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| **EXPOSURE DRAFT** |

Inserts for

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

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

Schedule 1—ASIC directions

Part 1—Main amendments to Corporations Act

Corporations Act 2001

1 After Division 6 of Part 7.6

Insert:

Division 7—ASIC directions to financial services licensees

Subdivision A—Directions to financial services licensees

918 ASIC may give direction to financial services licensee

(1) ASIC may make a direction under subsection (3) if any of the following conditions are met:

(a) ASIC has reason to suspect that a financial services licensee has engaged, or is engaging, in conduct that constitutes a contravention of a financial services law;

(b) ASIC has reason to suspect that a financial services licensee will engage in conduct that would constitute a contravention of a financial services law.

(2) If the conditions in either or both of paragraphs (1)(a) and (b) are met in respect of 2 or more contraventions, the direction may relate to any or all of those contraventions.

(3) ASIC may direct the licensee in writing to engage in conduct specified in the direction in order to:

(a) if paragraph (1)(a) applies—address the contravention; and

(b) if paragraph (1)(b) applies—prevent the contravention; and

(c) in any case—prevent a similar or related contravention.

(4) Without limiting the scope of subsection (3), the direction may direct the licensee to engage in specified conduct:

(a) during a specified period; or

(b) by or until a specified time; or

(c) until a specified condition is met.

(5) Without limiting the scope of subsections (3) and (4), the conduct to be engaged in as specified in the direction may include any of the following:

(a) to not authorise persons as authorised representatives of the licensee;

(b) to not accept new clients;

(c) to not transfer a specified asset to another person;

(d) to conduct a review or audit of the activities or records of an authorised representative of the licensee;

(e) to appoint, engage or deploy any of the following to carry out specified tasks:

(i) a specified person;

(ii) a person in a specified class of persons;

(iii) a person who is nominated in writing by the licensee and approved by ASIC under subsection 918E(2);

(iv) a person in a specified class of persons, who is nominated in writing by the licensee and approved by ASIC under subsection 918E(2);

(f) if paragraph (1)(a) applies:

(i) to assess the extent of the contravention; and

(ii) to identify persons who have suffered loss or damage as a result of the contravention; and

(iii) to establish and implement a specified program to compensate those persons;

(g) to take specified steps that are ancillary to conduct mentioned in the previous paragraphs of this subsection;

(h) any other conduct of a kind specified in the regulations.

(6) Without limiting the scope of subparagraph (5)(f)(iii), the specification of the program mentioned in that subparagraph:

(a) may set out features of the program at a broad or detailed level; and

(b) may set out any of the following features:

(i) assessing the extent of the loss or damage suffered by persons as a result of the contravention;

(ii) notifying those persons of aspects of the program;

(iii) providing compensation to those persons without the need for them to take any action (such as making claims);

(iv) any other feature that ASIC considers appropriate.

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

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

918A Publication of direction

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

918B When direction takes effect

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

918C Opportunity for hearings, and consultation with APRA

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

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

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

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

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

918D Varying and repealing directions

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

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

(3) ASIC may, by notice in writing to the financial services licensee in respect of which a direction under subsection 918(3) was made, revoke the direction if, at the time of the revocation, ASIC considers that the direction is no longer necessary or appropriate.

(4) ASIC must publish a copy of a variation or revocation under this section on its website as soon as practicable after making it.

(5) A variation or revocation under this section of a direction takes effect when it is given to the financial services licensee in respect of which the direction was made.

918E ASIC approvals of persons to carry out tasks

(1) This subsection applies if:

(a) ASIC makes a direction under subsection 918(3); and

(b) the direction requires the appointment, engagement or deployment of a person in accordance with subparagraph 918(5)(e)(iii) or (iv); and

(c) the financial services licensee mentioned in that subparagraph nominates, in writing, a person for the purposes of that requirement; and

(d) the financial services licensee gives ASIC a copy of the nomination.

