has contravened a provision of this Act; or

(b) the accountable entity is likely to contravene a provision of this Act and the direction is reasonably necessary to ensure compliance with the provision; or

(c) an accountable person of the accountable entity, or of a significant related entity of the accountable entity, has contravened a provision of this Act; or

(d) an accountable person of the accountable entity, or of a significant related entity of the accountable entity, is likely to contravene a provision of this Act and the direction is reasonably necessary to ensure compliance with the provision.

Note 1: A decision to give a direction under this section is a reviewable decision (see Part 5 of Chapter 3).

Note 2: For variation and revocation of a direction given under this section, see subsection 33(3) of the *Acts Interpretation Act 1901*.

Kinds of direction

(2) The kinds of direction that the accountable entity may be given are directions to do, or to cause a significant related entity of the accountable entity to do, any one or more of the following:

(a) to take specified action to deal with the ground for giving the direction;

(b) to order an audit of the affairs of the accountable entity or significant related entity, at the expense of the accountable entity or significant related entity, by an auditor chosen by the Regulator;

(c) to make changes to the accountable entity’s or significant related entity’s systems, business practices or operations;

(d) to reconstruct, amalgamate or otherwise alter all or part of:

(i) the business, structure or organisation of the accountable entity or significant related entity; or

(ii) the business, structure or organisation of the accountable entity’s relevant group;

(e) to do, or to refrain from doing, anything else in relation to the affairs of the accountable entity.

Note: For the definition of ***relevant group***, see section 7.

(3) The direction must:

(a) be given by notice in writing to the accountable entity; and

(b) specify the ground referred to in subsection (1) as a result of which the direction is given; and

(c) specify the time by which, or period during which, the direction is to be complied with; and

(d) state that the accountable entity could commit an offence if the accountable entity fails to comply with the direction.

Note: See section 62 (offence for non‑compliance with a direction).

Power to comply

(4) The accountable entity has power to comply with the direction despite anything in its constitution or any contract or arrangement to which it is a party.

(5) If the direction requires the accountable entity to cause a significant related entity to do, or to refrain from doing, an act or thing:

(a) the accountable entity has power to cause the significant related entity to do, or to refrain from doing, the act or thing; and

(b) the significant related entity has power to do, or to refrain from doing, the act or thing;

despite anything in the significant related entity’s constitution or any contract or arrangement to which the significant related entity is a party.

Direction not a legislative instrument

(6) A direction under subsection (1) is not a legislative instrument.

Note: Under paragraph 11(2)(c) of the *Legislation Act 2003*, the Regulator may register a direction under this section as a notifiable instrument.

61  Direction to reallocate responsibilities

Power to give direction

(1) The Regulator may give an accountable entity a direction to reallocate a responsibility to which paragraph 21(1)(a) applies if the Regulator reasonably believes that the current allocation of the responsibility is likely to give rise to:

(a) a prudential risk; or

(b) a risk of significant and systemic non‑compliance with a law, order or direction mentioned in subparagraphs 19(1)(d)(i) to (x).

Note 1: A decision to give a direction under this section is a reviewable decision (see Part 5 of Chapter 3).

Note 2: For variation and revocation of a direction given under this section, see subsection 33(3) of the *Acts Interpretation Act 1901*.

(2) If both of the following apply:

(a) the person allocated the responsibility is an accountable person of the accountable entity;

(b) the accountable entity has given an accountability statement for the accountable person under section 29;

the Regulator must have regard to the responsibilities set out in the accountability statement.

(3) The direction must:

(a) be given by notice in writing to the accountable entity; and

(b) specify the time by which, or period during which, the direction is to be complied with; and

(c) state that the accountable entity could commit an offence or be liable to a civil penalty if the accountable entity fails to comply with the direction.

Note: See section 62 (offence for non‑compliance with a direction) and paragraph 21(1)(c) (key personnel obligations of accountable entities) and section 76 (civil penalty provisions).

Direction not a legislative instrument

(4) A direction under subsection (1) is not a legislative instrument.

Note: Under paragraph 11(2)(c) of the *Legislation Act 2003*, the Regulator may register a direction under this section as a notifiable instrument.

Subdivision B—Non‑compliance with directions

62 Offence provision for non‑compliance with a direction

Accountable entity

(1) An accountable entity contravenes this subsection if:

(a) the accountable entity is given a direction under section 60 or 61; and

(b) the accountable entity fails to comply with the direction.

(2) An accountable entity commits an offence if the accountable entity contravenes subsection (1).

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: See also subsection 4B(3) (body corporate multiplier) and section 4K (continuing and multiple offences) of the *Crimes Act 1914*.

Note 3: An accountable entity may also contravene a civil penalty provision if it fails to comply with a direction given under section 61 (see paragraph 21(1)(c) and section 76).

