



# Corporations Regulations 2001

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Volume 1: regulations 1.0.01–6D.5.03

**Volume 2: regulations 7.1.02–7.6.08E**

Volume 3: regulations 7.7.01–8A.7.20

Volume 4: regulations 9.1.01–12.9.03

Volume 5: Schedules 1, 2 and 2A

Volume 6: Schedules 3–13

Volume 7: Endnotes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

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## About this compilation

### This compilation

This is a compilation of the *Corporations Regulations 2001* that shows the text of the law as amended and in force on 8 December 2018 (the *compilation date*).

The notes at the end of this compilation (the *endnotes*) include information about amending laws and the amendment history of provisions of the compiled law.

### Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register ([www.legislation.gov.au](http://www.legislation.gov.au)). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

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If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

### Editorial changes

For more information about any editorial changes made in this compilation, see the endnotes.

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If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

### Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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## Chapter 7—Financial services and markets

### Part 7.1—Preliminary

#### Division 1—General

##### 7.1.02 Participant

For subparagraph (b)(vi) of the definition of *participant* in section 761A of the Act, section 792A of the Act is prescribed.

##### 7.1.03 Prescribed CS facility

For the definition of *prescribed CS facility* in section 761A of the Act, ASX Settlement and Transfer Corporation Pty Limited (also known as ‘ASTC’) is a prescribed CS facility.

##### 7.1.03A Basic deposit products

- (1) For subparagraph (d)(ii) of the definition of *basic deposit product* in section 761A of the Act, this regulation applies in relation to ADIs entitled under the *Banking Act 1959* to use any of the following expressions in relation to their financial business:
  - (a) credit union;
  - (b) credit society;
  - (c) credit co-operative;
  - (d) building society.
- (2) The prior notice requirement is a period not more than 7 days before a withdrawal or transfer of funds from a facility made available by the ADI.

##### 7.1.03B Self managed superannuation funds

In this Chapter:

*self managed superannuation fund* has the same meaning as in the SIS Act.

##### 7.1.04 Derivatives

- (1) For paragraph 761D(1)(b) of the Act, the prescribed period is:
  - (a) for a foreign exchange contract—3 business days; and
  - (b) in any other case—1 business day.
- (2) For subsection 761D(2) of the Act, and subject to this regulation, an arrangement is declared to be a derivative if the following conditions are satisfied in relation to the arrangement:
  - (a) the arrangement is not a foreign exchange contract;

Regulation 7.1.04

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- (b) under the arrangement, a party to the arrangement must, or may be required to, provide at some future time (which may be less than 1 day after the arrangement is entered into) consideration of a particular kind or kinds to someone;
  - (c) the amount of the consideration, or the value of the arrangement, is ultimately determined, derived from or varies by reference to (wholly or in part) the value or amount of something else (of any nature whatsoever and whether or not deliverable), including, for example, one or more of the following:
    - (i) an asset;
    - (ii) a rate (including an interest rate or exchange rate);
    - (iii) an index;
    - (iv) a commodity.
- (4) An arrangement under which:
- (a) a party has, or may have, an obligation to buy tangible property (other than Australian or foreign currency) at a price and on a date in the future; and
  - (b) another party has, or may have, an obligation to sell that property; and
  - (c) the arrangement does not permit the seller's obligations to be wholly settled by cash, or by set-off between the parties, rather than by delivery of the property; and
  - (d) neither usual market practice, nor the rules of a licensed market or a licensed CS facility, permits the seller's obligations to be closed out by the matching up of the arrangement with another arrangement of the same kind under which the seller has offsetting obligations to buy;
- is not an arrangement to which subregulation (2) applies to the extent only that the arrangement deals with that purchase and sale.
- (5) An arrangement under which:
- (a) a party has an obligation to buy property; and
  - (b) another party has an obligation to sell the property;
- is not an arrangement to which subregulation (2) applies merely because the arrangement provides for the consideration to be varied by reference to a general inflation index (for example, the Consumer Price Index).
- (6) A contract for the future provision of services is not an arrangement to which subregulation (2) applies.
- (7) A thing that is described in subsection 764A(1) of the Act, other than paragraph 764A(1)(c), is not an arrangement to which subregulation (2) applies.
- (8) For paragraph 761D(3)(d) of the Act, each of the following is declared not to be a derivative for Chapter 7 of the Act:
- (a) tradeable water rights;
  - (b) an arrangement:
    - (i) under which a person (the *seller*) has, or may have, an obligation to sell tradeable water rights at a future date; and

