



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 218

Licensing: Administrative action against persons engaging in credit activities

November 2010

About this guide

This guide is for credit licensees and their representatives, as well as registered persons who engage in credit activities during the transition period (i.e. until 30 June 2011).

It describes the administrative powers available to ASIC to enforce compliance with the *National Consumer Credit Protection Act 2009* (for credit licensees) and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (for registered persons). It also indicates the matters ASIC generally takes into account when exercising these powers.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This version was issued on 25 November 2010 and is based on legislation and regulations as at 25 November 2010. This version amends the first bullet point in row 3 of Table 1.

Previous versions:

- Superseded Regulatory Guide 218, issued 10 November 2010

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the credit legislation and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

ASIC is responsible for regulating persons who engage in credit activities in Australia, including:

- licensing those persons;
- monitoring credit licensees for ongoing compliance with their licence and other legal obligations; and
- taking action to enforce the law when it is breached by a credit licensee (or a person who acts on the licensee's behalf).

Our powers to take action to protect consumers may involve the use of an administrative remedy, which may be in addition to civil or criminal remedies.

We will use the remedy, or combination of remedies, that best achieves our aim of promoting compliance with the law and raising ethical standards in the consumer credit industry.

During the transition period (i.e. until 30 June 2011), ASIC may also take administrative action in relation to registered persons in some cases.

RG 218.1 This regulatory guide provides guidance for persons engaging in credit activities on the administrative powers ASIC uses to enforce the credit legislation. It describes the administrative actions available to us, and indicates the matters we generally take into account when exercising these powers, with some illustrative examples.

Note: This guide does not discuss the administrative powers that ASIC may exercise in relation to Australian financial services (AFS) licensees. These are explained in Regulatory Guide 98 *Licensing: Administrative action against financial services providers* (RG 98).

RG 218.2 In this guide, we explain how we approach our task of protecting the public and reinforcing the integrity and reputation of the consumer credit industry.

RG 218.3 This guide focuses solely on our options for administrative action. We do not discuss our other complementary criminal and civil enforcement powers in this guide.

RG 218.4 This guide should be read in conjunction with our regulatory guides on how we administer the *National Consumer Credit Protection Act 2009* (National Credit Act): see 'Related information'.

ASIC's regulatory responsibilities in relation to credit

- RG 218.5 ASIC is responsible for regulating persons who engage in credit activities in Australia, as well as those who engage in credit activities on behalf of persons who carry on credit activities.
- RG 218.6 The national credit regime is intended to ensure that consumers can feel confident when dealing with persons licensed to engage in credit activities, and those acting on their behalf, because they are subject to the legal obligations attaching to their status as a licensee. Our powers to protect consumers include the power to apply a variety of administrative remedies against persons engaging in credit activities, where appropriate.
- RG 218.7 To promote consumers' confidence in the consumer credit industry, we endeavour to ensure that persons engaging in credit activities comply with their obligations and meet community expectations. We educate consumers so that they will be in a better position to make informed decisions. We also educate industry participants to raise compliance standards generally. Where necessary, we will take action to protect consumers as well as deter industry participants from engaging in misconduct.

Credit licensees and their representatives

- RG 218.8 Our regulatory role in relation to credit involves responsibility for licensing persons who wish to engage in credit activities in Australia. These persons are generally required to hold an Australian credit licence (credit licence): s29.
- RG 218.9 We are also responsible for monitoring credit licensees for ongoing compliance with their licence and other legal obligations. To this end, among other things, we conduct surveillance and analyse the complaints we receive.
- RG 218.10 Lastly, we are responsible for taking action to enforce the law when it is breached by a credit licensee or a person acting on behalf of a credit licensee. If appropriate, that enforcement action may involve the use of an administrative remedy, sometimes in addition to civil or criminal remedies.
- RG 218.11 We will use the remedy or combination of remedies that best achieves the aims set out in RG 218.8–RG 218.10.

Transitional responsibilities for registered persons

- RG 218.12 We are also responsible for regulating persons who have registered to engage in credit activities during the transition period, as well as those who engage in credit activities on behalf of registered persons.