Penalty: 50 penalty units.

Officer of accountable entity

(3) An officer of an accountable entity contravenes this subsection if:

(a) the accountable entity is given a direction under section 60 or 61; and

(b) the officer fails to take reasonable steps to ensure that the accountable entity complies with the direction; and

(c) the officer’s duties include ensuring that the accountable entity complies with the direction; and

(d) the accountable entity fails to comply with the direction.

(4) An officer of an accountable entity commits an offence if the officer contravenes subsection (3).

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: See also subsection 4B(3) (body corporate multiplier) and section 4K (continuing and multiple offences) of the *Crimes Act 1914*.

Penalty: 50 penalty units.

Subdivision C—Secrecy and disclosure provisions relating to directions

63 Regulator may determine that a direction is covered by secrecy provision

When this section applies

(1) This section applies if the Regulator has given an accountable entity a direction under section 60 or 61.

Power of Regulator to make determination

(2) The Regulator may determine, in writing, that the direction is covered under this subsection if the Regulator considers that the determination is necessary:

(a) to protect the depositors (within the meaning of the *Banking Act 1959*) ofany ADI; or

(b) to protect the policyholders (within the meaning of the *Insurance Act 1973*) of any general insurer; or

(c) to protect the policy owners (within the meaning of the *Life Insurance Act 1995*) of any life company; or

(d) to protect the policy holders (within the meaning of the *Private Health Insurance (Prudential Supervision) Act 2015*) of a health benefits fund (within the meaning of that Act) of any private health insurer; or

(e) to protect the beneficiaries (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a registrable superannuation entity (within the meaning of that Act) of any RSE licensee; or

(f) to promote financial system stability in Australia.

Note: For repeal of a determination, see subsection 33(3) of the *Acts Interpretation Act 1901*.

(3) The Regulator must give the accountable entity a copy of the determination as soon as practicable after making it.

Regulator must consider other determinations

(4) If the Regulator makes a determination under subsection (2), the Regulator must consider whether it is appropriate in the circumstances to also make a determination under either or both of subsections 66(2) and 66(4).

Determination not a legislative instrument

(5) An instrument under subsection (2) is not a legislative instrument.

64 Secrecy relating to directions

(1) A person commits an offence if:

(a) the Regulator has given an accountable entity (the ***directed accountable entity***) a direction under section 60 or 61; and

(b) the direction is covered by a determination under subsection 63(2); and

(c) the person is, or has been, covered by subsection (2) of this section in relation to the direction; and

(d) the person discloses information; and

(e) the information reveals the fact that the direction was given.

Penalty: Imprisonment for 2 years.

(2) A person is covered by this subsection in relation to the direction if the person is:

(a) the directed accountable entity; or

(b) a significant related entity of the directed accountable entity; or

(c) an officer, employee or contractor of the directed accountable entity at a time on or after the Regulator gave the directed accountable entity the direction; or

(d) an officer, employee or contractor of a significant related entity of the directed accountable entity at a time on or after the Regulator gave the directed accountable entity the direction; or

(e) any other person who, because of their employment, or in the course of that employment, has acquired information that reveals the fact that the direction was given.

Exception

(3) Subsection (1) does not apply if:

(a) the disclosure is authorised by section 65, 66, 67, 68, 69, 70 or 71; or

(b) the disclosure is required by an order or direction of a court or tribunal.

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

65 Disclosure of publicly available information

A person covered by subsection 64(2) in relation to a direction may disclose information that reveals the fact that the direction was given, to the extent that the information has already been lawfully made available to the public.

66 Disclosure allowed by the Regulator

(1) A person covered by subsection 64(2) in relation to a direction may disclose information that reveals the fact that the direction was given if:

(a) a determination under subsection (2) or (4) of this section allows the disclosure by the person; and

(b) if the Regulator has included conditions in the determination—those conditions are satisfied.

Determinations relating to specified person

(2) The Regulator may, in writing, make a determination allowing:

(a) a specified person covered by subsection 64(2) in relation to a specified direction; or

(b) a specified person covered by subsection 64(2) in relation to a direction that is in a specified class of directions;

to disclose specified information in relation to the direction.

(3) The Regulator must give a copy of the determination as soon as practicable after making it to:

(a) the directed accountable entity; and

(b) the person specified, or each person specified, in the determination.

Determinations relating to specified class of persons

(4) The Regulator may, by legislative instrument, make a determination allowing a specified class of persons covered by subsection 64(2) in relation to a direction that is in a specified class of directions to disclose:

(a) specified kinds ofinformation in relation to the direction; or

(b) any kind of information in relation to the direction.