(2) For the purposes of subparagraph 918(5)(e)(iii) or (iv), ASIC may, in writing, decide to approve or to not approve the person nominated.

(3) ASIC must give the financial services licensee a copy of the decision as soon as practicable after making it.

Subdivision B—Interim directions to financial services licensees

918F ASIC may give interim direction to financial services licensee

(1) ASIC may make an interim direction under subsection (3) if:

(a) any of the following conditions are met:

(i) ASIC has reason to suspect that a financial services licensee has engaged, or is engaging, in conduct that constitutes a contravention of a financial services law;

(ii) ASIC has reason to suspect that a financial services licensee will engage in conduct that would constitute a contravention of a financial services law; and

(b) ASIC considers that a delay in making the interim direction would be prejudicial to the public interest.

(2) If the conditions in either or both of subparagraphs (1)(a)(i) and (ii) are met in respect of 2 or more contraventions, the interim direction may relate to any or all of those contraventions.

(3) ASIC may direct the licensee in writing to engage in conduct specified in the interim direction in order to:

(a) if subparagraph (1)(a)(i) applies—address the contravention;

(b) if subparagraph (1)(a)(ii) applies—prevent the contravention;

(c) in any case—prevent a similar or related contravention.

(4) Without limiting the scope of subsection (3), the interim direction may direct the licensee to engage in specified conduct:

(a) during a specified period; or

(b) by or until a specified time; or

(c) until a specified condition is met.

(5) Without limiting the scope of subsections (3) and (4), the conduct to be engaged in as specified in the interim direction may include any of the following:

(a) to not authorise persons as authorised representatives of the licensee;

(b) to not accept new clients;

(c) to not transfer a specified asset to another person;

(d) to take specified steps that are ancillary to conduct mentioned in the previous paragraphs of this subsection.

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

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

918G When direction takes effect

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

918H Expiry of interim direction

(1) Subsection (2) applies if ASIC makes an interim direction under subsection 918F(3) in respect of a financial services licensee because a condition in subparagraph 918F(1)(a)(i) or (ii) was met in relation to a contravention of a financial services law.

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

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

(b) if ASIC makes a direction after that day under subsection 918(3) in respect of the financial services licensee because a condition in paragraph 918(1)(a) or (b) was met in relation to the contravention mentioned in subsection (1)—the time the direction takes effect.

(3) To avoid doubt, subsection (1) does not prevent ASIC from repealing the interim direction under section 918J.

918J Varying and repealing interim directions

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

(2) ASIC may, by notice in writing to the financial services licensee in respect of which an interim direction under subsection 918F(3) was made, revoke the interim direction if, at the time of the revocation, ASIC considers that the interim direction is no longer necessary or appropriate.

(3) A variation or revocation under this section of an interim direction takes effect when it is given to the financial services licensee in respect of which the interim direction was made.

Subdivision C—Enforcement

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

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

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

918L Compliance with conditions of Australian financial services licence

(1) Subsection (2) applies if:

(a) ASIC has made a direction under subsection 918(3) or an interim direction under subsection 918F(3) in respect of a financial services licensee; and

(b) the licensee engages in conduct that is necessary to comply with the direction.

(2) The licensee does not fail to comply with the conditions on its Australian financial services licence merely because it engages in that conduct.

Part 2—Main amendments to National Consumer Credit Protection Act

National Consumer Credit Protection Act 2009

2 After Part 2‑3

Insert:

Part 2‑3A—ASIC directions to licensees

Division 1—Introduction

78A Guide to this Part

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

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

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

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

Division 2—Directions to licensees

78B ASIC may give direction to licensee

(1) ASIC may make a direction under subsection (3) if any of the following conditions are met:

(a) ASIC has reason to suspect that a licensee has engaged, or is engaging, in conduct that constitutes a contravention of the credit legislation;

(b) ASIC has reason to suspect that a licensee will engage in conduct that would constitute a contravention of the credit legislation.