Note 1: The transition period is the period until 30 June 2011. Registered persons may continue to engage in credit activities without a credit licence until that date, as long as they have lodged a credit licence application with ASIC by 31 December 2010. From 1 July 2011, a person may only engage in credit activities if they hold a credit licence, or are exempted from this requirement under the credit legislation.

Note 2: For further information on credit registration and transition, see Regulatory Guide 202 *Credit registration and transition* (RG 202).

ASIC's administrative powers

RG 218.13 The credit legislation sets out the remedies available to us. These remedies can be broadly categorised as:

- (a) criminal action;
- (b) civil action; and
- (c) administrative action.

We may use these remedies in combination.

RG 218.14 The administrative actions that may be available to us are:

- (a) immediately suspending or cancelling a credit licence in certain limited circumstances;
- (b) suspending or cancelling a credit licence after offering a hearing;
- (c) banning a person from engaging in credit activities, either immediately, in certain limited circumstances, or after offering a hearing;
- (d) varying credit licence conditions after offering a hearing;
- (e) directing a credit licensee to provide us with a statement, which we may require to be audited, containing specified information about the business, activities or services provided by the licensee or its representatives; and
- (f) accepting an enforceable undertaking as an alternative to other remedies, where we consider it appropriate to do so.

These administrative actions also apply to registered persons during the transition period.

RG 218.15 Our administrative powers and the types of administrative actions available to us are explained in more detail in Section B.

When we will take administrative action

RG 218.16 In determining the type of administrative action that may be taken, we consider the circumstances of each matter on a case-by-case basis. Any administrative action we take may supplement civil or criminal action we are taking against the person or business.

Note: We do not discuss our complementary criminal and civil enforcement powers in this guide.

RG 218.17 Circumstances in which we will take particular administrative action and factors that we may take into account are explained in more detail in Section C.

B ASIC's administrative powers

Key points

Our powers to protect consumers include the power to apply a variety of administrative remedies where credit licensees (and those acting on their behalf) breach their legal obligations.

The administrative remedies that may be available to us are:

- suspending or cancelling a credit licence (with or without a hearing);
- making a temporary or permanent banning order preventing a person from engaging in all or specified credit activities;
- varying or imposing further conditions on a credit licence;
- directing a credit licensee to provide us with a statement, which we may require to be audited, containing specified information about the business, activities or services provided by the licensee or its representatives; and
- accepting an enforceable undertaking as an alternative to other remedies, where we consider it appropriate to do so.

Power to suspend or cancel a credit licence

Immediate suspension or cancellation

- RG 218.18 If appropriate, we may suspend or cancel a credit licence in certain circumstances without giving the licensee the opportunity of a hearing or to make submissions: s54.
- RG 218.19 The circumstances where we may suspend or cancel a credit licence immediately vary according to whether the credit licensee is a natural person, a partnership, a body corporate or a trustee.
- RG 218.20 For instance, if the credit licensee is a body corporate, we may suspend or cancel its licence without offering a hearing if:
- (a) it ceases to engage in credit activities;
 - (b) it becomes insolvent; or
 - (c) a director, secretary or senior manager of the body corporate who performs duties in relation to the credit activities:
 - (i) becomes insolvent;
 - (ii) is convicted of serious fraud;

- (iii) is incapable of managing their affairs due to physical or mental incapacity; or
- (iv) is subject to a prescribed order.

Note: See s54 for an explanation of when a credit licence held by a natural person, a partnership or a trustee can be suspended or cancelled without a hearing.

RG 218.21 During the transition period, we may also suspend or cancel the registration of a registered person without giving the person the opportunity of a hearing or to make submissions. The circumstances also vary according to whether the registered person is a natural person, a partnership, a body corporate or a trustee. For instance, if the registered person is a body corporate, we may cancel the registration if:

- (a) the body corporate:
 - (i) ceases to engage in credit activities;
 - (ii) is banned or disqualified from engaging in credit activities;
 - (iii) is banned from providing financial services;
 - (iv) is banned from engaging in credit activities under state or territory law; or
 - (v) becomes insolvent; or
- (b) a prescribed order is in force against a director, secretary or senior manager of the body corporate who performs duties in relation to the credit activities.

Note: See Sch 2 item 23 of the Transition Act for an explanation of when a registration held by a natural person, a partnership or a trustee can be suspended or cancelled without a hearing.