Conditions in determinations

(5) The Regulator may include conditions in a determination under subsection (2) or (4) that relate to any of the following:

(a) the kind of entities to which the disclosure may be made;

(b) the way in which the disclosure is to be made;

(c) any other matter that the Regulator considers appropriate.

Determination not a legislative instrument

(6) An instrument under subsection (2) is not a legislative instrument.

67 Disclosure to legal representative for purpose of seeking legal advice

A person covered by subsection 64(2) in relation to a direction may disclose information that reveals the fact that the direction was given if:

(a) the disclosure is to the person’s legal representative; and

(b) the purpose of the person making the disclosure is for the legal representative to provide legal advice, or another legal service, in relation to the direction.

68 Disclosure under the APRA Act

(1) A person covered by subsection 64(2) in relation to a direction may disclose information that reveals the fact that the direction was given if:

(a) the person is:

(i) an APRA member (within the meaning of the *Australian Prudential Regulation Authority Act 1998*); or

(ii) an APRA staff member; or

(iii) a Commonwealth officer (within the meaning of the *Crimes Act 1914*) who is covered by paragraph (c) of the definition of ***officer*** in subsection 56(1) of the *Australian Prudential Regulation Authority Act 1998*; and

(b) the information is protected information (within the meaning of subsection 56(1) of that Act), or is contained in a protected document (within the meaning of that subsection); and

(c) the disclosure is in accordance with a provision mentioned in paragraph 56(2)(c) of that Act.

Note: For the definition of ***APRA staff member***, see section 7.

Relationship to APRA Act secrecy provision

(2) Disclosure of information in relation to a direction is not an offence under section 56 of the *Australian Prudential Regulation Authority Act 1998* if the disclosure is authorised by section 65, 66, 67, 69, 70 or 71 of this Act.

69 Disclosure under the ASIC Act

A person covered by subsection 64(2) in relation to a direction may disclose information that reveals the fact that the direction was given if:

(a) the person is:

(i) a member of ASIC; or

(ii) an ASIC staff member; or

(iii) a Commonwealth officer (within the meaning of the *Crimes Act 1914*) who, because of their employment, or in the course of that employment, has acquired the information (other than an employee of the body to which the information or document relates); and

(b) the information is protected information (within the meaning of subsection 127(9) of the *Australian Securities and Investments Commission Act 2001*); and

(c) the disclosure is authorised use and disclosure of the information under section 127 of that Act.

Note 1: For the definition of ***ASIC staff member***, see section 7.

Note 2: A disclosure of information permitted by section 65, 66, 67, 68, 70 or 71 of this Act is an authorised disclosure for the purposes of subsection 127(2) of the *Australian Securities and Investments Commission Act 2001.*

70 Disclosure in circumstances set out in the Minister rules

A person covered by subsection 64(2) in relation to a direction may disclose information that reveals the fact that the direction was given, if the disclosure is made in circumstances (if any) prescribed by the Minister rules.

71 Disclosure for purpose

A person covered by subsection 64(2) (the ***relevant person***) in relation to a direction may disclose information that reveals the fact that the direction was given if:

(a) another person covered by subsection 64(2) in relation to the direction disclosed that information to the relevant person for a particular purpose in accordance with section 66, 67, 68, 69 or 70, or in accordance with a previous operation of this section; and

(b) the disclosure by the relevant person is for the same purpose.

72 Exceptions operate independently

Sections 65, 66, 67, 68, 69, 70 and 71 do not limit each other.

Subdivision D—Other provisions relating to directions

73 Direction not grounds for denial of obligations

When this section applies

(1) This section applies if an accountable entity, or a significant related entity of an accountable entity, is party to a contract, whether the proper law of the contract is:

(a) Australian law (including the law of a State or Territory); or

(b) law of a foreign country (including the law of part of a foreign country).

Direction does not allow denial of obligations

(2) The fact that the accountable entity is given a direction under section 60 does not allow the contract, or a party to the contract (other than the accountable entity or a significant related entity of the accountable entity), to do any of the following:

(a) deny any obligations under the contract;

(b) accelerate any debt under the contract;

(c) close out any transaction relating to the contract;

(d) enforce any security under the contract.

This subsection has effect subject to this section.

(3) If the accountable entity or the significant related entity is prevented from fulfilling its obligations under the contract because of a direction under section 60, the other party or parties to the contract are, subject to any orders made under subsection (4) of this section, relieved from obligations owed to the accountable entity or significant related entity under the contract.

Application to the Federal Court

(4) A party to a contract to which subsection (3) applies may apply to the Federal Court of Australia for an order relating to the effect on the contract of a direction under section 60. The order may deal with matters including (but not limited to):

(a) requiring a party to the contract to fulfil an obligation under the contract despite subsection (3) of this section; or

(b) obliging a party to the contract to take some other action (for example, paying money or transferring property) in view of obligations that were fulfilled under the contract before the direction was made.