(2) If the conditions in either or both of paragraphs (1)(a) and (b) are met in respect of 2 or more contraventions, the direction may relate to any or all of those contraventions.

(3) ASIC may direct the licensee in writing to engage in conduct specified in the direction in order to:

(a) if paragraph (1)(a) applies—address the contravention; and

(b) if paragraph (1)(b) applies—prevent the contravention; and

(c) in any case—prevent a similar or related contravention.

(4) Without limiting the scope of subsection (3), the direction may direct the licensee to engage in specified conduct:

(a) during a specified period; or

(b) by or until a specified time; or

(c) until a specified condition is met.

(5) Without limiting the scope of subsections (3) and (4), the conduct to be engaged in as specified in the direction may include any of the following:

(a) to not authorise persons as credit representatives of the licensee;

(b) to not accept new clients;

(c) to not transfer a specified asset to another person;

(d) to conduct a review or audit of the activities or records of a credit representative of the licensee;

(e) to appoint, engage or deploy any of the following to carry out specified tasks:

(i) a specified person;

(ii) a person in a specified class of persons;

(iii) a person who is nominated in writing by the licensee and approved by ASIC under subsection 78G(2);

(iv) a person in a specified class of persons, who is nominated in writing by the licensee and approved by ASIC under subsection 78G(2);

(f) if paragraph (1)(a) applies:

(i) to assess the extent of the contravention; and

(ii) to identify persons who have suffered loss or damage as a result of the contravention; and

(iii) to establish and implement a specified program to compensate those persons;

(g) to take specified steps that are ancillary to conduct mentioned in the previous paragraphs of this subsection;

(h) any other conduct of a kind specified in the regulations.

(6) Without limiting the scope of subparagraph (5)(f)(iii), the specification of the program mentioned in that subparagraph:

(a) may set out features of the program at a broad or detailed level; and

(b) may set out any of the following features:

(i) assessing the extent of the loss or damage suffered by persons as a result of the contravention;

(ii) notifying those persons of aspects of the program;

(iii) providing compensation to those persons without the need for them to take any action (such as making claims);

(iv) any other feature that ASIC considers appropriate.

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

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

78C Publication of direction

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

78D When direction takes effect

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

78E Opportunity for hearings, and consultation with APRA

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

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

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

(2) If a proposed direction under subsection 78B(3) will be in respect of a licensee that is a body regulated by APRA, ASIC must not make the direction unless ASIC has consulted APRA.

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

78F Varying and repealing directions

(1) ASIC may, by notice in writing to the licensee in respect of which a direction under subsection 78B(3) was made, vary the direction if, at the time of the variation, ASIC considers that the variation is necessary and appropriate.

(2) Section 78E (opportunity for hearings, and consultation with APRA) applies to a variation under this section in the same way as it applies to the making of a direction under subsection 78B(3).

(3) ASIC may, by notice in writing to the licensee in respect of which a direction under subsection 78B(3) was made, revoke the direction if, at the time of the revocation, ASIC considers that the direction is no longer necessary or appropriate.

(4) ASIC must publish a copy of a variation or revocation under this section on its website as soon as practicable after making it.

(5) A variation or revocation under this section of a direction takes effect when it is given to the licensee in respect of which the direction was made.

78G ASIC approvals of persons to carry out tasks

(1) This subsection applies if:

(a) ASIC makes a direction under subsection 78B(3); and

(b) the direction requires the appointment, engagement or deployment of a person in accordance with subparagraph 78B(5)(e)(iii) or (iv); and

(c) the licensee mentioned in that subparagraph nominates, in writing, a person for the purposes of that requirement; and

(d) the licensee gives ASIC a copy of the nomination.

(2) For the purposes of subparagraph 78B(5)(e)(iii) or (iv), ASIC may, in writing, decide to approve or to not approve the person nominated.

(3) ASIC must give the licensee a copy of the decision as soon as practicable after making it.

