



ASIC
Australian Securities &
Investments Commission

**Australian Securities
and Investments Commission**

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Discretionary Payments Team
Risk & Claims Branch
Department of Finance

13 April 2022

By email: sfc@finance.gov.au

Private & Confidential

Dear Sir/Madam

**ACT OF GRACE APPLICATION SUBMITTED BY s22(1)(a)(ii) ON BEHALF OF CLIENTS
OF s22(1)(a)(ii)**

1. ASIC refers to the applications (**Applications**) submitted to the Department of Finance (**Finance**) by s22(1)(a)(ii) seeking act of grace payments totalling \$11,363,828.41 on behalf of 20 individuals (**Applicants**).
2. The Applications are made under subsection 65(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) in relation to losses suffered by the Applicants' dealings with s22(1)(a)(ii) [REDACTED] and his company Papalia Enterprises Pty Ltd (**Papalia Enterprises**). A table listing the Applicants is at **Annexure A**.
3. The Applications are each accompanied by a form signed by each of the Applicants authorising s22(1)(a)(ii) from s22(1)(a)(ii) to act on behalf of each Applicant.

SUMMARY OF ASIC'S RESPONSE

4. ASIC submits that Finance should refuse the Applications as they do not disclose any '*special circumstances*' within the meaning of subsection 65(1) of the PGPA Act.
5. ASIC's actions with respect to **s22(1)(a)(ii)** and Papalia Enterprises were appropriate and reasonable given the information available to ASIC at the time. Further, the Applications do not provide evidence that the loss of the Applicants' investments can be attributed to any acts or omissions by ASIC.

SUMMARY OF THE APPLICATIONS

6. The Applications are supported by a submission prepared by the **s22(1)(a)(ii)** dated 14 February 2022 outlining the circumstances giving rise to each of the Applications (**s22(1)(a)(ii) Submission**).
7. In summary, the **s22(1)(a)(ii)** Submission alleges ASIC was defective in the performance of its regulatory duties which led to financial losses for the Applicants.
8. The **s22(1)(a)(ii)** Submission further alleges that the regulatory and external dispute resolution (**EDR**) framework currently precludes the Applicants from pursuing or obtaining redress and compensation through alternative avenues. Therefore, the Applications constitute actions of last resort for the Applicants.

Grounds for compensation

s47G, s47F



¹ **s22(1)(a)(ii)** Submission at page 7, second paragraph

Victim impact statements

15. ASIC acknowledges the great distress, financial and emotional, suffered by the Applicants as a result of the loss of their investments. ASIC notes that each of the Applications is supported by a statement prepared by each of the Applicants setting out the impact of the financial losses on the Applicants (**Victim Impact Statements**).

² **s22(1)(a)(ii)** Submission at page 7, last paragraph

³ **s22(1)(a)(ii)** Submission at page 8, first paragraph

⁴ **s22(1)(a)(ii)** Submission at page 8, second paragraph

⁵ **s22(1)(a)(ii)** Submission at page 8, third paragraph

⁶ **s22(1)(a)(ii)** Submission at page 8, last paragraph

STATUTORY FRAMEWORK FOR ACT OF GRACE PAYMENTS

16. Subsection 65(1) of the PGPA Act sets out the statutory basis for the Finance Minister to authorise and act of grace payment to an applicant. It states that:

*The Finance Minister may, on behalf of the Commonwealth, authorise, in writing, one or more payments to be made to a person if the Finance Minister considers it **appropriate to do so because of special circumstances.***

(emphasis added)

17. The terms 'appropriate' and 'special circumstances' are not defined in the PGPA Act. Section 65 confers a broad discretion on the Finance Minister or delegate.

18. Resource Management Guide 401: Requests for discretionary financial assistance under the *Public Governance, Performance and Accountability Act 2013* ([RMG 401](#)) describes the types of discretionary financial assistance, including act of grace payments, which may be authorised by the Finance Minister under the PGPA Act.

19. RMG 401 states at paragraphs 3 and 4:

'The act of grace mechanism is generally a remedy of last resort and it is not used when there is another viable remedy available to provide redress in the circumstances giving rise to the application.

If other avenues for a person to receive financial assistance from the Commonwealth (such as existing legislation or schemes), it is recommended that those avenues are investigated before a request is made for an act of grace payment.'

20. RMG 401 states at paragraph 10 that examples of special circumstances which may make it appropriate to approve an act of grace payment include where:

- a. an act of a non-corporate Commonwealth entity has caused an unintended and inequitable result to the individual seeking the payment;
- b. Commonwealth legislation or policy has had an unintended, anomalous, inequitable or otherwise unacceptable impact on the applicant's circumstances and those circumstances were specific to the applicant, outside the parameters of events for which the applicant was responsible or had the capacity to adequately control and consistent with what could be considered to be the broad intention of the relevant legislation; or
- c. the matter is not covered by legislation or a specific policy, but the Commonwealth Government intends to introduce such legislation or policy, and it is considered desirable in a particular case to apply the benefits of the relevant policy prospectively.

ASIC RESPONSE

21. In preparing its response, ASIC has considered the statutory framework for act of grace payments and RMG 401, referred to above at paragraphs 16 to 20.
22. ASIC notes the contents of its *Information Sheet 152: Public comment of ASIC's regulatory activities* ([INFO Sheet 152](#)) and that ASIC's ability to comment on its regulatory activities is restricted because of legislative restrictions on the disclosure of material provided to ASIC in confidence⁷, the *Privacy Act 1988* (Cth), legal professional privilege and public interest immunity.
23. Subject to the restrictions noted at paragraph 22 above, ASIC has prepared a chronology of key events at **Annexure B**.

