|  |
| --- |
| **EXPOSURE DRAFT** |

Inserts for

Financial Regulator Reform (No. 1) Bill 2019: Banning orders

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

Schedule #—Banning orders

Part 1—Corporations amendments

Corporations Act 2001

1 Section 9

Insert:

***banning order*** means an order made under subsection 920A(1).

2 Section 9 (definition of *control*)

Repeal the definition, substitute:

***control***:

 (a) unless paragraph (b) applies—has the meaning given by section 50AA; and

 (b) when used in Part 7.6—has the meaning given by section 910B.

3 Section 9

Insert:

***linked to a refusal or failure to give effect to a determination made by AFCA*** has the meaning given by section 910C.

4 Section 910A (definition of *control*)

Repeal the definition.

5 At the end of Division 1 of Part 7.6

Add:

910B Meaning of *control*

 (1) ***Control***, of a body corporate, is:

 (a) having the capacity to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the body corporate; or

 (b) directly or indirectly holding more than one half of the issued share capital of the body corporate (not including any part of the issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital, and not including MCIs); or

 (c) having the capacity to control the composition of the body corporate’s board or governing body; or

 (d) having the capacity to determine the outcome of decisions about the body corporate’s financial and operating policies, taking into account:

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

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

 (2) ***Control***, of an entity other than a body corporate, is:

 (a) having the capacity to control the composition of the entity’s board or governing body (if any); or

 (b) having the capacity to determine the outcome of decisions about the entity’s financial and operating policies, taking into account:

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

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

910C Meaning of *linked to a refusal or failure to give effect to a determination made by AFCA*

 (1) An entity is ***linked to a refusal or failure to give effect to a determination made by AFCA*** if:

 (a) a complaint is made under the AFCA scheme; and

 (b) AFCA makes a determination relating to the complaint; and

 (c) AFCA becomes aware that a party to the complaint (the ***primary entity***) may have refused or failed to give effect to the determination; and

 (d) AFCA gives particulars of the refusal or failure in accordance with subsection 1052E(1); and

 (e) the first‑mentioned entity is the primary entity or is covered by subsection (2) of this section.

 (2) This subsection covers an entity if, at any time during the period starting when AFCA makes the determination and ending when AFCA so gives the particulars, the entity is:

 (a) an officer of the primary entity; or

 (b) if the primary entity is an individual—substantially or significantly involved in the management of:

 (i) a financial services business carried on by the primary entity; or

 (ii) credit activities (within the meaning of the *National Consumer Credit Protection Act 2009*) engaged in by the primary entity; or

 (c) if the primary entity is the multiple trustees of a trust—one of the trustees of the trust.

6 Before subsection 920A(1)

Insert:

Making a banning order

7 Subsection 920A(1)

Omit “make a banning order against a person, by giving written notice to the person,”, substitute “, in writing, make one or more orders (***banning orders***) against a person”.

8 Paragraph 920A(1)(bb)

Before “an insolvent under administration”, insert “a Chapter 5 body corporate or”.

9 Paragraphs 920A(1)(d) and (da)

Repeal the paragraphs, substitute:

 (d) ASIC has reason to believe that the person is not a fit and proper person to:

 (i) provide one or more financial services; or

 (ii) perform one or more functions as an officer of an entity that carries on a financial services business; or

 (iii) control an entity that carries on a financial services business; or

 (da) ASIC has reason to believe that the person is not adequately trained, or is not competent, to:

 (i) provide one or more financial services; or

 (ii) perform one or more functions as an officer of an entity that carries on a financial services business; or

 (iii) control an entity that carries on a financial services business; or

10 At the end of subsection 920A(1)

Add:

 ; or (j) the person has, at least twice, been linked to a refusal or failure to give effect to a determination made by AFCA relating to a complaint about an act or omission in the course of:

 (i) carrying on a financial services business; or

 (ii) engaging in credit activities (within the meaning of the *National Consumer Credit Protection Act 2009*); or

 (k) subsection (1C) applies to the person in relation to 2 or more corporations; or

 (l) for a person who is not an individual:

 (i) one or more banning orders are in force; or

 (ii) ASIC is satisfied it could make a banning order;

 against another person who is an officer of the person and who is performing one or more functions involved in the person’s carrying on of a financial services business; or

 (m) for a person who is the multiple trustees of a trust:

 (i) one or more banning orders are in force; or

 (ii) ASIC is satisfied it could make a banning order;

 against any of the trustees of the trust.