- (ii) under which another person (the *buyer*) has, or may have, an obligation to buy the tradeable water rights, or replacement water rights, at a future date; and
  - (iii) that does not permit the seller's obligations to be wholly settled by cash, or by set-off between the seller and the buyer, rather than by transfer of ownership of the tradeable water rights or replacement water rights; and
  - (iv) in relation to which neither usual market practice, nor the rules, allow the seller's obligations to be closed out by matching up the arrangement with another arrangement of the same kind under which the seller has offsetting obligations to buy the tradeable water rights or replacement water rights;
- (c) a carbon abatement contract.

Note: For *carbon abatement contract*, see subregulation 1.0.02(1).

- (9) Subregulations (4) to (8) apply whether or not a matter mentioned in those subregulations is described in subsection 761D(1) of the Act.
- (10) In subregulation (8):

*replacement water rights* means tradeable water rights that are granted, issued or authorised as a replacement for the seller's tradeable water rights, including as a result of transformation arrangements mentioned in subsection 97(1) of the *Water Act 2007*.

*rules* means the rules of:

- (a) a licensed market; or
- (b) a licensed CS facility.

*tradeable water rights* has the same meaning as in the *Water Act 2007*.

#### **7.1.04A Meaning of *kind* of financial products (section 1012IA of the Act)**

- (1) For section 761CA of the Act, this regulation applies in relation to paragraph (a) of the definition of *custodial arrangement* in subsection 1012IA(1) of the Act.
- (2) Each of the following is a kind of financial product:
- (a) for interests in a managed investment scheme, all the interests in that managed investment scheme;
  - (b) in any other case, all the financial products issued by a person or the person's related bodies corporate.

#### **7.1.04B Meaning of *class* of financial products (managed investment schemes)**

- (1) For section 761CA of the Act, this regulation applies in relation to paragraph 1017F(4)(d) of the Act.
- (2) An interest in a managed investment scheme is in the same class as another interest in a managed investment scheme if they are both interests in the same managed investment scheme.

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**7.1.04C Meaning of *class* of financial products (superannuation products)**

- (1) For section 761CA of the Act, this regulation applies in relation to paragraph 1017F(4)(d) of the Act.
- (2) A superannuation product is in the same class as another superannuation product if they are both issued by the same superannuation entity.

**7.1.04CA Kinds of financial products**

- (1) For section 761CA of the Act, this regulation applies in relation to paragraph 917C(3)(ba) of the Act.
- (2) The following are kinds of financial product:
  - (a) motor vehicle insurance;
  - (b) home building insurance;
  - (c) home contents insurance;
  - (d) sickness and accident insurance;
  - (e) consumer credit insurance;
  - (f) travel insurance.

**7.1.04D Meaning of *issuer* for certain derivatives**

- (1) This regulation applies in relation to a financial product that:
  - (a) is a derivative; and
  - (b) is entered into, or acquired through a facility conducted in accordance with:
    - (i) the *Corporations (Exempt Futures Market—National Wholesale Electricity) Declaration 1999*; or
    - (ii) the *Corporations (Exempt Futures Market) Declaration 2001*.
- (2) For paragraph 761E(7)(a) of the Act, each person who is a party to the financial product is taken to be an issuer of the financial product.
- (3) For paragraph 761E(7)(a) of the Act, subsections 761E(5) and (6) of the Act do not apply to the financial product.