ASIC's statutory objectives

24. ASIC regulates corporations, managed investment schemes, participants in the financial services industry and people who engage in credit activities under a number of Commonwealth laws. These laws include the *Corporations Act 2001* (Cth) (**Corporations Act**), *Australian Securities and*

⁷ Section 127(1) of the ASIC Act 2001

Investments Commission Act 2001 (Cth) (**ASIC Act**) and the *National Consumer Credit Protection Act 2009* (Cth) (**National Credit Act**).

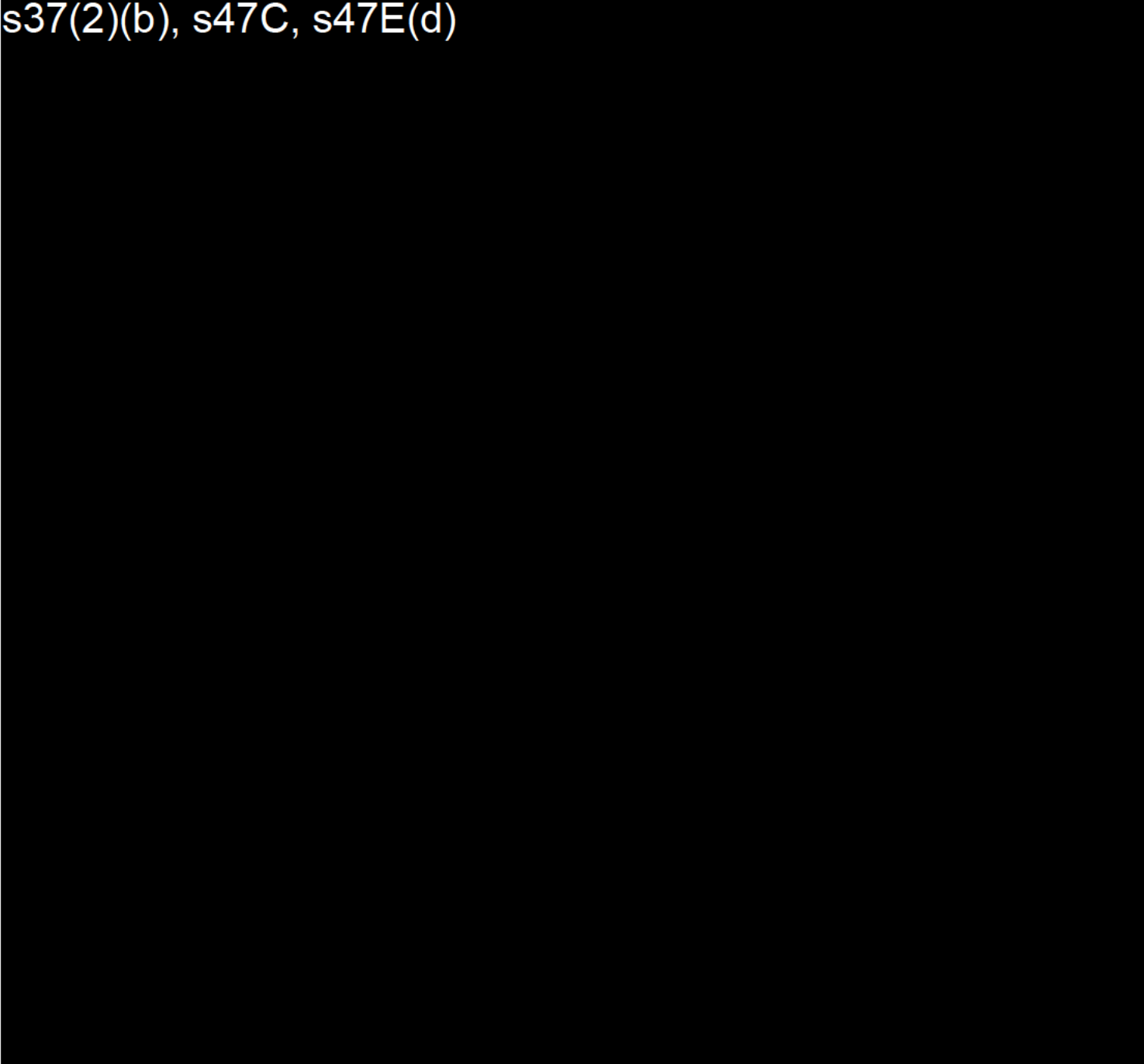
25. The objectives of ASIC, as set out in subsection 1(2) of the ASIC Act, relevantly include that ASIC *'take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it'*: see subsection 1(2)(g).
26. It is clear from the terms of subsection 1(2) of the ASIC Act that it does not impose a legal duty, obligation or requirement on ASIC to take any particular action on any given set of facts. ASIC must strive to achieve its objectives but is not under an obligation to anybody to take any particular action.⁸
27. ASIC's *Information Sheet 151: ASIC's approach to enforcement* ([INFO Sheet 151](#)) sets out how ASIC selects matters for formal investigation.
28. INFO Sheet 151 states that ASIC considers the following issues when deciding whether to take enforcement action:
- a. ASIC's strategic priorities, taking into account such matters as the seriousness of the alleged misconduct;
 - b. the regulatory benefits of pursuing the alleged misconduct;
 - c. the issues specific to a case, such as the availability of evidence admissible in court and whether the alleged conduct is continuing; and
 - d. alternatives to a formal investigation which might address ASIC's concerns more effectively, such as engagement with stakeholders and surveillance.
29. ASIC's statutory obligations mean that ASIC is to take the enforcement action it decides is best suited to the evidence available to it at the relevant time. As stated in INFO Sheet 151, ASIC:
- ' ... can pursue a variety of enforcement remedies, dependent on the seriousness and consequences of misconduct. Some*