The order must not require a person to take action that would contravene the direction.

Covered bonds

(5) Subsection (2) does not prevent the exercise of a contractual right in relation to an asset that secures liabilities to holders of covered bonds (within the meaning of the *Banking Act 1959*), or their representatives, if payments under the covered bonds to the holders or representatives are not made.

74 Information to the Minister about certain directions

(1) If the Minister requests the Regulator to provide information about:

(a) any directions under section 60 or 61 to a particular accountable entity; or

(b) any directions made under section 60 or 61, during a specified period, to any accountable entities;

the Regulator must comply with the request.

(2) The Regulator may provide any information that it considers appropriate to the Minister about:

(a) any directions given under section 60 or 61; or

(b) any revocations of any such directions.

(3) If the Regulator provides the Minister with information about a direction and then later revokes the direction, the Regulator must notify the Minister of the revocation of the direction as soon as practicable after the revocation.

(4) Failure to comply with this section does not affect the validity of the direction or revocation.

75 Relationship with other laws

If a direction given under section 60 or 61 is inconsistent with the Minister rules or the Regulator rules, the direction prevails and the rules, to the extent of the inconsistency, do not have any effect.

Division 6—Civil penalties

76 Civil penalty provision for non‑compliance with obligations

(1) A person contravenes this subsection if:

(a) the person is an accountable entity; and

(b) the person is subject to an obligation under Chapter 2; and

(c) the person fails to comply with the obligation.

Note: It is generally not necessary to prove a person’s state of mind in proceedings for a contravention of a civil penalty provision (see section 94 of the Regulatory Powers Act).

(2) A person is liable to a civil penalty if the person contravenes subsection (1).

Note: Section 92 of the Regulatory Powers Act (which deals with ancillary contravention of a civil penalty provision) applies in relation to this subsection.

77 Civil penalty provisions—enforcement

Civil penalty provisions enforceable under Regulatory Powers Act

(1) Each civil penalty provision of this Act is enforceable under Part 4 of the Regulatory Powers Act.

Note: Part 4 of the Regulatory Powers Act allows a civil penalty provision to be enforced by obtaining an order for a person to pay a pecuniary penalty for the contravention of the provision.

Authorised applicant

(2) For the purposes of Part 4 of the Regulatory Powers Act, the Regulator is an authorised applicant in relation to the provisions mentioned in subsection (1).

Relevant court

(3) For the purposes of Part 4 of the Regulatory Powers Act, the Federal Court of Australia is a relevant court in relation to the provisions mentioned in subsection (1).

Liability of Crown

(4) Part 4 of the Regulatory Powers Act, as that Part applies in relation to the provisions mentioned in subsection (1), does not make the Crown liable to a pecuniary penalty.

Extension to external Territories

(5) Part 4 of the Regulatory Powers Act, as it applies in relation to the provisions mentioned in subsection (1), extends to every external Territory.

78 Civil penalty provisions—amount of penalty

(1) Despite subsection 82(5) of the Regulatory Powers Act, the pecuniary penalty payable:

(a) by a person; and

(b) under a civil penalty order under Part 4 of that Act (as that Part applies because of section 77 of this Act);

must not be more than the maximum penalty amount worked out under this section for a contravention by the person.

Maximum amount of civil penalty

(2) For the purposes of subsection (1), the maximum penalty amount for a contravention by a body corporate of a civil penalty provision under this Act is the greatest of the following:

(a) 50,000 penalty units;

(b) if the court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3;

(c) either:

(i) 10% of the annual turnover of the body corporate for the 12‑month period ending at the end of the month in which the body corporate contravened, or began to contravene, the provision; or

(ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units—2.5 million penalty units.

Note: For the meanings of ***annual turnover*** and ***benefit derived and detriment avoided***, see section 7.

Additional relevant matter

(3) In addition to the matters a court must take into account under subsection 82(6) of the Regulatory Powers Act in determining the pecuniary penalty for a contravention of a civil penalty provision by an RSE licensee, the court must take into account the impact that the penalty under consideration would have on the beneficiaries of any registrable superannuation entities of which the RSE licensee is a trustee.

Division 7—Enforceable undertakings

79 Enforceable undertakings

Enforceable provisions

(1) The provisions of this Act are enforceable under Part 6 of the Regulatory Powers Act.

Note: Part 6 of the Regulatory Powers Act creates a framework for accepting and enforcing undertakings relating to compliance with provisions.

Authorised person

(2) For the purposes of Part 6 of the Regulatory Powers Act, the Regulator is an authorised person in relation to the provisions mentioned in subsection (1).

Relevant court

(3) For the purposes of Part 6 of the Regulatory Powers Act, the Federal Court of Australia is a relevant court in relation to the provisions mentioned in subsection (1).