**7.1.04E Issue of a new interest in a superannuation fund**

- (1) This regulation applies if a member of a superannuation fund, who has a superannuation interest in the growth phase, elects to receive a pension in relation to that interest or part of that interest.
- (2) For paragraph 761E(7)(a) of the Act, the superannuation fund is taken to issue a new financial product when:
  - (a) it acknowledges receipt of the member's election; or
  - (b) it makes the first payment of the pension;whichever occurs first.
- (3) For this regulation:



*growth phase* has the meaning given by regulation 1.03AB of the SIS Regulations.

*pension* has the meaning given by subregulation 1.06(1) of the SIS Regulations.

#### **7.1.04F Meaning of *class of financial services* (subsections 917A(3), 917C(2) and 917C(3) of the Act)**

- (1) For section 761CA of the Act, this regulation applies for subsections 917A(3), 917C(2) and 917C(3) of the Act.
- (2) Each of the following is a class of financial services:
  - (a) the provision of financial product advice relating to a general insurance product;
  - (b) the provision of financial product advice relating to an investment life insurance product;
  - (c) the provision of financial product advice relating to a life risk insurance product;
  - (d) dealing in a financial product that is a general insurance product;
  - (e) dealing in a financial product that is an investment life insurance product;
  - (f) dealing in a financial product that is a life risk insurance product.

#### **7.1.04G Meaning of *issuer* for a foreign exchange contract**

- (1) This regulation applies to a financial product that is a foreign exchange contract that is not entered into, or traded, on a financial market.
- (2) For paragraph 761E(7)(a) of the Act, each party to the foreign exchange contract is an issuer of the product.

#### **7.1.04N Specific things that are financial products—litigation funding schemes and arrangements**

For paragraph 764A(1)(m) of the Act:

- (a) an interest in a litigation funding scheme mentioned in regulation 5C.11.01 is a financial product; and
- (b) an interest in a litigation funding arrangement mentioned in regulation 5C.11.01 is a financial product.

#### **7.1.05 Specific things that are not financial products: superannuation interests**

For paragraph 765A(1)(q) of the Act, an exempt public sector superannuation scheme within the meaning of the SIS Act is prescribed.

#### **7.1.06 Specific things that are not financial products: credit facility**

- (1) For subparagraph 765A(1)(h)(i) of the Act, each of the following is a *credit facility*:
    - (a) the provision of credit:
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- (i) for any period; and
  - (ii) with or without prior agreement between the credit provider and the debtor; and
  - (iii) whether or not both credit and debit facilities are available; and
  - (iv) that is not a financial product mentioned in paragraph 763A(1)(a) of the Act; and
  - (v) that is not a financial product mentioned in paragraph 764A(1)(a), (b), (ba), (bb), (f), (g), (h) or (j) of the Act; and
  - (vi) that is not a financial product mentioned in paragraph 764A(1)(i) of the Act, other than a product the whole or predominant purpose of which is, or is intended to be, the provision of credit;
- (b) a facility:
- (i) known as a bill facility; and
  - (ii) under which a credit provider provides credit by accepting, drawing, discounting or indorsing a bill of exchange or promissory note;
- (c) the provision of credit by a pawnbroker in the ordinary course of a pawnbroker's business (being a business which is being lawfully conducted by the pawnbroker);
- (d) the provision of credit by the trustee of the estate of a deceased person by way of an advance to a beneficiary or prospective beneficiary of the estate;
- (e) the provision of credit by an employer, or a related body corporate of an employer, to an employee or former employee (whether or not it is provided to the employee or former employee with another person);
- (f) a mortgage:
- (i) that secures obligations under a credit contract (other than a lien or charge arising by operation of any law or by custom); and
  - (ii) that is not a financial product mentioned in paragraph 763A(1)(a) of the Act; and
  - (iii) that is not a financial product mentioned in paragraph 764A(1)(a), (b), (ba), (bb), (f), (g), (h) or (j) of the Act; and
  - (iv) that is not a financial product mentioned in paragraph 764A(1)(i) of the Act, other than a product the whole or predominant purpose of which is, or is intended to be, the provision of credit;
- (g) a guarantee related to a mortgage mentioned in paragraph (f);
- (h) a guarantee of obligations under a credit contract.
- (2) The provision of consumer credit insurance that includes a contract of general insurance for the *Insurance Contracts Act 1984* is not a credit facility.
- (2A) A litigation funding scheme mentioned in regulation 5C.11.01 is not a credit facility.
- (2B) A litigation funding arrangement mentioned in regulation 5C.11.01 is not a credit facility.
- (3) In this regulation:

**credit** means a contract, arrangement or understanding:

- (a) under which:
  - (i) payment of a debt owed by one person (a **debtor**) to another person (a **credit provider**) is deferred; or
  - (ii) one person (a **debtor**) incurs a deferred debt to another person (a **credit provider**); and
- (b) including any of the following:
  - (i) any form of financial accommodation;
  - (ii) a hire purchase agreement;
  - (iii) credit provided for the purchase of goods or services;
  - (iv) a contract, arrangement or understanding for the hire, lease or rental of goods or services, other than a contract, arrangement or understanding under which:
    - (A) full payment is made before or when the goods or services are provided; and
    - (B) for the hire, lease or rental of goods—an amount at least equal to the value of the goods is paid as a deposit in relation to the return of the goods;
  - (v) an article known as a credit card or charge card;
  - (vi) an article, other than a credit card or a charge card, intended to be used to obtain cash, goods or services;
  - (vii) an article, other than a credit card or a charge card, commonly issued to customers or prospective customers by persons who carry on business for the purpose of obtaining goods or services from those persons by way of a loan;
  - (viii) a liability in respect of redeemable preference shares;
  - (ix) a financial benefit arising from or as a result of a loan;
  - (x) assistance in obtaining a financial benefit arising from or as a result of a loan;
  - (xi) issuing, indorsing or otherwise dealing in a promissory note;
  - (xii) drawing, accepting, indorsing or otherwise dealing in a negotiable instrument (including a bill of exchange);
  - (xiii) granting or taking a lease over real or personal property;
  - (xiv) a letter of credit.

### **7.1.06A Arrangements for certain financial products that are not credit facilities**

- (1) This regulation applies in relation to a financial product that would be a credit facility in accordance with regulation 7.1.06 if subparagraphs 7.1.06(1)(a)(iv), (v) and (vi), and 7.1.06(1)(f)(ii), (iii) and (iv) did not apply.
- (2) For paragraph 761E(7)(a) of the Act, and in relation to the financial product:
  - (a) the credit provider is not taken to be the issuer of the financial product; and
  - (b) the debtor is taken to be the issuer of the financial product.
- (3) For paragraph 766A(2)(b) of the Act, and in relation to the financial product:

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- (a) the provision of financial product advice to the debtor, or the debtor's representative, is taken not to be the provision of a financial service; and
- (b) a dealing in the credit facility by the credit provider, or the credit provider's representative, is taken not to be the provision of a financial service.

(4) In this regulation:

*credit*, *credit provider* and *debtor* have the same meanings as in subregulation 7.1.06(3).

**7.1.06B Specific things that are not financial products: superannuation interests**

For paragraph 765A(1)(q) of the Act, an exempt public sector superannuation scheme within the meaning of the SIS Act is prescribed.

**7.1.07 Specific things that are not financial products: surety bonds**

- (1) This regulation applies to an arrangement between 2 persons (*person 1* and *person 2*) made in the following circumstances:
  - (a) person 1 enters into the arrangement in order to meet a requirement of another arrangement between person 1 and a person other than person 2 (*person 3*);
  - (b) under the arrangement, person 2 undertakes to make a payment to, or perform an obligation for the benefit of, person 3 in circumstances specified as part of the arrangement;
  - (c) under the arrangement, person 1 is liable to person 2 for any payments made, or liabilities, costs or expenses incurred, by person 2 in making the payment to, or performing the obligation for the benefit of, person 3;
  - (d) the arrangement does not constitute a financial product under section 764A of the Act, other than a derivative.
- (2) For paragraph 765A(1)(y) of the Act, the arrangement is not a financial product.