⁸ *Bhagat v Global Custodians Ltd* [2000] NSWSC 321 at [8] and [12]

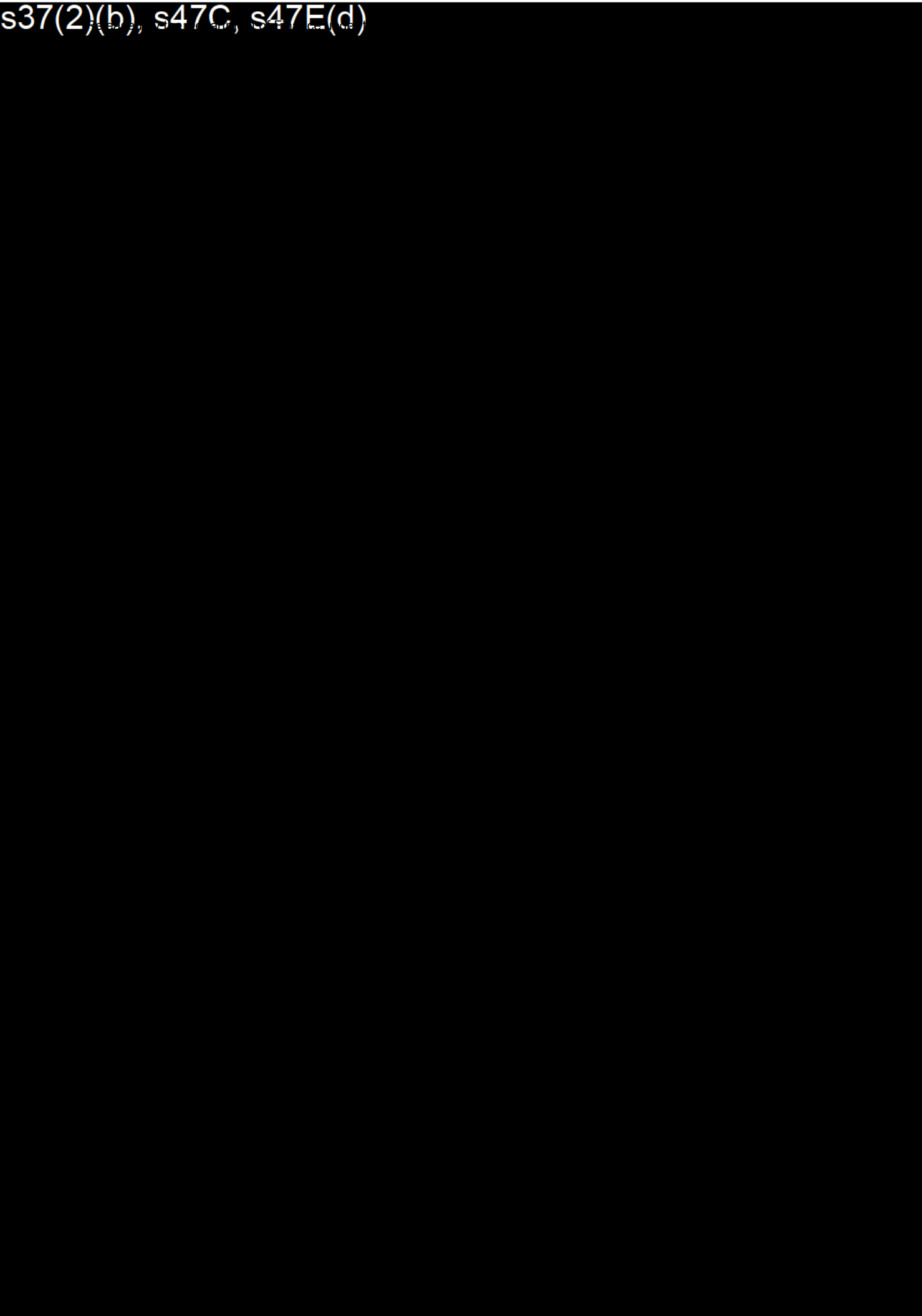
remedies involve relatively minor consequences while others will be serious, such as imprisonment and high monetary penalties. We will pursue the enforcement remedies best suited to the circumstances of the case and what we want, and are able, to achieve.

We can take enforcement action designed to punish wrongdoers, protect investors, preserve assets, correct disclosures and compensate people. We can also try to resolve matters through negotiation or issuing infringement notices.'