Other undertakings

(4) An authorised person may accept an undertaking in connection with a matter in relation to which the Regulator has a power or function under this Act. The undertaking must be expressed to be an undertaking under this subsection.

(5) The power in subsection (4) is in addition to the power of an authorised person under subsection 114(1) of the Regulatory Powers Act.

(6) Part 6 of the Regulatory Powers Act, other than subsections 114(1) and (2), applies to an undertaking accepted under subsection (4) of this section as if it were an undertaking accepted under subsection 114(1) of the Regulatory Powers Act.

Extension to external Territories

(7) Part 6 of the Regulatory Powers Act, as it applies in relation to the provisions mentioned in subsection (1), extends to every external Territory.

Division 8—Injunctions

80 Injunctions

Enforceable provisions

(1) The provisions of this Act are enforceable under Part 7 of the Regulatory Powers Act.

Note: Part 7 of the Regulatory Powers Act creates a framework for using injunctions to enforce provisions.

Authorised person

(2) For the purposes of Part 7 of the Regulatory Powers Act, the Regulator is an authorised person in relation to the provisions mentioned in subsection (1).

Relevant court

(3) For the purposes of Part 7 of the Regulatory Powers Act, the Federal Court of Australia is a relevant court in relation to the provisions mentioned in subsection (1).

Consent injunctions

(4) A relevant court may grant an injunction under Part 7 of the Regulatory Powers Act in relation to a provision mentioned in subsection (1) of this section by consent of all the parties to proceedings brought under that Part, whether or not the court is satisfied that section 121 of that Act applies.

Extension to external Territories

(5) Part 7 of the Regulatory Powers Act, as it applies in relation to the provisions mentioned in subsection (1), extends to every external Territory.

Division 9—Miscellaneous

81 Physical elements of offences

(1) This section applies if a provision of this Act provides that a person contravening another provision of this Act (the ***conduct provision***) commits an offence.

(2) For the purposes of applying Chapter 2 of the *Criminal Code* to the offence, the physical elements of the offence are set out in the conduct provision.

Note: Chapter 2 of the *Criminal Code* sets out general principles of criminal responsibility.

82 Contravening an offence provision or a civil penalty provision

(1) This section applies if a provision of this Act provides that a person contravening another provision of this Act (the ***conduct provision***) commits an offence or is liable to a civil penalty.

(2) For the purposes of this Act, a reference to a contravention of an offence provision or a civil penalty provision includes a reference to a contravention of the conduct provision.

Note: This also affects references in the Regulatory Powers Act to a contravention of an offence provision or a civil penalty provision: see the definition of ***this Act*** in section 7.

83 Self‑incrimination

(1) An individual is not excused from complying with a requirement under this Act to give information, produce a book, account or document or sign a record on the ground that doing so would tend to incriminate the individual.

Note: A body corporate is not entitled to claim the privilege against self‑incrimination.

(2) However, the information given, the record signed or the book, account or document produced by the individual in compliance with the requirement, is not admissible in evidence against the individual in criminal proceedings, other than proceedings in respect of the falsity of the information, if:

(a) before complying with the requirement, the individual claims that giving the information, signing the record or producing the book, account or document might tend to incriminate the individual; and

(b) giving the information, signing the record or producing the book, account or document might in fact tend to incriminate the individual.

(3) If, at general law, an individual would otherwise be able to claim the privilege against self‑exposure to a penalty (other than a penalty for an offence) in relation to giving information, producing a book, account or document, or signing a record under this Act, the individual is not excused from giving the information, producing the book, account or document, or signing the record, under those provisions on that ground.

Note: A body corporate is not entitled to claim the privilege against self‑exposure to a penalty.

84 Legal professional privilege

(1) This section applies if:

(a) under this Act, a person requires a lawyer;

(i) to give information; or

(ii) to produce a book, account or document; and

(b) either:

(i) giving the information would involve disclosing; or

(ii) the book, account or document contains;

a privileged communication made by, or on behalf of or to the lawyer in their capacity as a lawyer.

(2) The lawyer is entitled to refuse to comply with the requirement unless:

(a) if the person to whom, or by or on behalf of whom, the communication was made is a body corporate that is under administration or is being wound up—the administrator or the liquidator of the body; or

(b) otherwise—the person to whom, or by or on behalf of whom, the communication was made;

consents to the lawyer complying with the requirement.

(3) If the lawyer so refuses, they must, as soon as practicable, give to the person who made the requirement a written notice setting out:

(a) if the lawyer knows the name of the person to whom, or by or on behalf of whom, the communication was made—that name and address; and

(b) if subparagraph (1)(a)(i) applies and the communication was made in writing—sufficient particulars to identify the document containing the communication; and

(c) if subparagraph (1)(a)(ii) applies—sufficient particulars to identify the book, account or document, or the part of the book, account or document, containing the communication.