Note: To work out whether a person has been linked as described in paragraph (j), see section 910C.

11 Subsection 920A(1A)

Repeal the subsection, substitute:

When a person is not a fit and proper person

 (1A) For the purposes of paragraph (1)(d), ASIC must (subject to Part VIIC of the *Crimes Act 1914*) have regard to the following:

 (a) whether any of the following of the person has ever been suspended or cancelled:

 (i) an Australian financial services licence;

 (ii) an Australian credit licence, or a registration under the Transitional Act, within the meaning of the *National Consumer Credit Protection Act 2009*;

 (b) whether any of the following has ever been made against the person:

 (i) a banning order, or a disqualification order under Subdivision B of this Division;

 (ii) a banning order, or a disqualification order, under Part 2‑4 of the *National Consumer Credit Protection Act 2009*;

 (c) if the person is an individual—whether the person has ever been disqualified from managing corporations under Part 2D.6 of this Act;

 (d) whether the person has ever been banned from engaging in a credit activity (within the meaning of the *National Consumer Credit Protection Act 2009*) under a law of a State or Territory;

 (e) whether the person has ever:

 (i) been a Chapter 5 body corporate or an insolvent under administration; or

 (ii) if the person is a partnership—had a creditor’s petition or a debtor’s petition presented against it under Division 2 or 3 of Part IV of the *Bankruptcy Act 1966*;

 (f) if the person is the multiple trustees of a trust—whether a trustee of the trust has ever been a Chapter 5 body corporate or an insolvent under administration;

 (g) whether, in the last 10 years, the person has been convicted of an offence;

 (h) any relevant information given to ASIC by a State or Territory, or an authority of a State or Territory, in relation to the person;

 (i) any other matter prescribed by the regulations;

 (j) any other matter ASIC considers relevant.

Note: Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them.

12 Before subsection 920A(1B)

Insert:

When a person contravenes a financial services law

13 After subsection 920A(1B)

Insert:

When a person has been an officer of a corporation unable to pay its debts

 (1C) This subsection applies to a person in relation to a corporation if, within the last 7 years:

 (a) the person was an officer of the corporation when the corporation was:

 (i) carrying on a financial services business; or

 (ii) engaging in credit activities (within the meaning of the *National Consumer Credit Protection Act 2009*); and

 (b) either:

 (i) while the person was an officer of the corporation; or

 (ii) within the 12 months after the person ceased to be an officer of the corporation;

 the corporation was wound up and a liquidator lodged a report under subsection 533(1) (including that subsection as applied by section 526‑35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation’s inability to pay its debts.

Person to be given an opportunity to be heard

14 Subsection 920A(3)

Omit “the banning order”, substitute “a banning order”.

15 At the end of section 920A

Add:

Copy of banning order to be given to the person

 (4) ASIC must give a copy of a banning order to the person against whom it was made.

16 Section 920B (heading)

Repeal the heading, substitute:

920B What a banning order prohibits

17 Subsections 920B(1) and (2)

Repeal the subsections, substitute:

 (1) A banning order made against a person may specify that the person is prohibited from doing one or more of the following:

 (a) providing any financial services;

 (b) providing specified financial services in specified circumstances or capacities;

 (c) controlling, whether alone or in concert with one or more other entities, an entity that carries on a financial services business;

 (d) performing any function involved in the carrying on of a financial services business (including as an officer, manager, employee, contractor or in some other capacity);

 (e) performing specified functions involved in the carrying on of a financial services business.