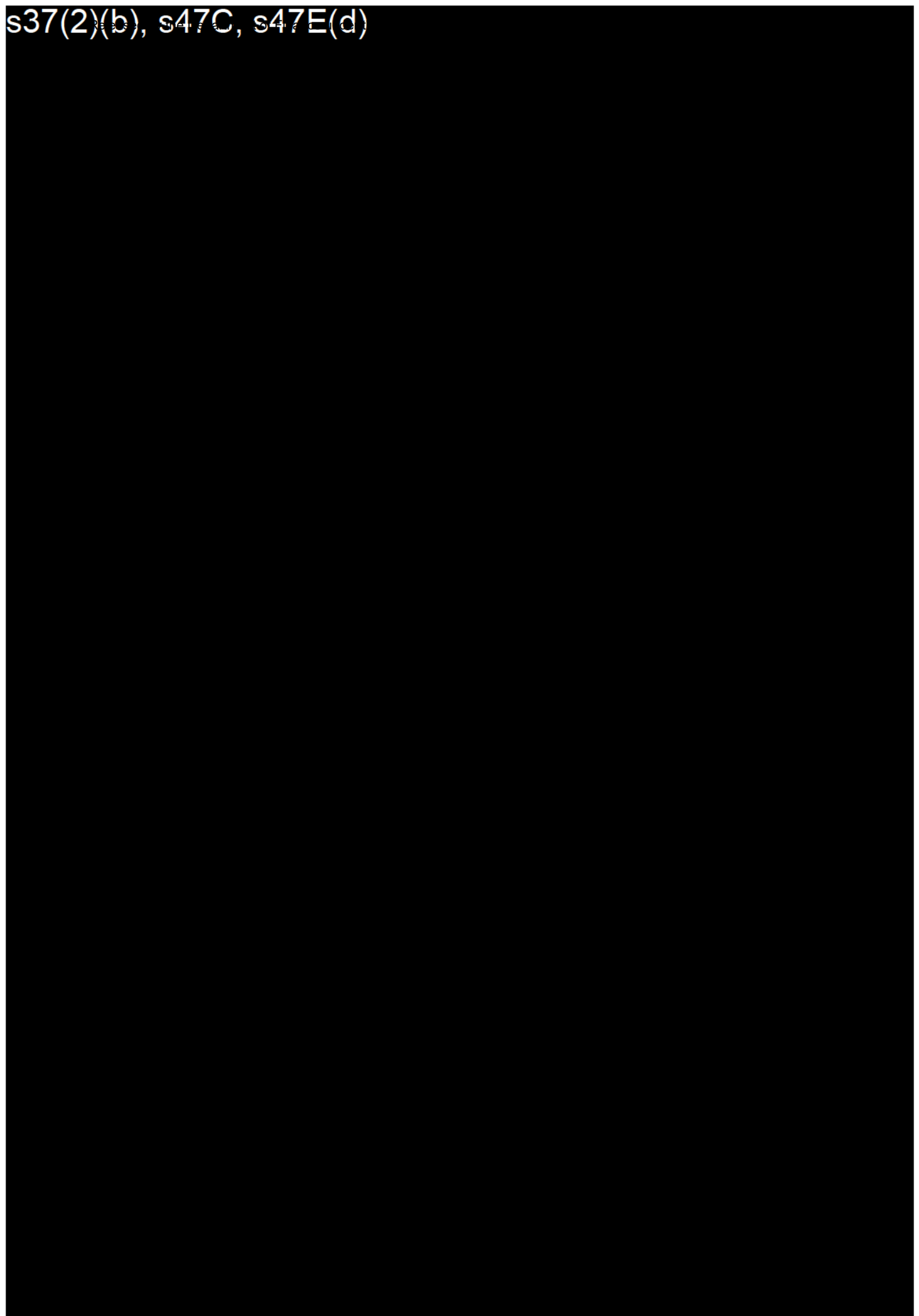
s37(2)(b), s47C, s47E(d)



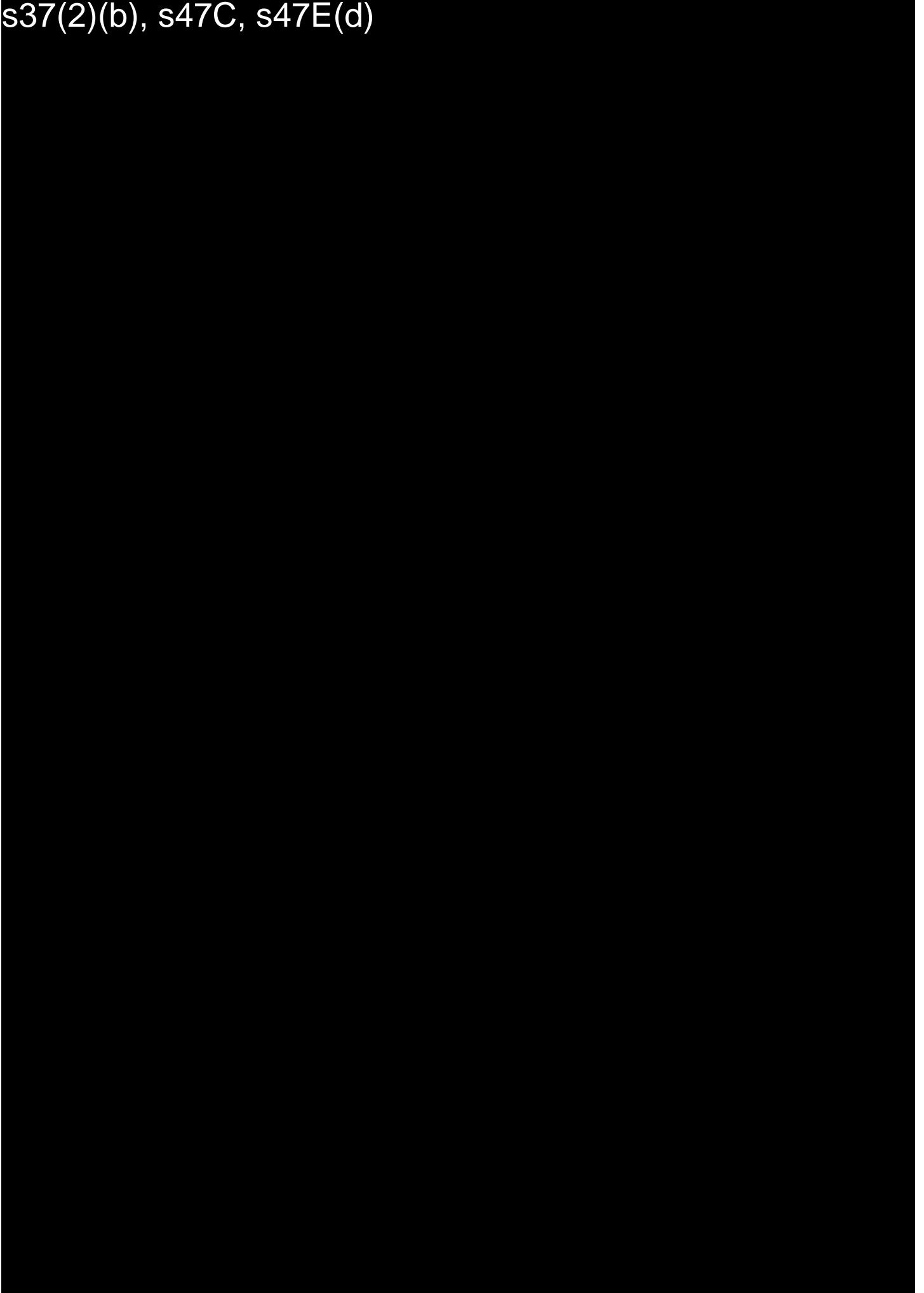
s37(2)(b), s47C, s47E(d)