Suspension or cancellation after offering a hearing

RG 218.22 We may also suspend or cancel a credit licence after giving the licensee an opportunity to appear or be represented at a private hearing before us and to make submissions: s55(4).

Note: The principles and procedures we adopt for these hearings are set out in Regulatory Guide 8 *Hearings practice manual* (RG 8) at www.asic.gov.au/hearingsmanual. For details of our overall approach to the obligations of a credit licensee, see Regulatory Guide 205 *Credit licensing: General conduct obligations* (RG 205) and Regulatory Guide 206 *Credit licensing: Competence and training* (RG 206).

RG 218.23 The circumstances that may give rise to suspension or cancellation under s55 are:

- (a) the application for a credit licence contained materially false or misleading information or omitted material information;

- (b) the credit licensee failed to comply with its obligations as a licensee as specified in s47, or we have reason to believe that the licensee is likely to contravene an obligation under that section;
- (c) we have reason to believe that the credit licensee is not a fit and proper person to engage in credit activities; and
- (d) if the credit licensee is a body corporate, we have reason to believe that a director, secretary or senior manager of the body corporate who performs duties in relation to credit activities is not a fit and proper person to carry on such activities.

RG 218.24 If we suspend or cancel a credit licence, we may, however, specify that the licence continues in effect for the purposes of specified provisions of the National Credit Act, in relation to specified matters, or for a specified period, or both: s62.

Note: An example of when we might allow a credit licence to continue in effect for a specified purpose would be to enable consumers affected by a credit licensee's conduct to have their complaints investigated and acted upon by an ASIC-approved external dispute resolution (EDR) scheme. Ordinarily, if a credit licence were suspended or cancelled, the credit licensee would cease to be a member of the EDR scheme, which would prevent consumers from accessing the service.

RG 218.25 During the transition period, we may also suspend or cancel the registration of a registered person after giving the person an opportunity to appear or be represented at a private hearing before us and to make submissions: Sch 2, item 24 of the Transitional Act.

RG 218.26 The circumstances that may give rise to suspension or cancellation under Sch 2, item 24 of the Transitional Act are:

- (a) the application for registration contained materially false or misleading information or omitted material information;
- (b) the registered person has contravened an obligation under Sch 2, item 16, or we have reason to believe that the registered person is likely to contravene an obligation under that item; or
- (c) if the registered person is a body corporate, partnership or the trustees of a trust, a director or secretary, partner or trustee who performs duties in relation to credit activities:
 - (i) is banned or disqualified from engaging in credit activities;
 - (ii) is banned or disqualified from providing financial services;
 - (iii) is banned from engaging in credit activities under state or territory law;
 - (iv) has had their AFS licence suspended or cancelled in the last seven years in circumstances that require us to offer a hearing or because of mental or physical incapacity;
 - (v) becomes insolvent;

- (vi) is disqualified from managing corporations;
- (vii) is convicted of serious fraud; or
- (viii) is incapable of managing their affairs due to physical or mental incapacity.

RG 218.27 If we suspend or cancel a registered person's registration, we may, however, specify that the registration continues in effect for the purposes of specified provisions of Sch 2 to the Transitional Act, in relation to specified matters, or for a specified period, or both: Sch 2, item 31 of the Transitional Act.

Power to make a banning order

What is a banning order?

RG 218.28 A banning order is a written order by ASIC that prohibits the banned person from engaging in credit activities: s81. We can make an order that either prevents a person from engaging in all credit activities, or from engaging in specified credit activities in specified circumstances. A banning order may be permanent or for a specified period.

RG 218.29 A person subject to a banning order cannot be granted a credit licence contrary to the banning order: s40(1).

Making a banning order

RG 218.30 We can make a banning order that has immediate effect, without giving the person the opportunity of a hearing, if the person has been convicted of serious fraud or the person's credit licence has been suspended or cancelled without a hearing: s80(5) and (6).

RG 218.31 In other cases, we can only make a banning order after giving the person the opportunity to appear or to be represented at a private hearing before us and to make submissions: s80(4).