Division 3—Interim directions to licensees

78H ASIC may give interim direction to licensee

(1) ASIC may make an interim direction under subsection (3) if:

(a) any of the following conditions are met:

(i) ASIC has reason to suspect that a licensee has engaged, or is engaging, in conduct that constitutes a contravention of the credit legislation;

(ii) ASIC has reason to suspect that a licensee will engage in conduct that would constitute a contravention of the credit legislation; and

(b) ASIC considers that a delay in making the interim direction would be prejudicial to the public interest.

(2) If the conditions in either or both of subparagraphs (1)(a)(i) and (ii) are met in respect of 2 or more contraventions, the interim direction may relate to any or all of those contraventions.

(3) ASIC may direct the licensee in writing to engage in conduct specified in the interim direction in order to:

(a) if subparagraph (1)(a)(i) applies—address the contravention; and

(b) if subparagraph (1)(a)(ii) applies—prevent the contravention; and

(c) in any case—prevent a similar or related contravention.

(4) Without limiting the scope of subsection (3), the interim direction may direct the licensee to engage in specified conduct:

(a) during a specified period; or

(b) by or until a specified time; or

(c) until a specified condition is met.

(5) Without limiting the scope of subsections (3) and (4), the conduct to be engaged in as specified in the interim direction may include any of the following:

(a) to not authorise persons as credit representatives of the licensee;

(b) to not accept new clients;

(c) to not transfer a specified asset to another person;

(d) to take specified steps that are ancillary to conduct mentioned in the previous paragraphs of this subsection.

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

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

78J When direction takes effect

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

78K Expiry of interim direction

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

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

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

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

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

78L Varying and repealing interim directions

(1) ASIC may, by notice in writing to the licensee in respect of which an interim direction under subsection 78H(3) was made, vary the interim direction if, at the time of the variation, ASIC considers that the variation is necessary and appropriate.

(2) ASIC may, by notice in writing to the licensee in respect of which an interim direction under subsection 78H(3) was made, revoke the interim direction if, at the time of the revocation, ASIC considers that the interim direction is no longer necessary or appropriate.

(3) A variation or revocation under this section of an interim direction takes effect when it is given to the licensee in respect of which the interim direction was made.

Division 4—Enforcement

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

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

Civil penalty: 5,000 penalty units.

78N Compliance with conditions of licence

(1) Subsection (2) applies if:

(a) ASIC has made a direction under subsection 78B(3) or an interim direction under subsection 78H(3) in respect of a licensee; and

(b) the licensee engages in conduct that is necessary to comply with the direction.

(2) The licensee does not fail to comply with the conditions on its licence merely because it engages in that conduct.

Part 3—Consequential amendments

Corporations Act 2001

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

Insert:

|  |  |  |
| --- | --- | --- |
| section 918K | financial services licensee to comply with ASIC direction or interim direction | financial services |

Part 4—Application provisions

Corporations Act 2001

4 In the appropriate position in Chapter 10

Insert:

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

[1665] Definitions

In this Part:

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

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

[1666] Application

(1) A direction under subsection 918(3) (as inserted by the amending Part) may be made on or after the commencement day, regardless of whether the relevant condition mentioned in paragraph 918(1)(a) or (b) (as inserted by the amending Part) for making the direction was met before, on or after the commencement day.

(2) An interim direction under subsection 918F(3) (as inserted by the amending Part) may be made on or after the commencement day, regardless of whether the relevant condition mentioned in subparagraph 918F(1)(a)(i) or (ii) (as inserted by the amending Part) for making the interim direction was met before, on or after the commencement day.

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

5 In the appropriate position

Insert:

Schedule XX—Application provisions for Part 2 of Schedule 1 to the Financial Sector Reform (Hayne Royal Commission Response—Stronger Regulators (2020 Measures)) Act 2020

1 Definitions

In this Schedule:

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

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

2 Application

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

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