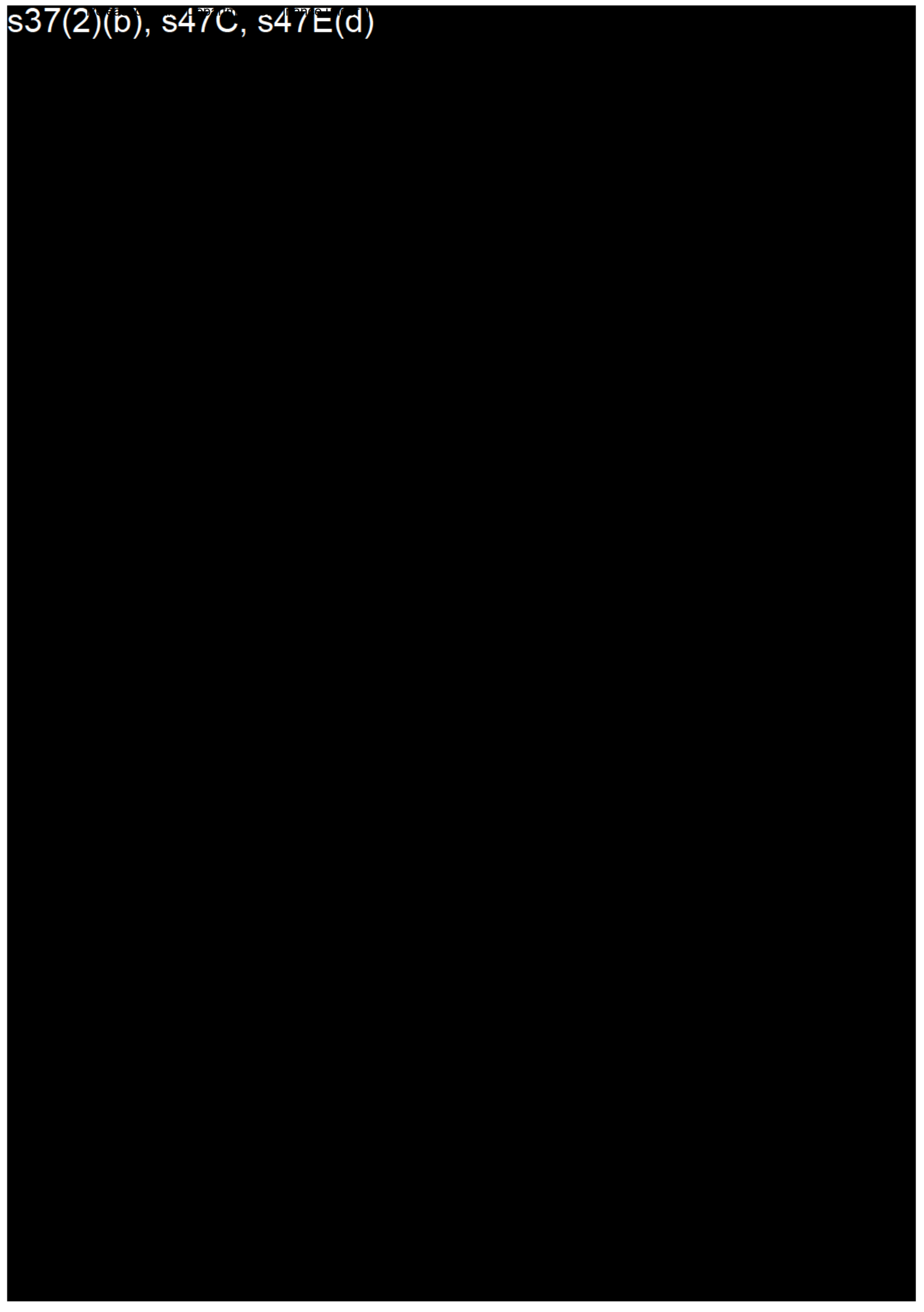
s37(2)(b), s47C, s47E(d)