RG 218.32 The circumstances where we can make a banning order against a person are:

- (a) we have suspended or cancelled a credit licence held by the person;
- (b) the person becomes insolvent (unless they are a trustee of a trust);
- (c) the person has contravened the credit legislation or has been involved in the contravention of the credit legislation by another person;
- (d) we have reason to believe that the person is likely to contravene the credit legislation or be involved in the contravention of the credit legislation by another person;
- (e) if the person is a natural person, the person is convicted of fraud;

- (f) we have reason to believe that the person is not a fit and proper person to engage in credit activities; or
- (g) a prescribed state or territory order is in force against the person.

Note: See s80. For some examples of factors likely to lead to a banning order for a greater or lesser period, see Table 2 in Section C.

Banning orders and registered persons

RG 218.33 During the transition period, we may also ban a person from engaging in credit activities, by making a banning order under s80.

Note: Schedule 2, items 32 and 34 of the Transitional Act enable s80 (dealing with banning a person from the credit industry) to apply during the transition period.

RG 218.34 We can ban a registered person with immediate effect, without giving the person the opportunity of a hearing:

- (a) if we have suspended or cancelled the person's registration and the suspension or cancellation took place without a hearing; or
- (b) if the person is a natural person and has been convicted of serious fraud.

RG 218.35 In other cases we can only ban a person after giving the person the opportunity to appear or to be represented at a private hearing before us and to make submissions. The grounds on which we can make a banning order in relation to a registered person under s80 are:

- (a) we have suspended or cancelled a credit registration held by the person;
- (b) the person becomes insolvent (unless they are a trustee of a trust);
- (c) the person has contravened the credit legislation or has been involved in the contravention of the credit legislation by another person;
- (d) we have reason to believe that the person is likely to contravene the credit legislation or be involved in the contravention of the credit legislation by another person;
- (e) if the person is a natural person, the person is convicted of fraud;
- (f) we have reason to believe that the person is not a fit and proper person to engage in credit activities; or
- (g) a prescribed state or territory order is in force against the person.

Limited and permissive banning orders

RG 218.36 We have the power to impose both limited and permissive banning orders. That is, we may impose a banning order:

- (a) that applies only in specified circumstances or capacities (limited banning order): s81(1); or

- (b) that generally prohibits a person from engaging in credit activities, but also includes a provision allowing the person to do specified acts, in specified circumstances, that the order would otherwise prohibit them from doing (permissive banning order): s81(3).

Nevertheless, we consider that it is generally not appropriate to impose limited or permissive banning orders.

RG 218.37 In considering whether to make a limited or permissive banning order, we will have regard to:

- (a) the factors set out in Table 1, Section C;
- (b) considerations of specific and general deterrence; and
- (c) whether such an order is consistent with our priority of protecting consumers.

RG 218.38 If we were to make a permissive banning order in a particular case, it would likely be subject to conditions that add to existing obligations under the credit legislation and that would address our concerns about the person in question. Conditions that we may consider imposing include:

- (a) conditions requiring the person to undertake and successfully complete additional relevant education or training before being permitted to engage in credit activities; and
- (b) conditions requiring additional monitoring, supervision or audit of the person by their credit licensee or by a suitably qualified external expert appointed by the licensee and approved by us.

RG 218.39 We will not consider imposing conditions that impose any obligations on us. Nor will we consider making a permissive banning order unless a nominated credit licensee has agreed to appoint or continue to engage the person and to comply with any conditions applicable to the licensee under the order.

Other action ASIC may take

Variation of licence conditions

RG 218.40 We may impose conditions, or additional conditions, on a credit licence at any time, whether at the time of granting the licence or subsequently. We may also vary or revoke licence conditions: s45.

RG 218.41 Before imposing or varying credit licence conditions after the licence has been granted, we must give the credit licensee an opportunity to appear or be represented at a private hearing before us and to make submissions to us: s45(5).

- RG 218.42 If appropriate, we may use our power to impose additional licence conditions to address systemic compliance issues. These licence conditions may, for example, preclude the licensee from engaging in certain credit activities, or may impose different or additional compliance obligations on the credit licensee, such as requiring the licensee to engage an independent external compliance consultant and provide us with ongoing reports of its progress in remedying previously identified deficiencies in compliance measures.
- RG 218.43 During the transition period, we may also impose conditions, or additional conditions, on a registered person at any time, whether at the time of registration or subsequently, and may vary or revoke the conditions: Sch 2, item 14 of the Transitional Act. Before imposing or varying any such conditions after the person has been registered, we must give the registered person an opportunity to appear or be represented at a private hearing before us and to make submissions to us: Sch 2, item 14(5) of the Transitional Act.