(4) A person commits an offence if the person refuses or fails to comply with a requirement under this section.

Penalty: 30 penalty units.

85 Powers of Court relating to non‑compliance with this Act

(1) If the Regulator or an investigator is satisfied that a person has, without reasonable excuse, failed to comply with a requirement made under this Act, the Regulator or the investigator may, by writing certify the failure to the Federal Court of Australia.

(2) If the Regulator or the investigator certifies the failure under subsection (1), the Federal Court of Australia may inquire into the case and may order the person to comply with the requirement as specified in the order.

Part 5—Review of decisions

86 Reviewable decisions

A decision by the Regulator referred to in column 1 of an item of the following table is a ***reviewable decision***. Each person referred to in column 2 of the item is an ***affected person*** for the decision.

| Reviewable decisions | | |
| --- | --- | --- |
| Item | Column 1  Decision | Column 2  Affected person |
| 1 | A decision under subsection 15(1) not to specify an obligation that an accountable entity need not comply with | The accountable entity |
| 2 | A decision under subsection 15(1) to specify conditions to which a notice specifying an obligation that an accountable entity need not comply with is subject | The accountable entity |
| 3 | A decision under subsection 17(1) not to specify an obligation that an accountable person of an accountable entity, or of a significant related entity of an accountable entity, need not comply with | All of the following:  (a) the accountable person;  (b) the accountable entity;  (c) the significant related entity |
| 4 | A decision under subsection 17(1) to specify conditions to which a notice specifying an obligation that an accountable person of an accountable entity, or of a significant related entity of an accountable entity, need not comply with is subject | All of the following:  (a) the accountable person;  (b) the accountable entity;  (c) the significant related entity |
| 5 | A decision under subsection 24(3) that remuneration of an accountable person of an accountable entity, or of a significant related entity of an accountable entity, is, or is not, variable remuneration | All of the following:  (a) the accountable person;  (b) the accountable entity;  (c) the significant related entity |
| 6 | A decision under subsection 24(3) to vary the remuneration of an accountable person of an accountable entity, or of a significant related entity of an accountable entity, that is, or is not, variable remuneration | All of the following:  (a) the accountable person;  (b) the accountable entity;  (c) the significant related entity |
| 7 | A decision under subsection 24(3) to refuse to vary the remuneration of an accountable person of an accountable entity, or of a significant related entity of an accountable entity, that is, or is not, variable remuneration | All of the following:  (a) the accountable person;  (b) the accountable entity;  (c) the significant related entity |
| 8 | A decision under subsection 25(3) that the value of variable remuneration of an accountable person of an accountable entity, or of a significant related entity of an accountable entity, is to be worked out in a particular way | All of the following:  (a) the accountable person;  (b) the accountable entity;  (c) the significant related entity |
| 9 | A decision under subsection 25(3) to vary the way that the value of variable remuneration of an accountable person of an accountable entity, or of a significant related entity of an accountable entity, is to be worked out | All of the following:  (a) the accountable person;  (b) the accountable entity;  (c) the significant related entity |
| 10 | A decision under subsection 25(3) to refuse to vary the way that the value of variable remuneration of an accountable person of an accountable entity, or of a significant related entity of an accountable entity, is to be worked out | All of the following:  (a) the accountable person;  (b) the accountable entity;  (c) the significant related entity |
| 11 | A decision under subsection 39(1) to disqualify a person from being or acting as an accountable person | All of the following:  (a) the person;  (b) an accountable entity;  (c) a significant related entity |
| 12 | A decision under subsection 40(1) to vary or revoke a disqualification of a person from being or acting as an accountable person | All of the following:  (a) the person;  (b) an accountable entity;  (c) a significant related entity |
| 13 | A decision under subsection 40(1) to refuse to vary or revoke a disqualification of a person from being or acting as an accountable person | All of the following:  (a) the person;  (b) an accountable entity;  (c) a significant related entity |
| 14 | A decision under subsection 60(1) to give a direction to an accountable entity to do something, or to cause something to be done | Both of the following:  (a) the accountable entity;  (b) if another person is subject to the direction—that person |
| 15 | A decision under subsection 60(1) to vary or revoke a direction given to an accountable entity to do something, or to cause something to be done | Both of the following:  (a) the accountable entity;  (b) if another person is subject to the direction—that person |
| 16 | A decision under subsection 60(1) to refuse to vary or revoke a direction given to an accountable entity to do something, or to cause something to be done | Both of the following:  (a) the accountable entity;  (b) if another person is subject to the direction—that person |
| 17 | A decision under subsection 61(1) to give a direction to an accountable entity to reallocate a responsibility of a person | Both of the following:  (a) the accountable entity;  (b) the person |
| 18 | A decision under subsection 61(1) to vary or revoke a direction given to an accountable entity to reallocate a responsibility of a person | Both of the following:  (a) the accountable entity;  (b) the person |
| 19 | A decision under subsection 61(1) to refuse to vary or revoke a direction given to an accountable entity to reallocate a responsibility of a person | Both of the following:  (a) the accountable entity;  (b) the person |

87 Notice of decisions and review rights

(1) If written notice of a reviewable decision is given to an affected person, the notice:

(a) must include a statement setting out particulars of the person’s review rights; and

(b) may impose conditions relating to the disclosure of information contained in reasons for the decision that are included in the notice.

