

EXPOSURE DRAFT

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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.

29/8/2019 3:32 PM

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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

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- 1 the issued share capital that carries no right to participate
2 beyond a specified amount in a distribution of either profits
3 or capital, and not including MCIs); or
4 (c) having the capacity to control the composition of the body
5 corporate's board or governing body; or
6 (d) having the capacity to determine the outcome of decisions
7 about the body corporate's financial and operating policies,
8 taking into account:
9 (i) the practical influence that can be exerted (rather than
10 the rights that can be enforced); and
11 (ii) any practice or pattern of behaviour affecting the body
12 corporate's financial or operating policies (whether or
13 not it involves a breach of an agreement or a breach of
14 trust).
- 15 (2) **Control**, of an entity other than a body corporate, is:
16 (a) having the capacity to control the composition of the entity's
17 board or governing body (if any); or
18 (b) having the capacity to determine the outcome of decisions
19 about the entity's financial and operating policies, taking into
20 account:
21 (i) the practical influence that can be exerted (rather than
22 the rights that can be enforced); and
23 (ii) any practice or pattern of behaviour affecting the
24 entity's financial or operating policies (whether or not it
25 involves a breach of an agreement or a breach of trust).

26 **910C Meaning of *linked to a refusal or failure to give effect to a*** 27 ***determination made by AFCA***

- 28 (1) An entity is ***linked to a refusal or failure to give effect to a***
29 ***determination made by AFCA*** if:
30 (a) a complaint is made under the AFCA scheme; and
31 (b) AFCA makes a determination relating to the complaint; and
32 (c) AFCA becomes aware that a party to the complaint (the
33 ***primary entity***) may have refused or failed to give effect to
34 the determination; and
35 (d) AFCA gives particulars of the refusal or failure in accordance
36 with subsection 1052E(1); and
37 (e) the first-mentioned entity is the primary entity or is covered
38 by subsection (2) of this section.

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

4 (a) an officer of the primary entity; or

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

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

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

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

14 **6 Before subsection 920A(1)**

15 Insert:

16 *Making a banning order*

17 **7 Subsection 920A(1)**

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

21 **8 Paragraph 920A(1)(bb)**

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

24 **9 Paragraphs 920A(1)(d) and (da)**

25 Repeal the paragraphs, substitute:

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

28 (i) provide one or more financial services; or

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

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

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

35 (i) provide one or more financial services; or

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- 1 (ii) perform one or more functions as an officer of an entity
2 that carries on a financial services business; or
3 (iii) control an entity that carries on a financial services
4 business; or

10 At the end of subsection 920A(1)

5 Add:

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

- 10 (i) carrying on a financial services business; or
11 (ii) engaging in credit activities (within the meaning of the
12 *National Consumer Credit Protection Act 2009*); or
13 (k) subsection (1C) applies to the person in relation to 2 or more
14 corporations; or
15 (l) for a person who is not an individual:
16 (i) one or more banning orders are in force; or
17 (ii) ASIC is satisfied it could make a banning order;
18 against another person who is an officer of the person and
19 who is performing one or more functions involved in the
20 person's carrying on of a financial services business; or
21 (m) for a person who is the multiple trustees of a trust:
22 (i) one or more banning orders are in force; or
23 (ii) ASIC is satisfied it could make a banning order;
24 against any of the trustees of the trust.
25