Direction to provide a statement

- RG 218.44 We may give written notice to a credit licensee to provide statements containing specified information about the credit activities engaged in by the licensee or its representatives. We may also require the statements to be audited before being given to us: s49.
- RG 218.45 Credit licensees also have an obligation to provide us with information and assistance to determine compliance with the licence if reasonably requested: s51.
- RG 218.46 During the transition period, we may also require a registered person to provide statements about its credit activities or those of its representatives, and may require the statements to be audited: Sch 2, item 17 of the Transitional Act.

Direction to apply for a credit licence

- RG 218.47 During the transition period, we may give written notice to a registered person directing them to apply for a credit licence by a day specified in the notice: Sch 2, item 22 of the Transitional Act. Failure to comply with the notice may result in our suspension or cancellation of the registration.

Enforceable undertakings

- RG 218.48 We may accept an enforceable undertaking as an alternative to pursuing other remedies in certain circumstances. We will not, however, accept an enforceable undertaking in lieu of commencing criminal proceedings against a party.

Note: The factors that we might consider when deciding whether to accept an enforceable undertaking from an AFS licensee are set out in Regulatory Guide 100 *Enforceable undertakings* (RG 100). The principles set out in RG 100 are an indication of the approach we would be likely to take in relation to deciding whether to accept an enforceable undertaking from a credit licensee.

- RG 218.49 We will generally only consider accepting an enforceable undertaking when we:
- (a) consider the enforceable undertaking to be an appropriate regulatory outcome having regard to the significance of the issues to the market and the community;
 - (b) consider the person is likely to comply with the enforceable undertaking (any history of complaints may be relevant); and
 - (c) have considered the nature of the alleged breach and the regulatory impact of the enforceable undertaking compared to that of other available enforcement remedies.
- RG 218.50 For example, if there is a range of remedial action that can be taken to rectify the consequences of the misconduct, we may consider an enforceable undertaking as a more effective and flexible outcome. However, an undertaking offering a voluntary disqualification for a specified period may not provide an appropriate regulatory outcome, and we may regard a banning order to be a more appropriate regulatory outcome as:
- (a) we maintain a public register where consumers can find information about persons who have been banned by us;
 - (b) a banning order clearly expresses our view of the nature and extent of the misconduct; and
 - (c) breach of a banning order is a criminal offence (this is not the case with a breach of an enforceable undertaking): s82.

Note: This approach is consistent with the approach taken in *Sage v Australian Securities and Investments Commission* [2005] FCA 1043, where an undertaking offered to the court as an alternative to banning action was not considered to be an adequate alternative.

C When we will take administrative action

Key points

The factors we will take into account when making decisions about whether to take administrative action will depend on the facts of each matter.

These factors may include whether:

- we detect non-compliance by a licensee or by a person acting on the licensee's behalf;
- the non-compliance involves serious corporate wrongdoing;
- an achievable or appropriate remedy exists for us to pursue; and
- we consider action is required to protect consumers and deter other persons in the consumer credit industry from engaging in misconduct.

Where we decide to take administrative action, the type of administrative action we take will depend on the nature and seriousness of the conduct involved.

Our approach to administrative decision making

RG 218.51 Factors underlying our decisions about whether to take administrative action, and what type of administrative action to take, include whether:

- (a) we have jurisdiction in the matter;
- (b) the matter involves serious corporate wrongdoing or serious risk or detriment to consumers or the market;
- (c) an achievable or appropriate remedy exists for us to pursue; and
- (d) the matter satisfies our regulatory and enforcement priorities, including deterrence and public education.

RG 218.52 In determining the type of administrative action which may be taken, we consider the circumstances of each matter on a case-by-case basis. Any administrative action we take may supplement other civil or criminal action we are taking against the person or business.

RG 218.53 In general, we are likely to suspend, cancel or vary a credit licence or ban a person where we have serious concerns about the credit licensee or person, or the way their business is being or has been conducted. This is particularly so in instances where there is a need to protect consumers and where conduct may result in consumer detriment.

