



# CDPP

Australia's Federal Prosecution Service

## Practice Group Instructions Commercial, Financial and Corruption



### Prosecution of Summary Regulatory Offences by ASIC

Instruction Number: 5  
Last Update: 25 January 2019

This Practice Group Instruction sets out the summary regulatory offences which the CDPP has given the Australian Securities and Investments Commission (**ASIC**) permission to prosecute.

#### Background

1. Clause 7.1 of the Memorandum of Understanding (**MOU**) between ASIC and the CDPP provides that ASIC may prosecute such summary regulatory offences as are agreed from time to time between ASIC and the CDPP.
2. This permission is subject to clause 7.2 of the MOU which sets out categories of matters which ASIC will refer to the CDPP including, for example, matters involving allegations of fraud or dishonesty, matters involving complex questions of law, and matters where it is alleged that the defendant has committed both summary regulatory offences and more serious offences.

#### ***Business Names Registration Act 2011***

3. The CDPP has agreed that ASIC may prosecute the following offences under the *Business Names Registration Act 2011*:

- s 18(1): Carrying on business under an unregistered business name;
- s 19(1): Failure to include business name in written communications;
- s 20(1): Failure to display business name at places open to public;
- s 21(1): Carrying on business under a business name while disqualified; and
- s 37(3): Failure to give ASIC information requested under s 37(1).

4. ASIC may prosecute the above offences whether or not the defendant intends to plead guilty to the relevant charge.

#### ***Corporations Act 2001***

5. The CDPP has agreed that ASIC may prosecute the following offences under the *Corporations Act 2001* (**Corporations Act**):

- s 142(1) & (2): Registered office;
- s 146(1): Change of address of principal place of business;
- s 156(1): Carrying on business using "Limited", "No Liability" or "Proprietary" in name;
- s 188(1) & (2): Company secretary or directors responsible for certain corporate contraventions;
- s 205B(1), (2), (4) & (5): Notice of name and address of directors and secretaries to ASIC;
- s 205E(2): ASIC's power to ask for information about person's position as director or secretary;
- s 250N(1) & (2): Public company must hold AGM [only where the defendant pleads guilty];
- s 286(1): Obligation to keep financial records;

- s 314(1) & (1AB): Annual financial reporting to members [only where the defendant pleads guilty];
- s 317(1): Consideration of reports at AGM [only where the defendant pleads guilty];
- s 319(1): Lodgement of annual reports with ASIC [only where the defendant pleads guilty];
- s 320(1): Lodgement of half-year reports [only where the defendant pleads guilty];
- s 429(2)(b): Officers to report to controller about corporation's affairs;
- s 430(4): Controller may require reports;
- s 431: Controller may inspect books
- s 438B: Directors to help administrator [only where the defendant pleads guilty];
- s 438C(5): Administrator's rights to company's books [only where the defendant pleads guilty];
- s 446C(4): Liquidator may require submission of a report about the company's affairs
- s 475(9): Report as to company's affairs to be submitted to liquidator;
- s 497(4): Directors to give liquidator a report about the company's affairs
- s 530A(6): Officers to help liquidator;
- s 530B(3): Liquidator's rights to company's books [only where the defendant pleads guilty];
- s 530B(6): Non-compliance with liquidator's notice for company's books; and
- s 1274(13): Registers (Contravention of an Order) [only where the defendant pleads guilty].

6. Unless specified to the contrary, ASIC may prosecute the above offences whether or not the defendant intends to plead guilty to the relevant charge.

#### ***National Consumer Credit Protection Act 2009 and National Consumer Credit Code***

7. The CDPP has agreed that ASIC may prosecute the following offences under the *National Consumer Credit Protection Act 2009 (NCCP Act)*:

- s 49(8): Obligation to provide a statement or obtain an audit report if directed by ASIC;
- s 53(5): Obligation to lodge annual compliance certificate;
- s 71(6): Obligation to notify ASIC etc. about credit representatives;
- s 113(5): Credit guide of credit assistance providers;
- s 120(4): Providing the consumer with preliminary assessment;
- s 126(5): Credit guide of credit providers;
- s 127(5): Credit guide of credit providers who are assignees;
- s 132(5): Giving the consumer the assessment;
- s 136(5): Credit guide of credit assistance providers;
- s 143(4): Providing the consumer with the preliminary assessment;
- s 149(5): Credit guide of lessors;
- s 150(5): Credit guide of lessors who are assignees;
- s 155(5): Giving the consumer the assessment;



- s 158(5): Credit guide of credit representatives;
- s 160(6): Credit guide of debt collectors;
- s 218(6): ASIC may refuse to receive document etc. [**only where the defendant pleads guilty**]; and
- s 220(4): ASIC may require person to give information for document registers [**only where the defendant pleads guilty**].

8. The CDPP has agreed that ASIC may prosecute the following offences under the *National Consumer Credit Code*, being Schedule 1 to the *NCCP Act*:

- s 22(1): Negotiating and making credit contracts;
- s 62(1): Guarantees;
- s 87(2): One-off notice to be given the first time a direct debit default occurs;
- s 94(2): Postponement of exercise of rights;
- s 153(1): Interest rates which may be disclosed;
- s 174(3): Disclosures in consumer leases; and
- s 191(3): Contracting out.

10. Unless specified to the contrary, ASIC may prosecute the offences listed in paragraphs 7-8 whether or not the defendant intends to plead guilty to the relevant charge.

#### **Combinations of charges**

11. If the defendant faces a combination of charges, comprising charges that may be prosecuted by ASIC (as specified above) and charges that must be prosecuted by the CDPP (including where a defendant intends to plead not guilty to a charge against s 250N(1) & (2), 314(1) & (1AB), 317(1), 319(1), 320(1), 438B, 438C(5), 530B(3) or 1274(13) of the *Corporations Act*; or s 218(6) or 220(4) of the *NCCP Act*) the *entire matter* will be referred to the CDPP to conduct the hearing.

#### **Attachments**

Letter dated 25 January 2019 from CDPP to ASIC 'Prosecution of Summary Regulatory Offences'<sup>1</sup>



Berdj Tchakerian  
Acting Deputy Director (Commercial, Financial & Corruption)  
25 January 2019

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<sup>1</sup> The consolidated table of offences in this letter replaces four previous letters to ASIC dated:

- 7 July 2003 and 4 September 2014 relating to *Corporations Act 2001* offences;
- 2 July 2010 relating to *National Consumer Credit Protection Act 2009* and the *National Consumer Credit Code* offences; and
- 17 August 2012 relating to *Business Names Registration Act 2011* offences.

Some provisions mentioned in the earlier letters have been omitted from the consolidated list either because they no longer create offences (section 471A(1) of the *Corporations Act 2001* and section 72(3) of the *National Consumer Credit Code*), or because charges for the offences would now be statute barred (*National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* Schedule 2 item 17(8)).