**7.1.07A Specific things that are not financial products: rental agreements**

- (1) This regulation applies to an arrangement between 2 persons (*person 1* and *person 2*) made in the following circumstances:
  - (a) person 1 leases or rents something from person 2;
  - (b) under the arrangement, person 1 makes a payment to person 2 to reduce the amount that person 1 would otherwise have to pay to person 2 under the leasing or rental agreement;
  - (c) the payment relates to the event of an accident or other eventuality affecting the thing that is being leased or rented.

Example: Collision damage waiver insurance for a rental car.

- (2) For paragraph 765A(1)(y) of the Act, the arrangement is not a financial product.

**7.1.07B Specific things that are not financial products: bank drafts**

For paragraph 765A(1)(y) of the Act, a bank draft, including (but not limited to):

- (a) a cheque drawn by a financial institution on itself; or
- (b) a cheque drawn by a financial institution on a financial institution other than itself;

is not a financial product.

**7.1.07C Specific things that are not financial products: insurance under an overseas student health insurance contract**

- (1) For paragraph 765A(1)(y) of the Act, insurance under an overseas student health insurance contract is not a financial product.
- (2) In this regulation:

*overseas student health insurance contract* has the same meaning as in regulation 48 of the *National Health Regulations 1954*.

**7.1.07D Specific things that are not financial products: funeral expenses policy**

- (1) For paragraph 765A(1)(y) of the Act, a funeral expenses policy is not a financial product.
- (2) In this regulation:

*funeral expenses policy* means a scheme or arrangement for the provision of a benefit consisting of the payment of money, payable only on the death of a person, for the sole purpose of meeting the whole or part of the expenses of, and incidental to the person's:

- (a) funeral; and
- (b) burial or cremation.

**7.1.07E Specific things that are not financial products: rights of the holder of a debenture**

- (1) This regulation applies to a facility that consists of the rights of the holder of a debenture against a trustee under a trust deed entered into under:
  - (a) section 283AA of the Act; or
  - (b) Chapter 2L or Division 4 of Part 7.12 of the old Corporations Law.
- (2) For paragraph 765A(1)(y) of the Act, the facility is not a financial product.

**7.1.07F Specific things that are not financial products: money orders**

For paragraph 765A(1)(y) of the Act, a money order issued as a money order by, or for, Australia Post is not a financial product.

### **7.1.07G Specific things that are not financial products: electronic funds transfers**

For paragraph 765A(1)(y) of the Act, a non-cash payment facility is not a financial product if:

- (a) the issuer is:
  - (i) a body corporate that is an ADI (within the meaning of the *Banking Act 1959*); or
  - (ii) an operator of a payment system; and
- (b) under the facility, as instructed by the client, the issuer makes money available (or causes it to be made available) to a person nominated by the client:
  - (i) within 2 business days of receiving the client's instruction; or
  - (ii) within the time reasonably required to complete the transaction subject to any constraints imposed by law; and
- (c) under the facility the funds are transferred by electronic means for collection by, or for the credit of, the payer or another person; and
- (d) the issuer and the payer do not have a standing arrangement to transfer funds in this manner.

Example: Telegraphic transfers and international money transfers offered by banks and remittance dealers.

### **7.1.07H Specific things that are not financial products: ACT insurance**

For paragraph 765A(1)(y) of the Act, Australian Capital Territory insurance, including insurance entered into by the Australian Capital Territory and another insurer as joint insurers, is not a financial product.

### **7.1.07I Specific things that are not financial products—Australian carbon credit units and eligible international emissions units**

- (1) For paragraph 765A(1)(y) of the Act:
  - (a) an Australian carbon credit unit is not a financial product; and
  - (b) an eligible international emissions unit is not a financial product.
- (2) On 1 July 2012:
  - (a) subregulation (1) ceases to apply; and
  - (b) Australian carbon credit units and eligible international emissions units become financial products.

### **7.1.07J Specific things that are not financial products—carbon abatement**

For paragraph 765A(1)(y) of the Act, a carbon abatement contract is declared not to be a financial product.

Note: For *carbon abatement contract*, see subregulation 1.0.02(1).