- RG 218.54 Similar considerations apply when we consider whether to suspend, cancel or vary a registered person's registration or ban a person during the transition period.

Relevant factors we consider

- RG 218.55 Whether administrative action will be taken will turn on the facts of each matter. While it is not possible to identify all factors relevant to that decision, Table 1 following sets out factors that may be taken into account. Table 2 following provides examples of conduct and indicates the potential consequences that may follow from engaging in that conduct.

Note: The information provided in Table 1 and Table 2 is not exhaustive and there will be other factors or conduct that are not mentioned in this guide that could lead to these outcomes.

Cancelling or suspending a credit licence

- RG 218.56 As noted in RG 218.40–RG 218.50, we can vary credit licence conditions, direct a licensee to provide statements containing specified information or accept an enforceable undertaking. In cases where misconduct cannot be addressed by these actions, we may cancel a credit licence: see RG 218.18–RG 218.27.
- RG 218.57 Examples of misconduct that may result in a credit licence being cancelled are:
- (a) dishonesty by a credit licensee;
 - (b) systemic or persistent breaches of the credit licensee's obligations (and the licensee has failed to address these issues after they were brought to its attention) where there is actual or potential significant risk to consumers; and
 - (c) the credit licensee has, at senior levels of management, misled or hindered us, including by concealing or deliberately destroying records it is required to keep.
- RG 218.58 We may also cancel a licence where the credit licensee:
- (a) does not have the organisational capacity to continue to meet its obligations; or
 - (b) does not comply with the conditions of its credit licence;
 - (c) and there is actual or potential significant risk to consumers.
- RG 218.59 In appropriate cases, public protection considerations may be satisfied by suspending rather than cancelling a credit licence (e.g. to enable necessary remedial or compliance measures to be put in place by the licensee).

Table 1: Key factors we consider in deciding to take administrative action

Factors	Relevant considerations
Nature and seriousness of the suspected misconduct	<ul style="list-style-type: none"> • Scope of the misconduct: <ul style="list-style-type: none"> – the duration of the misconduct and the number of alleged breaches; and – whether the misconduct was systemic or indicative of a pattern of non-compliance with the law • Nature of the misconduct, that is, whether it: <ul style="list-style-type: none"> – involved dishonesty; – involved a breach or loss of confidentiality; or – was deliberate, reckless or negligent, or inadvertent • Whether the person had relied on any professional advice, including legal or accounting advice, in determining whether to engage in the relevant conduct • The amount of any benefit gained or detriment suffered as a result of the misconduct, and the amount of any loss caused to consumers • The remedies previously applied by ASIC for the same or comparable types of breaches or in comparable circumstances
Internal controls	<ul style="list-style-type: none"> • Whether a credit licensee had in place effective internal procedures to ensure compliance with obligations and to detect any breaches of them • Whether those procedures were complied with and whether any breaches of obligations were detected • Where the misconduct was committed by a representative of a credit licensee, whether it indicates a systemic compliance failure of the licensee • Whether a corporate culture conducive to compliance with obligations is evident (e.g. effective educational and compliance programs)
Conduct after the misconduct occurs	<ul style="list-style-type: none"> • Whether a credit licensee elected to draw the misconduct to ASIC's attention in a timely and comprehensive manner • The nature of the other action taken by the credit licensee to deal with the misconduct and its consequences, including: <ul style="list-style-type: none"> – any steps taken to prevent any recurrence of the breach; – remedial steps taken, or planned, to minimise harm or loss from the breach, including appropriate complaints-handling procedures and compensation to affected consumers; – the extent of any assistance and cooperation provided during our investigation of the breach and whether that affected the duration and cost of our investigation; and – whether the person made an early decision not to dispute the breach and whether that affected the time and cost incurred by us in taking administrative action • Whether the person demonstrated any contrition, and the likelihood that the same type of contravention may recur if no administrative action is taken
Previous regulatory record	<ul style="list-style-type: none"> • Whether we have taken any previous action resulting in adverse findings against the credit licensee or representative • Whether the credit licensee or representative has previously given us any undertakings not to do a particular act or engage in particular behaviour • The general compliance history of the credit licensee or representative
Mitigating factors	<ul style="list-style-type: none"> • Whether there would be any personal hardship were a banning order to be made