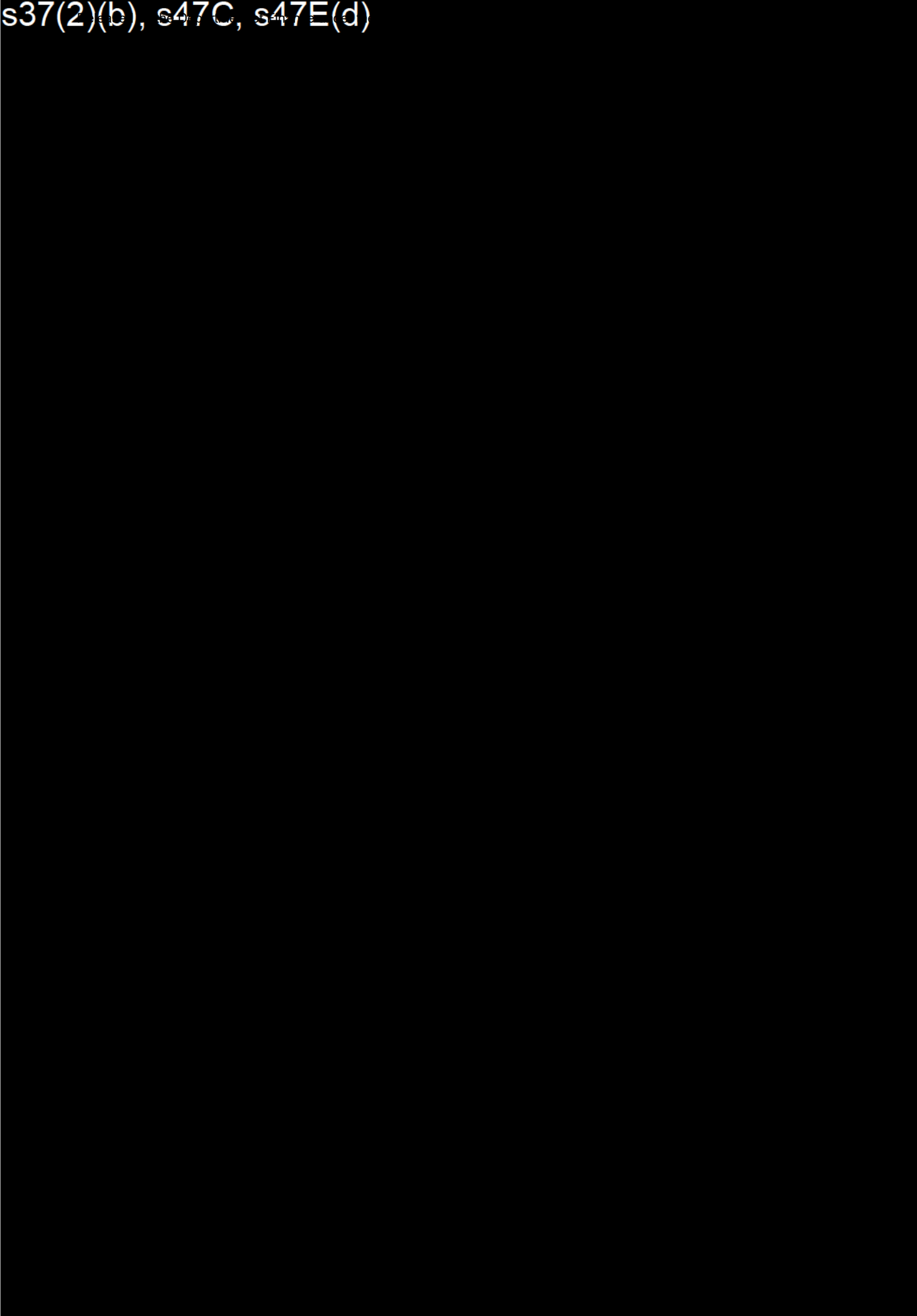
s37(2)(b), s47C, s47E(d)



s37(2)(b), s47C, s47E(d)



s37(2)(b), s47C, s47E(d)



68. For the reasons set out above, ASIC submits that it acted appropriately and in accordance with legislation and policy and submits that its actions in the present circumstances have not had an unintended or inequitable result.

CONCLUSION

69. In the circumstances described above, the Applications do not demonstrate special circumstances which make it appropriate for act of grace payments to be made.

70. ASIC notes that, according to media reports, the matter is currently before the Court in Western Australia and makes no further comment.

Yours faithfully,

s22(1)(a)(ii)

Senior Lawyer

Australian Securities and Investments Commission

¹⁸ s37(2)(b), s47C, s47E(d)

List of Annexures

Annexure A – table listing the Applicants

Annexure B – Chronology of key events.

s47F



Annexure G – Extracts from the *Corporations Act 2001* (Cth) and the *National Consumer Credit Protection Act 2009* (Cth)

Annexure G

Extracts from the *Corporations Act 2001 (Cth)* and the *National Consumer Credit Protection Act 2009 (Cth)*

Section 206F of the *Corporations Act 2001 (Cth)* – ASIC's power of disqualification

Power to disqualify

- (1) ASIC may disqualify a person from managing corporations for up to 5 years if:
- (a) within 7 years immediately before ASIC gives a notice under paragraph (b)(i):
 - (i) the person has been an officer of 2 or more corporations; and
 - (ii) while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1) (including that subsection as applied by section 526-35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation's inability to pay its debts; and
 - (b) ASIC has given the person:
 - (i) a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and
 - (ii) an opportunity to be heard on the question; and
 - (c) ASIC is satisfied that the disqualification is justified.
- (1A) To avoid doubt, the references in paragraph (1)(a) to corporations include references to Aboriginal and Torres Strait Islander corporations.