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**7.1.08 Meaning of *financial product advice: exempt document or statement***

- (1) For subparagraph (a)(ii) of the definition of *exempt document or statement* in subsection 766B(9) of the Act, the following documents and statements are prescribed (and so excluded from the definition):
  - (a) a Product Disclosure Statement that:
    - (i) contains personal advice; or
    - (ii) contains general advice about a financial product other than a financial product to which the Statement relates;
  - (b) a Financial Services Guide that contains personal advice;
  - (c) a document or statement that would, but for this regulation, be an exempt document or statement only because it is prepared or given in accordance with section 1018A of the Act;
  - (d) a record of advice mentioned in subsection 946B(3A) of the Act.
- (2) For subregulation (1), if a person:
  - (a) acquires a financial product (*product 1*); and
  - (b) will be able, by acquiring product 1, to give the product issuer an instruction to acquire a particular financial product or a financial product of a particular kind (within the meaning of section 1012IA of the Act) under a custodial arrangement (within the meaning of section 1012IA of the Act);the Product Disclosure Statement for product 1 is taken to relate to the other financial product.
- (3) For paragraph (b) of the definition of *exempt document or statement* in subsection 766B(9) of the Act, documents, information and statements that:
  - (a) do not contain personal advice; and
  - (b) are required by, and prepared as a result of, a requirement under an Australian law; and
  - (c) are included in a class of documents, information or statements specified by ASIC in a list published in the *Gazette* for this subregulation;are prescribed (and so included in the definition).
- (3A) For the purposes of paragraph (b) of the definition of *exempt document or statement* in subsection 766B(9) of the Act, the following documents and statements are prescribed (and so included in the definition):
  - (a) a CSF offer document that does not contain personal advice;
  - (b) a document or statement to the extent that it contains or draws information from a CSF offer document and attributes that information to the CSF offer document, if:
    - (i) the information is published on the platform on which the CSF offer document is published, and does not contain personal advice; or
    - (ii) the information is a statement made on the communication facility for the CSF offer, and does not contain personal advice;
  - (c) an advertisement or publication to the extent that the advertisement or publication:

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- (i) contains or draws information from a CSF offer document and attributes that information to the CSF offer document; and
  - (ii) does not contravene subsection 738ZG(1) of the Act; and
  - (iii) does not contain personal advice.
- (4) For paragraph (b) of the definition of *exempt document or statement* in subsection 766B(9) of the Act:
- (a) an assessment under subsection 985E(1) of the Act that a margin lending facility will not be unsuitable for the person to whom the margin lending facility is to be issued is prescribed (and so excluded from the definition); and
  - (b) an assessment under subsection 985E(1) of the Act that a margin lending facility whose limit is proposed to be increased will not be unsuitable for the person for whom the limit of the margin lending facility is to be increased is prescribed (and so excluded from the definition).

Note: The effect of paragraph (b) of the definition of *exempt document or statement* in subsection 766B(9), is that a prescribed document or statement is an exempt document or statement.

**7.1.08A Modification of section 766D of the Act—free carbon units**

For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies in relation to free carbon units (within the meaning of the *Clean Energy Act 2011*) as if section 766D of the Act were modified by inserting after subsection 766D(2) the following subsection:

- (3) A person who holds a free carbon unit (within the meaning of the *Clean Energy Act 2011*) that has been issued to the person by the Clean Energy Regulator is taken not to be making a market for a financial product if the person states the price of the free carbon unit.