Table 2: Factors and examples of conduct relating to specific periods of banning

Outcome	Factors	Examples of conduct (indicative only)
Banning for 10+ years and permanent banning	<ul style="list-style-type: none"> • Dishonesty and intent to defraud • Continued, knowing and wilful contraventions of the law and disregard of legal obligations • Causing a large financial loss or making a large financial gain • Previous contraventions of the law • Serious incompetence and irresponsibility • A likelihood that the person will engage in similar contravening conduct in the future • Significant adverse impact on consumer confidence 	<ul style="list-style-type: none"> • Misappropriation of client funds or otherwise engaging in fraud or theft • Falsification, concealment or deliberate destruction of records required to be kept • Engaging in a pattern of persistent contraventions that indicates systemic failure or a general lack of understanding of and regard for compliance
Banning for 3–10 years	<ul style="list-style-type: none"> • Adverse impact on consumer confidence • False, misleading or deceptive, or unconscionable conduct, or conduct with a lesser degree of dishonesty • Causing a significant financial loss or making a significant financial gain • A deliberate course of conduct to enrich themselves at others' expense but with a lesser degree of dishonesty • Incompetence and irresponsibility, but with the possibility that the person may develop requisite skills and abilities • Disregard for the law and compliance with regulations 	<ul style="list-style-type: none"> • Non-compliance with provisions of the National Credit Code • Not making reasonable inquiries in the course of making an unsuitability assessment as required under Ch 3 of the National Credit Act, or providing credit that is unsuitable for the consumer • Engaging in credit activities without either holding a credit licence, acting as the representative of a licensee or being exempted from the licensing requirement • Engaging in credit activities not covered by the credit licence, if one is required • Failing to keep financial records that must be kept • Failing to comply with disclosure requirements, including not disclosing commissions and other benefits
Banning for less than 3 years	<ul style="list-style-type: none"> • Some loss to client, but as a result of carelessness or inadvertence rather than dishonesty • Attempt to remedy the contravention and person has fully cooperated with ASIC • No previous history of contraventions • Indications of clear intention to comply with legal obligations in demonstrated behaviour 	<ul style="list-style-type: none"> • Giving a complying disclosure document, but not within the required time • Failing to lodge documents with ASIC as required

Note: These factors and examples are indicative only. Each case must depend on its particular circumstances and will be determined on a case-by-case basis. The factors in this table have been compiled having regard to the propositions formulated in *HIH Insurance Ltd and HIH Casualty and General Insurance Ltd, Re: ASIC v Adler*, (2002) 42 ACSR 80. A combination of more than one example of misconduct can increase the seriousness of the misconduct, so that a longer banning than indicated by this table is merited. Consumer loss is not a prerequisite for a period of banning.

Variation or cancellation of banning orders

- RG 218.60 We may vary or cancel a banning order if we are satisfied that it is appropriate to do so because of a change in any of the circumstances based on which we made the order: s83(1). This criterion is very broad, and, while it is not possible to identify all of the matters that may be relevant to a decision to vary or cancel a banning order, they may include the following:
- (a) the seriousness of the misconduct that resulted in the order;
 - (b) the period that has elapsed since the order was made and whether the person continues to pose a risk to consumers or to confidence in the consumer credit industry by reason of the conduct for which we made the banning order;
 - (c) any action taken by the person to remedy the misconduct or the cause of the misconduct (e.g. if the misconduct was the result of incompetence, the person may have remedied this by satisfactorily completing relevant training and obtaining relevant qualifications); and
 - (d) any information which, if it had been known to us at the time, would have been relevant to our decision to make the banning order.
- RG 218.61 We may vary or cancel a banning order on our own initiative, or if the person against whom the order was made lodges an application for us to vary or cancel the banning order. If we propose not to vary or cancel a banning order in accordance with an application lodged by a banned person, we must give the person an opportunity to appear or be represented at a private hearing before us and to make submissions: s83(4).
- RG 218.62 If the person applying for the variation or cancellation of a banning order is doing so to work in the consumer credit industry (as will usually be the case), it is likely that we will want to take the following matters into account:
- (a) the nature of the credit activities the person proposes to be involved in and the capacity in which they will do so;
 - (b) where the person proposes to act as a representative of a credit licensee, the compliance record of the licensee; and
 - (c) details of the compliance and supervisory regime under which the person would operate if their application is granted, including details of any independent auditing of the person's activities.