 (2) The banning order may specify that a particular prohibition specified in the order applies against the person:

 (a) if the sole ground for the banning order is because paragraph 920A(1)(k) applies—for a specified period of up to 5 years; or

 (b) otherwise—either permanently or for a specified period.

Note: This subsection applies separately to each prohibition specified in the order.

18 Paragraph 921A(2)(a)

Repeal the paragraph, substitute:

 (a) one or more orders disqualifying the person, permanently or for a specified period, from doing one or more of the following:

 (i) providing any financial services;

 (ii) providing specified financial services in specified circumstances or capacities;

 (iii) controlling, whether alone or in concert with one or more other entities, an entity that carries on a financial services business;

 (iv) performing any function involved in the carrying on of a financial services business (including as an officer, manager, employee, contractor or in some other capacity);

 (v) performing specified functions involved in the carrying on of a financial services business; or

19 Paragraph 1200G(6)(c)

Omit “under section 920A”.

20 Paragraph 1317P(1)(e)

Repeal the paragraph, substitute:

 (e) a banning order, or an order by the Court under section 921A (about disqualification by the Court), has been made against the person.

21 Paragraphs 1349(1)(j), (3)(h) and (4)(e)

Omit “under section 920A of this Act”.

22 In the appropriate position in Chapter 10

Insert:

Part 10.39—Transitional provisions relating to the Financial Regulator Reform (No. 1) Act 2019

1663 Application—conduct etc. relevant to new banning and disqualification orders

 When making either of the following orders at or after the commencement of Part 1 of Schedule # to the *Financial Regulator Reform (No. 1)* *Act 2019*:

 (a) a banning order;

 (b) a disqualification order described in paragraph 921A(2)(a) of this Act;

regard may be had to acts, omissions, states of affairs or matters before, at or after that commencement.

1664 Transitional—existing banning and disqualification orders

 (1) An order made under subsection 920A(1), that is in force immediately before the commencement of Part 1 of Schedule # to the *Financial Regulator Reform (No. 1)* *Act 2019*, continues in force (and may be dealt with) as if it had been made under that subsection as amended by that Act.

 (2) An order described in paragraph 921A(2)(a) that:

 (a) was made under subsection 921A(2); and

 (b) is in force immediately before the commencement of Part 1 of Schedule # to the *Financial Regulator Reform (No. 1)* *Act 2019*;

continues in force (and may be dealt with) as if it had been made under that subsection as amended by that Act.

 (3) Section 920D applies to an order covered by subsection (1) of this section as if the words “because of a change in any of the circumstances based on which ASIC made the order” were omitted from subsection 920D(1).

Part 2—Consumer credit amendments

National Consumer Credit Protection Act 2009

23 Subsection 5(1) (definition of *banning order*)

Repeal the definition, substitute:

***banning order*** means an order made under subsection 80(1).

24 Subsection 5(1)

Insert:

***control*** has the meaning given by section 16A.

25 At the end of Division 4 of Part 1‑2

Add:

16A Meaning of control

 (1) ***Control***, of a body corporate, is:

 (a) having the capacity to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the body corporate; or

 (b) directly or indirectly holding more than one half of the issued share capital of the body corporate (not including any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital, and not including MCIs); or

 (c) having the capacity to control the composition of the body corporate’s board or governing body; or

 (d) having the capacity to determine the outcome of decisions about the body corporate’s financial and operating policies, taking into account:

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

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

 (2) ***Control***, of a person other than a body corporate, is:

 (a) having the capacity to control the composition of the person’s board or governing body (if any); or

 (b) having the capacity to determine the outcome of decisions about the person’s financial and operating policies, taking into account:

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

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

 (3) For the purposes of paragraph (1)(b), ***MCI*** has the same meaning as in the *Corporations Act 2001*, and ***issued*** has the same meaning as in Chapter 7 of that Act.