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

11 Subsection 920A(1A)

28 Repeal the subsection, substitute:

29 *When a person is not a fit and proper person*

- 30 (1A) For the purposes of paragraph (1)(d), ASIC must (subject to
31 Part VIIC of the *Crimes Act 1914*) have regard to the following:
32 (a) whether any of the following of the person has ever been
33 suspended or cancelled:
34 (i) an Australian financial services licence;
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- 1 (ii) an Australian credit licence, or a registration under the
2 Transitional Act, within the meaning of the *National*
3 *Consumer Credit Protection Act 2009*;
- 4 (b) whether any of the following has ever been made against the
5 person:
- 6 (i) a banning order, or a disqualification order under
7 Subdivision B of this Division;
- 8 (ii) a banning order, or a disqualification order, under
9 Part 2-4 of the *National Consumer Credit Protection*
10 *Act 2009*;
- 11 (c) if the person is an individual—whether the person has ever
12 been disqualified from managing corporations under
13 Part 2D.6 of this Act;
- 14 (d) whether the person has ever been banned from engaging in a
15 credit activity (within the meaning of the *National Consumer*
16 *Credit Protection Act 2009*) under a law of a State or
17 Territory;
- 18 (e) whether the person has ever:
- 19 (i) been a Chapter 5 body corporate or an insolvent under
20 administration; or
- 21 (ii) if the person is a partnership—had a creditor’s petition
22 or a debtor’s petition presented against it under
23 Division 2 or 3 of Part IV of the *Bankruptcy Act 1966*;
- 24 (f) if the person is the multiple trustees of a trust—whether a
25 trustee of the trust has ever been a Chapter 5 body corporate
26 or an insolvent under administration;
- 27 (g) whether, in the last 10 years, the person has been convicted
28 of an offence;
- 29 (h) any relevant information given to ASIC by a State or
30 Territory, or an authority of a State or Territory, in relation to
31 the person;
- 32 (i) any other matter prescribed by the regulations;
- 33 (j) any other matter ASIC considers relevant.

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

12 Before subsection 920A(1B)

38 Insert:

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When a person contravenes a financial services law

1
2 **13 After subsection 920A(1B)**

3 Insert:

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

6 (1C) This subsection applies to a person in relation to a corporation if,
7 within the last 7 years:

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

10 (i) carrying on a financial services business; or

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

13 (b) either:

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

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

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

22 *Person to be given an opportunity to be heard*

23 **14 Subsection 920A(3)**

24 Omit "the banning order", substitute "a banning order".

25 **15 At the end of section 920A**

26 Add:

27 *Copy of banning order to be given to the person*

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

30 **16 Section 920B (heading)**

31 Repeal the heading, substitute:

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1 920B What a banning order prohibits

2 17 Subsections 920B(1) and (2)

3 Repeal the subsections, substitute:

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

- 6 (a) providing any financial services;
- 7 (b) providing specified financial services in specified
8 circumstances or capacities;
- 9 (c) controlling, whether alone or in concert with one or more
10 other entities, an entity that carries on a financial services
11 business;
- 12 (d) performing any function involved in the carrying on of a
13 financial services business (including as an officer, manager,
14 employee, contractor or in some other capacity);
- 15 (e) performing specified functions involved in the carrying on of
16 a financial services business.

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

- 19 (a) if the sole ground for the banning order is because
20 paragraph 920A(1)(k) applies—for a specified period of up
21 to 5 years; or
- 22 (b) otherwise—either permanently or for a specified period.

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

25 18 Paragraph 921A(2)(a)

26 Repeal the paragraph, substitute:

- 27 (a) one or more orders disqualifying the person, permanently or
28 for a specified period, from doing one or more of the
29 following:
 - 30 (i) providing any financial services;
 - 31 (ii) providing specified financial services in specified
32 circumstances or capacities;
 - 33 (iii) controlling, whether alone or in concert with one or
34 more other entities, an entity that carries on a financial
35 services business;
 - 36 (iv) performing any function involved in the carrying on of a
37 financial services business (including as an officer,
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1 manager, employee, contractor or in some other
2 capacity);
3 (v) performing specified functions involved in the carrying
4 on of a financial services business; or

5 **19 Paragraph 1200G(6)(c)**

6 Omit “under section 920A”.

7 **20 Paragraph 1317P(1)(e)**

8 Repeal the paragraph, substitute:

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

12 **21 Paragraphs 1349(1)(j), (3)(h) and (4)(e)**

13 Omit “under section 920A of this Act”.

14 **22 In the appropriate position in Chapter 10**

15 Insert:

16 **Part 10.39—Transitional provisions relating to the**
17 **Financial Regulator Reform (No. 1) Act**
18 **2019**
19

20 **1663 Application—conduct etc. relevant to new banning and**
21 **disqualification orders**

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

25 (a) a banning order;

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

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

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1664 Transitional—existing banning and disqualification orders

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- (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).