**7.1.09 Obligations related to clearing and settlement facility**

- (1) For paragraph 768A(1)(b) of the Act, the following obligations are prescribed:
  - (a) each obligation arising from a contract to transfer a financial product mentioned in paragraph 764A(1)(a) of the Act;
  - (b) each obligation arising from a contract to transfer a financial product mentioned in paragraph 764A(1)(b) of the Act;
  - (c) each obligation arising from acquiring or providing a financial product mentioned in paragraph 764A(1)(c) of the Act;
  - (d) each obligation arising from a contract to transfer a financial product mentioned in paragraph 764A(1)(j) of the Act;
  - (e) each obligation arising from a contract to transfer a financial product mentioned in paragraph 764A(1)(ba) of the Act;
  - (ea) each obligation arising from a contract to transfer a financial product mentioned in paragraph 764A(1)(bb) of the Act;
  - (f) each obligation arising from a contract to transfer a financial product mentioned in paragraph 764A(1)(k) of the Act;



- (fa) each obligation arising from a contract to transfer a carbon unit, an Australian carbon credit unit or an eligible international emissions unit;

Note: See paragraphs 764A(1)(ka) and (kb) of the Act.

- (g) each obligation arising from a contract to transfer a right that includes an undertaking by a body to repay, as a debt, money deposited with or lent to the body;
  - (h) each obligation arising from the entry into a repurchase agreement.
- (2) In this regulation, **repurchase agreement** means a repurchase transaction, in relation to a financial product, entered into pursuant to:
- (a) The Bond Market Association and the International Securities Market Association Global Master Repurchase Agreement (known as the TBMA/ISMA Global Master Repurchase Agreement); or
  - (b) another commonly used master agreement for repurchase transactions.

### **7.1.10 Conduct that does not constitute operating a clearing and settlement facility**

- (2) For paragraph 768A(2)(i) of the Act, the conduct of:
- (a) National Stock Exchange of Australia Limited, or an agent of that body; or
  - (b) a participant of the National Stock Exchange of Australia Limited, or an agent of the participant; or
  - (c) Bendigo Stock Exchange Limited, or an agent of that body; or
  - (d) a participant of the Bendigo Stock Exchange Limited, or an agent of the participant;

in operating a facility in accordance with the operating rules of a licensed market does not constitute operating a **clearing and settlement facility** if the requirements of subregulation (3) are met.

- (3) For subregulation (2), the requirements are:
- (a) the market licensee must have, and must be responsible for enforcing, operating rules that apply to a participant of the licensed market in relation to the participant's obligations arising from transactions carried out on the licensed market; and
  - (b) a participant mentioned in paragraph (a), or an agent of the participant appointed in accordance with the operating rules of the licensed market, must be responsible for fulfilling the obligations owed to another participant or agent arising from transactions carried out on the licensed market; and
  - (c) the market licensee is not the operator of any other clearing and settlement facility; and
  - (d) each participant of the licensed market is not the operator of any other clearing and settlement facility; and
  - (e) each agent of a participant of the licensed market is not the operator of any other clearing and settlement facility.

## Division 2—Retail clients and wholesale clients

### 7.1.11 Meaning of *retail client* and *wholesale client*: motor vehicle insurance product

- (1) For subparagraph 761G(5)(b)(i) of the Act, a **motor vehicle insurance product** is a contract or part of a contract that provides insurance cover (whether or not the cover is limited or restricted in any way) in respect of one or more of the following:
  - (a) loss of, or damage to, a motor vehicle;
  - (b) liability for loss of, or damage to, property caused by or resulting from impact of a motor vehicle with some other thing.
- (2) A motor vehicle insurance product does not include:
  - (a) insurance to or in relation to which the *Marine Insurance Act 1909* applies; or
  - (b) insurance entered into, or proposed to be entered into, for the purposes of a law (including a law of a State or Territory) that relates to:
    - (i) workers' compensation; or
    - (ii) compulsory third party compensation.
- (3) In this regulation:

**motor vehicle** means a vehicle that is designed:

  - (a) to travel by road; and
  - (b) to use volatile spirit, steam, gas, oil, electricity or any other power (not being human power or animal power) as its principal means of propulsion; and
  - (c) to carry passengers;

and includes a motor cycle.
- (4) However, a motor vehicle does not include:
  - (a) an omnibus; or
  - (b) a tram; or
  - (c) a motor vehicle the carrying capacity of which exceeds 2 tonnes.