26 Section 79

Repeal the section, substitute:

79 Guide to this Part

This Part is about banning or disqualifying persons from:

 (a) engaging in credit activities; or

 (b) controlling others who engage in credit activities; or

 (c) performing some or any functions involved in others engaging in credit activities.

The bans are orders made by ASIC under Division 2.

The disqualifications are orders made by the court under Division 3.

27 Before subsection 80(1)

Insert:

Making a banning order

28 Subsection 80(1)

Omit “make a banning order”, substitute “, in writing, make one or more orders (***banning orders***)”.

29 Paragraph 80(1)(b)

Omit “for a person other than the trustees of a trust—”.

30 Paragraph 80(1)(f)

Repeal the paragraph, substitute:

 (f) if ASIC has reason to believe that the person is not a fit and proper person to:

 (i) engage in one or more credit activities; or

 (ii) perform one or more functions as an officer (within the meaning of the *Corporations Act 2001*) of another person who engages in credit activities; or

 (iii) control another person who engages in credit activities; or

 (fa) if ASIC has reason to believe that the person is not adequately trained, or is not competent, to:

 (i) engage in one or more credit activities; or

 (ii) perform one or more functions as an officer (within the meaning of the *Corporations Act 2001*) of another person who engages in credit activities; or

 (iii) control another person who engages in credit activities; or

 (fb) if the person has, at least twice, been linked to a refusal or failure to give effect to a determination made by AFCA (as defined in section 910C of the *Corporations Act 2001*) relating to a complaint about an act or omission in the course of:

 (i) engaging in credit activities; or

 (ii) carrying on a financial services business (within the meaning of the *Corporations Act 2001*); or

 (fc) if subsection (3) applies to the person in relation to 2 or more corporations; or

31 At the end of subsection 80(1)

Add:

 ; or (i) for a person who is not a natural person—if:

 (i) one or more banning orders are in force; or

 (ii) ASIC is satisfied it could make a banning order;

 against another person who is an officer (within the meaning of the *Corporations Act 2001*) of the person and who is performing one or more functions involved in the person’s engaging in of credit activities; or

 (j) for a person who is the multiple trustees of a trust—if:

 (i) one or more banning orders are in force; or

 (ii) ASIC is satisfied it could make a banning order;

 against any of the trustees of the trust.

32 Subsections 80(2) and (3)

Repeal the subsections, substitute:

When a person is not a fit and proper person

 (2) For the purposes of paragraphs (1)(e) and (f), ASIC must (subject to Part VIIC of the *Crimes Act 1914*) have regard to the following:

 (a) whether any of the following of the person has ever been suspended or cancelled:

 (i) a licence, or a registration under the Transitional Act;

 (ii) an Australian financial services licence;

 (b) whether any of the following has ever been made against the person:

 (i) a banning order, or a disqualification order under Part 2‑4;

 (ii) a banning order, or a disqualification order, under Division 8 of Part 7.6 of the *Corporations Act 2001*;

 (c) if the person is a natural person—whether the person has ever been disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001*;

 (d) whether the person has ever been banned from engaging in a credit activity under a law of a State or Territory;

 (e) whether the person has ever been insolvent;

 (f) if the person is the multiple trustees of a trust—whether a trustee of the trust has ever been insolvent;

 (g) whether, in the last 10 years, the person has been convicted of an offence;

 (h) any relevant information given to ASIC by a State or Territory, or an authority of a State or Territory, in relation to the person;

 (i) any other matter prescribed by the regulations;

 (j) any other matter ASIC considers relevant.

Note: Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them.