(2) A person commits an offence if:

(a) the person is given a notice of a reviewable decision; and

(b) the notice includes a condition relating to the disclosure of information; and

(c) the person fails to comply with the condition.

Penalty: Imprisonment for 2 years.

88 Affected person may request reconsideration of reviewable decision

(1) An affected person for a reviewable decision may request the decision‑maker to reconsider the decision.

Note: For the meaning of ***decision‑maker***, see section 7.

(2) The request must:

(a) be made in writing; and

(b) set out the reasons for the request; and

(c) be given to the decision‑maker within 21 days after the affected person is notified of the reviewable decision.

89 Reconsideration of reviewable decision

(1) If a request is made under section 88 by an affected person for a reviewable decision, the decision‑maker must:

(a) personally reconsider the decision to which the application relates; or

(b) cause the decision to be reconsidered by a delegate of the decision‑maker who:

(i) was not involved in making the decision; and

(ii) occupies a position that is at least the same level as that occupied by the person who made the decision.

The person who reconsiders the decision is the ***internal decision reviewer***.

(2) After reconsidering the reviewable decision, the internal decision reviewer must:

(a) affirm the decision; or

(b) vary the decision; or

(c) set the decision aside and substitute a new decision.

(3) After the internal decision reviewer makes the reconsideration decision, the reviewer must give written notice of the following to the applicant:

(a) the reconsideration decision;

(b) the date that decision takes effect;

(c) the reasons for that decision.

Note: Section 27A of the *Administrative Appeals Tribunal Act 1975* requires the applicant to be notified of the applicant’s review rights.

(4) The notice may impose conditions relating to the disclosure of information contained in the reasons for the decision.

(5) A person commits an offence if:

(a) the person is given a notice under subsection (3); and

(b) the notice includes a condition relating to the disclosure of information; and

(c) the person fails to comply with the condition.

Penalty: Imprisonment for 2 years.

(6) The internal decision reviewer is taken to have affirmed the reviewable decision if the reviewer does not give notice of the reconsideration decision to the applicant within 60 days after receiving the application.

(7) The reconsideration decision is taken to have been made under the provision under which the reviewable decision was made other than for the purposes of section 88.

90 Review by the Administrative Appeals Tribunal

(1) Applications may be made to the Administrative Appeals Tribunal for review of a reconsideration decision of an internal decision reviewer.

Note: For the definitions of ***internal decision reviewer*** and ***reconsideration decision***, see section 7.

(2) An application under subsection (1) may be made only by, or on behalf of, a person affected by the reviewable decision.

(3) Subsection (2) has effect despite subsection 27(1) of the *Administrative Appeals Tribunal Act 1975*.

Part 6—Miscellaneous

91 Indemnifying accountable entities

(1) A related body corporate of an accountable entity must not (whether by agreement or by making a payment and whether directly or through an interposed entity):

(a) indemnify the accountable entity against the consequences of breaching an obligation under this Act; or

(b) pay, or agree to pay, a premium for a contract insuring the accountable entity against the consequences of breaching an obligation under this Act.

(2) Subsection (1) does not apply to a liability for legal costs.

(3) Anything that purports to indemnify or insure a person against a liability, or exempt them from a liability, is void to the extent that it contravenes subsection (1).

92 Causes of action not created

This Act does not have the effect of creating a cause of action that would not have existed if this Act had not been enacted.

93 Compensation for acquisition of property

(1) If the operation of this Act would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph), the Commonwealth is liable to pay a reasonable amount of compensation to the person.

(2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court of Australia or the Supreme Court of a State or Territory for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

94 Conduct of directors, employees and agents

State of mind of an individual

(1) If, in proceedings for an offence against this Act, it is necessary to establish the state of mind of an individual in relation to particular conduct, it is sufficient to show:

(a) that the conduct was engaged in by an employee or agent of the individual within the scope of actual or apparent authority; and

(b) that the employee or agent had the state of mind.

Conduct of an individual

(2) Any conduct engaged in on behalf of an individual by an employee or agent of the individual within the scope of actual or apparent authority is taken to have been engaged in also by the individual unless the individual establishes that they took reasonable precautions and exercised due diligence to avoid the conduct.