Grounds for disqualification

- (2) In determining whether disqualification is justified, ASIC:
- (a) must have regard to whether any of the corporations mentioned in subsection (1) were related to one another; and
 - (b) may have regard to:
 - (i) the person's conduct in relation to the management, business or property of any corporation; and
 - (ii) whether the disqualification would be in the public interest; and
 - (iii) any other matters that ASIC considers appropriate.
- (2A) To avoid doubt, the references in subsection (2) to a corporation includes a reference to an Aboriginal and Torres Strait Islander corporation.

Notice of disqualification

- (3) If ASIC disqualifies a person from managing corporations under this section, ASIC must serve a notice on the person advising them of the disqualification. The notice must be in the prescribed form.

Start of disqualification

- (4) The disqualification takes effect from the time when a notice referred to in subsection (3) is served on the person.

Section 920A of the Corporations Act Corporations Act 2001 (Cth) – ASIC's power to make a banning order*Making a banning order*

- (1) ASIC may, in writing, make one or more orders (**banning orders**) against a person if:
- (a) ASIC suspends or cancels an Australian financial services licence held by the person; or
 - (b) the person has not complied with their obligations under section 912A; or
 - (ba) ASIC has reason to believe that the person is likely to contravene their obligations under section 912A; or
 - (bb) the person becomes a Chapter 5 body corporate or an insolvent under administration; or
 - (c) the person is convicted of fraud; or
 - (d) ASIC has reason to believe that the person is not a fit and proper person to:
 - (i) provide one or more financial services; or
 - (ii) perform one or more functions as an officer of an entity that carries on a financial services business; or
 - (iii) control an entity that carries on a financial services business; or
 - (da) ASIC has reason to believe that the person is not adequately trained, or is not competent, to:
 - (i) provide one or more financial services; or
 - (ii) perform one or more functions as an officer of an entity that carries on a financial services business; or
 - (iii) control an entity that carries on a financial services business; or
 - (db) the person has not complied with any one or more of his or her obligations under section 921F (requirements relating to provisional relevant providers); or
 - (dc) both of the following apply:
 - (i) a supervisor referred to in section 921F has not complied with any one or more of his or her obligations under that section in relation to a provisional relevant provider;

- (ii) both the supervisor and the provisional relevant provider are authorised to provide personal advice to retail clients, on behalf of the person, in relation to relevant financial products; or
- (dd) both of the following apply:
 - (i) a provisional relevant provider has not complied with his or her obligations under subsection 921F(7);
 - (ii) the provisional relevant provider is authorised to provide personal advice to retail clients, on behalf of the person, in relation to relevant financial products; or
- (de) ASIC has reason to believe that the person was authorised, in contravention of subsection 921C(2), (3) or (4), to provide personal advice to retail clients in relation to relevant financial products; or
- (e) the person has not complied with a financial services law (other than subsection 921E(3) (relevant providers to comply with the Code of Ethics)); or
- (f) ASIC has reason to believe that the person is likely to contravene a financial services law; or
- (g) the person has been involved in the contravention of a financial services law by another person; or
- (h) ASIC has reason to believe that the person is likely to become involved in the contravention of a financial services law by another person; or
- (i) the person is the operator of, or another person connected with, an Australian passport fund, and each of the following is satisfied:
 - (i) a host regulator for the fund has notified ASIC in writing that it is of the opinion that the person or the fund has not complied, is not complying or is not likely to comply with the law of that host economy to the extent that the law is administered by the host regulator for the fund (including the Passport Rules for the host economy for the fund);
 - (ii) ASIC is of the opinion that it should make the banning order, given the potential impact of the failure, or potential failure, to comply on members or potential members of the fund; or
- (j) the person has, at least twice, been linked to a refusal or failure to give effect to a determination made by AFCA relating to a complaint that relates to:
 - (i) a financial services business; or
 - (ii) credit activities (within the meaning of the *National Consumer Credit Protection Act 2009*); or
- (k) subsection (1C) applies to the person in relation to 2 or more corporations.

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

(1AA) Subsection (1) has effect subject to subsection (2).

When a person is not a fit and proper person

- (1A) For the purposes of paragraph (1)(d), ASIC must have regard to the matters in section 913BB.

When a person contravenes a financial services law

- (1B) To avoid doubt, a person contravenes a financial services law if a person fails to comply with a duty imposed under that law, even if the provision imposing the duty is not an offence provision or a civil penalty provision.

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

- (1C) This subsection applies to a person in relation to a corporation if, within the last 7 years:
- (a) the person was an officer of the corporation when the corporation was:
 - (i) carrying on a financial services business; or
 - (ii) engaging in credit activities (within the meaning of the *National Consumer Credit Protection Act 2009*); and
 - (b) the corporation was wound up either:
 - (i) while the person was an officer of the corporation; or
 - (ii) within the 12 months after the person ceased to be an officer of the corporation; and
 - (c) a liquidator lodged a report under subsection 533(1) (including that subsection as applied by section 526-35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation's inability to pay its debts.

Person to be given an opportunity to be heard

- (2) Subject to subsection (3), if ASIC has not delegated its power to make a banning order against a person to a Financial Services and Credit Panel, ASIC may make the order only after giving the person 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.

Note: If ASIC delegates its power to make a banning order against a person to a Financial Services and Credit Panel, the panel may make the order only after holding a hearing in relation to the proposed order (see section 157 of the ASIC Act).

- (3) ASIC may make a banning order against a person without giving the person the opportunities mentioned in subsection (2) if:
- (a) either:
 - (i) ASIC has not delegated its power to make the banning order to a Financial Services and Credit Panel; or

- (ii) ASIC exercises its power to make the banning order despite such a delegation; and
- (b) ASIC's grounds for making the banning order are or include both of the following:
 - (i) that the suspension or cancellation of the relevant licence took place under section 915B;
 - (ii) that the person has been convicted of serious fraud.