When a person has been an officer of a corporation unable to pay its debts

 (3) This subsection applies to a person in relation to a corporation if, within the last 7 years:

 (a) the person was an officer (within the meaning of the *Corporations Act 2001*) of the corporation when the corporation was:

 (i) engaging in credit activities; or

 (ii) carrying on a financial services business (within the meaning of the *Corporations Act 2001*); and

 (b) either:

 (i) while the person was such an officer of the corporation; or

 (ii) within the 12 months after the person ceased to be such an officer of the corporation;

 the corporation was wound up and a liquidator lodged a report under subsection 533(1) of that Act (including that subsection as applied by section 526‑35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation’s inability to pay its debts.

Person to be given an opportunity to be heard

33 Paragraphs 80(5)(a) and (6)(a)

Omit “the banning order against the person”, substitute “a banning order against a person”.

34 Before subsection 80(7)

Insert:

Copy of banning order to be given to the person

35 Subsection 80(7)

Omit “the banning order”, substitute “a banning order”.

36 Section 81 (heading)

Repeal the heading, substitute:

81 What a banning order prohibits

37 Subsections 81(1) and (2)

Repeal the subsections, substitute:

 (1) A banning order made against a person may specify that the person is prohibited from doing one or more of the following:

 (a) engaging in any credit activities;

 (b) engaging in specified credit activities in specified circumstances or capacities;

 (c) controlling, whether alone or in concert with one or more other entities, another person who engages in credit activities;

 (d) performing any function involved in the engaging in of credit activities (including as an officer (within the meaning of the *Corporations Act 2001*), manager, employee, contractor or in some other capacity);

 (e) performing specified functions involved in the engaging in of credit activities.

 (2) The banning order may specify that a particular prohibition specified in the order applies against the person:

 (a) if the sole ground for the banning order is because paragraph 80(1)(fc) applies—for a specified period of up to 5 years; or

 (b) otherwise—either permanently or for a specified period.

Note: This subsection applies separately to each prohibition specified in the order.

38 Subsection 86(1)

Omit “an order”, substitute “one or more orders”.

39 Paragraph 86(2)(a)

Repeal the paragraph, substitute:

 (a) one or more orders disqualifying the person, permanently or for a specified period, from doing one or more of the following:

 (i) engaging in any credit activities;

 (ii) engaging in specified credit activities in specified circumstances or capacities;

 (iii) controlling, whether alone or in concert with one or more other entities, another person who engages in credit activities;

 (iv) performing any function involved in the engaging in of credit activities (including as an officer (within the meaning of the *Corporations Act 2001*), manager, employee, contractor or in some other capacity);

 (v) performing specified functions involved in the engaging in of credit activities; or

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

40 In the appropriate position

Insert:

Schedule 9—Application and transitional provisions for the Financial Regulator Reform (No. 1) Act 2019

1 Application—conduct etc. relevant to new banning and disqualification orders

When making either of the following orders at or after the commencement of Part 2 of Schedule # to the *Financial Regulator Reform (No. 1)* *Act 2019*:

 (a) a banning order;

 (b) a disqualification order described in paragraph 86(2)(a) of the National Credit Act;

regard may be had to acts, omissions, states of affairs or matters before, at or after that commencement.

2 Transitional—existing banning and disqualification orders

(1) An order made under subsection 80(1) of the National Credit Act, that is in force immediately before the commencement of Part 2 of Schedule # to the *Financial Regulator Reform (No. 1)* *Act 2019*, continues in force (and may be dealt with) as if it had been made under that subsection as amended by that Part.

(2) An order described in paragraph 86(2)(a) of the National Credit Act that:

 (a) was made under subsection 86(2) of that Act; and

 (b) is in force immediately before the commencement of Part 2 of Schedule # to the *Financial Regulator Reform (No. 1)* *Act 2019*;

continues in force (and may be dealt with) as if it had been made under that subsection as amended by that Part.

(3) Section 83 of the National Credit Act applies to an order covered by subitem (1) as if the words “because of a change in any of the circumstances based on which ASIC made the order” were omitted from subsection 83(1) of that Act.