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1 **Part 2—Consumer credit amendments**

2 *National Consumer Credit Protection Act 2009*

3 **23 Subsection 5(1) (definition of *banning order*)**

4 Repeal the definition, substitute:

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

6 **24 Subsection 5(1)**

7 Insert:

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

9 **25 At the end of Division 4 of Part 1-2**

10 Add:

11 **16A Meaning of control**

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

- 13 (a) having the capacity to cast, or control the casting of, more
14 than one half of the maximum number of votes that might be
15 cast at a general meeting of the body corporate; or
16 (b) directly or indirectly holding more than one half of the issued
17 share capital of the body corporate (not including any part of
18 that issued share capital that carries no right to participate
19 beyond a specified amount in a distribution of either profits
20 or capital, and not including MCIs); or
21 (c) having the capacity to control the composition of the body
22 corporate's board or governing body; or
23 (d) having the capacity to determine the outcome of decisions
24 about the body corporate's financial and operating policies,
25 taking into account:
26 (i) the practical influence that can be exerted (rather than
27 the rights that can be enforced); and
28 (ii) any practice or pattern of behaviour affecting the body
29 corporate's financial or operating policies (whether or
30 not it involves a breach of an agreement or a breach of
31 trust).

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- 1 (2) **Control**, of a person other than a body corporate, is:
- 2 (a) having the capacity to control the composition of the person's
- 3 board or governing body (if any); or
- 4 (b) having the capacity to determine the outcome of decisions
- 5 about the person's financial and operating policies, taking
- 6 into account:
- 7 (i) the practical influence that can be exerted (rather than
- 8 the rights that can be enforced); and
- 9 (ii) any practice or pattern of behaviour affecting the
- 10 person's financial or operating policies (whether or not
- 11 it involves a breach of an agreement or a breach of
- 12 trust).
- 13 (3) For the purposes of paragraph (1)(b), **MCI** has the same meaning
- 14 as in the *Corporations Act 2001*, and **issued** has the same meaning
- 15 as in Chapter 7 of that Act.

26 Section 79

16 Repeal the section, substitute:

18 79 Guide to this Part

19 This Part is about banning or disqualifying persons from:

- 20 (a) engaging in credit activities; or
- 21 (b) controlling others who engage in credit activities; or
- 22 (c) performing some or any functions involved in others
- 23 engaging in credit activities.

24 The bans are orders made by ASIC under Division 2.

25 The disqualifications are orders made by the court under

26 Division 3.

27 27 Before subsection 80(1)

28 Insert:

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Making a banning order

1
2 **28 Subsection 80(1)**

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

5 **29 Paragraph 80(1)(b)**

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

7 **30 Paragraph 80(1)(f)**

8 Repeal the paragraph, substitute:

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

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

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

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

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

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

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

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

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

30 (i) engaging in credit activities; or

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

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

35 **31 At the end of subsection 80(1)**

36 Add:

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- 1 ; or (i) for a person who is not a natural person—if:
2 (i) one or more banning orders are in force; or
3 (ii) ASIC is satisfied it could make a banning order;
4 against another person who is an officer (within the meaning
5 of the *Corporations Act 2001*) of the person and who is
6 performing one or more functions involved in the person’s
7 engaging in of credit activities; or
8 (j) for a person who is the multiple trustees of a trust—if:
9 (i) one or more banning orders are in force; or
10 (ii) ASIC is satisfied it could make a banning order;
11 against any of the trustees of the trust.