Note: See section 34AB of the *Acts Interpretation Act 1901* (effect of delegation).

Special procedure for RSE licensees

- (3A) If a person against whom ASIC proposes to make a banning order is a financial services licensee who is authorised to provide a superannuation trustee service, the following provisions apply:
 - (a) ASIC cannot make the banning order if doing so would, in ASIC's opinion, have the result of preventing the licensee from providing that service, unless:
 - (i) APRA agrees in writing to the making of the banning order; or
 - (ii) the licensee's RSE licence is not in effect, and is not treated by section 29GB of the *Superannuation Industry (Supervision) Act 1993* as if it were in effect;
 - (b) if ASIC makes the banning order and paragraph (a) does not apply to that action, ASIC must, within one week, inform APRA of the action that has been taken.
- (3B) A failure to comply with a requirement of subsection (3A) to get the agreement of APRA about a banning order does not invalidate the action taken.

Copy of banning order to be given to the person

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

Section 920B of the *Corporations Act 2001 (Cth)* – What a banning order prohibits

- (1) A banning order made against a person may specify that the person is prohibited from doing one or more of the following:
 - (a) providing any financial services;
 - (b) providing specified financial services in specified circumstances or capacities;
 - (c) controlling, whether alone or in concert with one or more other entities, an entity that carries on a financial services business;
 - (d) performing any function involved in the carrying on of a financial services business (including as an officer, manager, employee, contractor or in some other capacity);

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

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

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

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

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

(3) A banning order may include a provision allowing the person against whom it was made, subject to any specified conditions:

(a) to do specified acts; or

(b) to do specified acts in specified circumstances;

that the order would otherwise prohibit them from doing.

Section 80 of the *National Consumer Credit Protection Act 2009* (Cth) – ASIC's power to make a banning order

Making a banning order

(1) ASIC may, in writing, make one or more orders (**banning orders**) against a person:

(a) if ASIC suspends or cancels a licence of the person; or

(b) if the person becomes insolvent; or

(c) for a natural person—if the person is convicted of fraud; or

(d) if the person has:

(i) contravened any credit legislation; or

(ii) been involved in a contravention of a provision of any credit legislation by another person; or

(e) if ASIC has reason to believe that the person is likely to:

(i) contravene any credit legislation; or

(ii) be involved in a contravention of a provision of any credit legislation by another person; or

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

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

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

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

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

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

- (ii) perform one or more functions as an officer (within the meaning of the *Corporations Act 2001*) of another person who engages in credit activities; or
- (iii) control another person who engages in credit activities; or
- (fb) if the person has, at least twice, been linked to a refusal or failure to give effect to a determination made by AFCA (as defined in section 910C of the *Corporations Act 2001*) relating to a complaint that relates to:
 - (i) credit activities; or
 - (ii) a financial services business (within the meaning of the *Corporations Act 2001*); or
- (fc) if subsection (3) applies to the person in relation to 2 or more corporations; or
- (g) if a prescribed State or Territory order is in force against the person; or
- (h) in any other circumstances prescribed by the regulations.

(1A) Subsection (1) has effect subject to subsection (4).

When a person is not a fit and proper person

- (2) For the purposes of paragraph (1)(f), ASIC must have regard to the matters in section 37B.

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

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

Person to be given an opportunity to be heard

- (4) Subject to subsection (5), if ASIC has not delegated its power to make a banning order against a person to a Financial Services and Credit Panel, ASIC may make the order only after giving the person 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.

Note: If ASIC delegates its power to make a banning order against a person to a Financial Services and Credit Panel, the panel may make the order only after holding a hearing in relation to the proposed order (see section 157 of the ASIC Act).

- (5) ASIC may make a banning order against a person without giving the person the opportunities mentioned in subsection (4) if:
 - (a) either:
 - (i) ASIC has not delegated its power to make the banning order to a Financial Services and Credit Panel; or
 - (ii) ASIC exercises its power to make the banning order despite such a delegation; and
 - (b) subsection (6) or (6A) applies.

Note: See section 34AB of the *Acts Interpretation Act 1901* (effect of delegation).

- (6) This subsection applies if:
 - (a) ASIC's grounds for making a banning order against a person include that ASIC has suspended or cancelled a licence of the person (see paragraph (1)(a)); and
 - (b) the suspension or cancellation took place without a hearing under section 54.

- (6A) This subsection applies if:
 - (a) ASIC's grounds for making a banning order against a person include that the person has been convicted of fraud (see paragraph (1)(c)); and
 - (b) the person has been convicted of serious fraud.

Copy of banning order to be given to the person

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

Section 81 of the *National Consumer Credit Protection Act 2009* (Cth) – What a banning order prohibits

- (1) A banning order made against a person may specify that the person is prohibited from doing one or more of the following:
 - (a) engaging in any credit activities;
 - (b) engaging in specified credit activities in specified circumstances or capacities;
 - (c) controlling, whether alone or in concert with one or more other entities (as defined by section 64A of the *Corporations Act 2001*), another person who engages in credit activities;

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

- (2) The banning order may specify that a particular prohibition specified in the order applies against the person:
 - (a) if the sole ground for the banning order is because paragraph 80(1)(fc) applies—for a specified period of up to 5 years; or
 - (b) otherwise—either permanently or for a specified period.

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

- (3) A banning order may include a provision allowing the person against whom it was made, subject to any specified conditions:
 - (a) to do specified acts; or
 - (b) to do specified acts in specified circumstances;that the order would otherwise prohibit them from doing.
- (4) A banning order is not a legislative instrument.