Public notification of decisions

RG 218.63 We are required to make public our decisions to vary, suspend or cancel a credit licence or to make an order banning a person by publishing a notice of the action on our website: s60(3) and 84(3).

RG 218.64 Such a notice will be put on our website no earlier than the second business day after the person concerned has been given notice of the decision. For example, if the banning decision is given to the person on a Wednesday, a notice will be put on our website no earlier than the following Friday.

RG 218.65 Similarly, we will update our publicly accessible credit registers with the relevant details of our administrative actions no earlier than the second business day after the person concerned has been given notice of the decision.

Note: We are required to establish one or more registers relating to credit activities: s213(1). A person may inspect the registers and may make copies of, or take extracts from, them: s214(1). The registers must include details about licensees and people who have been banned: reg29 and 30.

RG 218.66 As a general principle it is our view that there is significant public interest in ensuring that consumers are aware of and informed about action taken by us. Transparency and disclosure are important factors in consumer confidence, and serve to promote deterrence as well as to educate.

Note: The importance of the public being promptly informed about banning decisions under the *Corporations Act 2001* was confirmed by the Full Court of the Federal Court in *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2009] FCFC 185.

Public comment

RG 218.67 Our approach to public comment on our decisions to vary, cancel or suspend a credit licence or make, vary or cancel a banning order will be governed by our stated policy: see Regulatory Guide 47 *Public comment* (RG 47). We will not make a public comment in accordance with that policy before we give notice of the decision on our website or update the relevant register.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an Australian financial services licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
ASIC	Australian Securities and Investments Commission
consumer	A natural person or strata corporation Note: See s5 of the National Credit Act.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
credit	Credit to which the National Credit Code applies Note: See s3 and 5–6 of the National Credit Code.
credit activity (or credit activities)	Has the meaning given in s6 of the National Credit Act
credit legislation	Has the meaning given in s5 of the National Credit Act
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds an Australian credit licence under s35 of the National Credit Act
credit provider	Has the meaning given in s5 of the National Credit Act
credit service	Has the meaning given in s7 of the National Credit Act
insolvent	Has the meaning given by s5 of the National Credit Act
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
National Credit Code	National Credit Code at Schedule 1 of the National Credit Act
prescribed state or territory order	An order under criminal organisation legislation of New South Wales, Queensland and South Australia Note: See reg 5 of the <i>National Consumer Credit Protection Regulations 2010</i>
reg30 (for example)	A regulation in the <i>National Consumer Credit Protection Regulations 2010</i> (in this example numbered 30)

Term	Meaning in this document
registered person	A person who is registered to engage in credit activities under item 12 of Schedule 2 of the Transitional Act
registration	Registration to engage in credit activities granted under item 12 of Schedule 2 of the Transitional Act
representative	Has the meaning given in s5 of the National Credit Act
RG 148 (for example)	An ASIC regulatory guide (in this example numbered 148)
s35 (for example)	A section of the National Credit Act (in this example numbered 35), unless otherwise specified
transition period	The period until 30 June 2011 during which registered persons may continue to engage in credit activities under the Transitional Act, as long as they have lodged a credit licence application with ASIC by 31 December 2010
Transitional Act	<i>National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009</i>

Related information

Headnotes

administrative powers, banning orders, cancellation, suspension, credit licence, credit licensees, licence conditions

Regulatory guides

RG 47 *Public comment*

RG 98 *Licensing: Administrative action against financial services providers*

RG 100 *Enforceable undertakings*

RG 202 *Credit registration and transition*

RG 203 *Do I need a credit licence?*

RG 204 *Applying for and varying a credit licence*

RG 205 *Credit licensing: General conduct obligations*

RG 206 *Credit licensing: Competence and training*

RG 207 *Credit licensing: Financial requirements*

RG 209 *Credit licensing: Responsible lending conduct*

RG 210 *Compensation and insurance arrangements for credit licensees*

Information sheets

INFO 97 *Guidance for small credit businesses*

Legislation

National Credit Act, s5, 6, 7, 29, 35, 40, 45, 47, 49, 51, 54, 55, 62, 80, 81, 82, 83; Transitional Act, Sch 2