32 Subsections 80(2) and (3)

12 Repeal the subsections, substitute:

13 *When a person is not a fit and proper person*

- 14
- 15 (2) For the purposes of paragraphs (1)(e) and (f), ASIC must (subject
16 to Part VIIC of the *Crimes Act 1914*) have regard to the following:
17 (a) whether any of the following of the person has ever been
18 suspended or cancelled:
19 (i) a licence, or a registration under the Transitional Act;
20 (ii) an Australian financial services licence;
21 (b) whether any of the following has ever been made against the
22 person:
23 (i) a banning order, or a disqualification order under
24 Part 2-4;
25 (ii) a banning order, or a disqualification order, under
26 Division 8 of Part 7.6 of the *Corporations Act 2001*;
27 (c) if the person is a natural person—whether the person has ever
28 been disqualified from managing corporations under
29 Part 2D.6 of the *Corporations Act 2001*;
30 (d) whether the person has ever been banned from engaging in a
31 credit activity under a law of a State or Territory;
32 (e) whether the person has ever been insolvent;
33 (f) if the person is the multiple trustees of a trust—whether a
34 trustee of the trust has ever been insolvent;
35 (g) whether, in the last 10 years, the person has been convicted
36 of an offence;

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- 1 (h) any relevant information given to ASIC by a State or
2 Territory, or an authority of a State or Territory, in relation to
3 the person;
4 (i) any other matter prescribed by the regulations;
5 (j) any other matter ASIC considers relevant.

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

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

- 12 (3) This subsection applies to a person in relation to a corporation if,
13 within the last 7 years:
14 (a) the person was an officer (within the meaning of the
15 *Corporations Act 2001*) of the corporation when the
16 corporation was:
17 (i) engaging in credit activities; or
18 (ii) carrying on a financial services business (within the
19 meaning of the *Corporations Act 2001*); and
20 (b) either:
21 (i) while the person was such an officer of the corporation;
22 or
23 (ii) within the 12 months after the person ceased to be such
24 an officer of the corporation;
25 the corporation was wound up and a liquidator lodged a
26 report under subsection 533(1) of that Act (including that
27 subsection as applied by section 526-35 of the *Corporations*
28 *(Aboriginal and Torres Strait Islander) Act 2006*) about the
29 corporation's inability to pay its debts.

30 *Person to be given an opportunity to be heard*

31 **33 Paragraphs 80(5)(a) and (6)(a)**

32 Omit "the banning order against the person", substitute "a banning
33 order against a person".

34 **34 Before subsection 80(7)**

35 Insert:

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Copy of banning order to be given to the person

1
2 **35 Subsection 80(7)**

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

4 **36 Section 81 (heading)**

5 Repeal the heading, substitute:

6 **81 What a banning order prohibits**

7 **37 Subsections 81(1) and (2)**

8 Repeal the subsections, substitute:

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

11 (a) engaging in any credit activities;

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

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

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

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

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

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

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

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

30 **38 Subsection 86(1)**

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

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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.

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2 Transitional—existing banning and disqualification orders

- 1
- 2 (1) An order made under subsection 80(1) of the National Credit Act, that
3 is in force immediately before the commencement of Part 2 of Schedule
4 # to the *Financial Regulator Reform (No. 1) Act 2019*, continues in
5 force (and may be dealt with) as if it had been made under that
6 subsection as amended by that Part.
- 7 (2) An order described in paragraph 86(2)(a) of the National Credit Act
8 that:
9 (a) was made under subsection 86(2) of that Act; and
10 (b) is in force immediately before the commencement of Part 2
11 of Schedule # to the *Financial Regulator Reform (No. 1) Act*
12 *2019*;
13 continues in force (and may be dealt with) as if it had been made under
14 that subsection as amended by that Part.
- 15 (3) Section 83 of the National Credit Act applies to an order covered by
16 subitem (1) as if the words “because of a change in any of the
17 circumstances based on which ASIC made the order” were omitted
18 from subsection 83(1) of that Act.
- 19