Note: Part 2.5 of the *Criminal Code* and section 97 of the Regulatory Powers Act deal with responsibility of bodies corporate for offences and civil penalties.

Limitation on imprisonment

(3) If:

(a) an individual is convicted of an offence; and

(b) the individual would not have been convicted of the offence if subsections (1) and (2) had not been enacted;

the individual is not liable to be punished by imprisonment for that offence.

Extended meaning of state of mind

(4) A reference in subsection (1) to the state of mind of a person includes a reference to:

(a) the person’s knowledge, intention, opinion, belief or purpose; and

(b) the person’s reasons for the intention, opinion, belief or purpose.

Engaging in conduct

(5) A reference in this section to engaging in conduct includes a reference to failing or refusing to engage in conduct.

95 Protection from liability—general

(1) A person is not subject to any liability to any person in respect of anything done, or omitted to be done, in good faith and without negligence in the exercise or performance, or the purported exercise or performance, of powers, functions or duties under this Act.

(2) Subsection (1) does not apply to a person referred to in section 58 of the *Australian Prudential Regulation Authority Act 1998* and, to avoid doubt, does not affect the operation of that section.

Note: Section 58 of the *Australian Prudential Regulation Authority Act 1998* deals with protection from liability for APRA, APRA members, APRA staff members and their agents.

96 Protection from liability—directions and secrecy

(1) An action, suit or proceeding (whether criminal or civil) does not lie against a person in relation to anything done, or omitted to be done, in good faith by the person if:

(a) the person does the thing, or omits to do the thing, for the purpose of any of the following:

(i) complying with a direction under this Act given by the Regulator to an accountable entity;

(ii) complying with section 64 (secrecy) in relation to a direction under this Act given by the Regulator to an accountable entity; and

(b) it is reasonable for the person to do the thing, or to omit to do the thing, in order to achieve that purpose; and

(c) the person is any of the following:

(i) an officer or senior manager of the accountable entity, or of a member of the accountable entity’s relevant group;

(ii) an employee or agent of the accountable entity, or of a member of the accountable entity’s relevant group;

(iii) the accountable entity or a member of the accountable entity’s relevant group.

Note: For the definition of ***relevant group***, see section 7.

(2) For the purposes of paragraph (1)(b), treat it as reasonable for a person to do a thing, or to omit to do a thing, in order to achieve a purpose unless no reasonable person in that person’s position would do the thing, or omit to do the thing, in order to achieve that purpose.

(3) In this section:

***employee*** of an accountable entity, or of a member of an accountable entity’s relevant group, includes a person engaged to provide advice or services to the accountable entity or member.

97 Protection from liability—provisions do not limit each other

The following provisions do not limit the operation of each other:

(a) section 95 of this Act;

(b) section 96 of this Act;

(c) section 58 of the *Australian Prudential Regulation Authority Act 1998*.

98 Review of operation of this Act

(1) The Minister must cause a review of the operation of this Act to be undertaken as soon as possible after the fifth anniversary of the commencement of this Act.

(2) The persons undertaking the review must give the Minister a written report of the review within 6 months of the commencement of the review.

(3) The Minister must cause a copy of the report of the review to be tabled in each House of the Parliament within 15 sitting days of that House after the report is given to the Minister.

99 Minister rules

(1) The Minister may, by legislative instrument, make rules (the ***Minister rules***) prescribing matters:

(a) required or permitted by this Act to be prescribed by the Minister rules; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) To avoid doubt, the Minister rules may not do the following:

(a) create an offence or civil penalty;

(b) provide powers of:

(i) arrest or detention; or

(ii) entry, search or seizure;

(c) impose a tax;

(d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;

(e) directly amend the text of this Act.

(3) In this section, a reference to this Act does not include a reference to the Minister rules, the Regulator rules or the Regulatory Powers Act.

100 Regulator rules

(1) APRA and ASIC may jointly, by legislative instrument, make rules (the ***Regulator rules***) prescribing matters:

(a) required or permitted by this Act to be prescribed by the Regulator rules; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) To avoid doubt, the Regulator rules may not do the following:

(a) create an offence or civil penalty;

(b) provide powers of:

(i) arrest or detention; or

(ii) entry, search or seizure;

(c) impose a tax;

(d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;

(e) directly amend the text of this Act.

(3) Regulator rules that are inconsistent with the Minister rules have no effect to the extent of the inconsistency, but the Regulator rules are taken to be consistent with the Minister rules to the extent that the Regulator rules are capable of operating concurrently with the Minister rules.

(4) In this section, a reference to this Act does not include a reference to the Regulator rules, the Minister rules or the Regulatory Powers Act.