### 7.1.12 Meaning of *retail client* and *wholesale client*: home building insurance product

- (1) For subparagraph 761G(5)(b)(ii) of the Act, a **home building insurance product** is a contract or part of a contract that provides insurance cover (whether or not the cover is limited or restricted in any way) in respect of destruction of or damage to a home building.
- (2) A home building insurance product does not include insurance entered into, or proposed to be entered into, for the purposes of a law (including a law of a State

or Territory) that relates to building or construction work in relation to a home building.

(3) In this regulation:

**home building** means:

- (a) a building used, or intended to be used, principally and primarily as a place of residence; and
- (b) out-buildings, fixtures and structural improvements used for domestic purposes, being purposes related to the use of the principal residence; on the site and, without limiting the generality of the expression, includes:
  - (c) fixed wall coverings, fixed ceiling coverings and fixed floor coverings (other than carpets); and
  - (d) services (whether underground or not) that are the property of the insured or that the insured is liable to repair or replace or pay the cost of repairing and replacing; and
  - (e) fences and gates wholly or partly on the site.

**site**, in relation to a building, means the site specified in the relevant contract of insurance as the site on which the building is situated.

(4) A home building does not include:

- (a) a hotel; or
- (b) a motel; or
- (c) a boarding house; or
- (d) a building that:
  - (i) is in the course of construction; and
  - (ii) is being constructed by the insured, or an intending insured, in the course of a construction business; or
- (e) a temporary building or structure or a demountable or moveable structure; or
- (f) a caravan (whether fixed to the site or not).

### **7.1.13 Meaning of *retail client* and *wholesale client*: home contents insurance product**

- (1) For subparagraph 761G(5)(b)(iii) of the Act, a **home contents insurance product** is a contract or part of a contract that provides insurance cover (whether or not the cover is limited or restricted in any way) in respect of loss of or damage to the contents of a residential building.
- (2) A home contents insurance product does not include:
  - (a) insurance to or in relation to which the *Marine Insurance Act 1909* applies; or
  - (b) insurance entered into, or proposed to be entered into, for the purposes of a law (including a law of a State or Territory) that relates to:
    - (i) workers' compensation; or

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(ii) compulsory third party compensation.

(3) In this regulation:

**contents**, in relation to a residential building, means any of the following items:

- (a) furniture, furnishings and carpets (whether fixed or unfixed);
- (b) household goods;
- (c) clothing and other personal effects;
- (d) a picture;
- (e) a work of art;
- (f) a fur;
- (g) a piece of jewellery;
- (h) a gold or silver article;
- (i) a document of any kind;
- (j) a collection of any kind;
- (k) swimming pools that:
  - (i) are not fixtures; and
  - (ii) are owned by the insured or by a member of the insured's family ordinarily residing with the insured;

but does not include an article or thing to which the definition of **residential building** applies.

**residential building** means:

- (a) a building used principally and primarily as a place of residence on the site; and
- (b) out-buildings used for domestic purposes, being purposes related to the use of the principal residence on the site.

(4) A residential building does not include:

- (a) a hotel; or
- (b) a motel; or
- (c) a boarding house; or
- (d) a building that is in the course of construction; or
- (e) a temporary building or structure or a demountable or moveable structure.

**7.1.14 Meaning of *retail client* and *wholesale client*: sickness and accident insurance product**

- (1) For subparagraph 761G(5)(b)(iv) of the Act, a **sickness and accident insurance product** is a contract or part of a contract that has either of the following characteristics:
  - (a) the contract provides insurance cover (whether the cover is limited or restricted in any way) in respect of the insured person contracting a sickness or disease or a specified sickness or disease or sustaining an injury or a specified injury;

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- (b) if the insured person dies as a result of the sickness, disease or injury, the contract provides insurance cover (whether the cover is limited or restricted in any way) in respect of the death.
- (2) A sickness and accident insurance product does not include:
- (a) sickness and accident policies which are guaranteed 'renewable' at the option of the insured or where the insurer guarantees not to cancel the policy in response to a change in the risk where such a policy has been effected for a predetermined period of years in excess of 1 year; or
  - (b) insurance to or in relation to which the *Marine Insurance Act 1909* applies; or
  - (c) insurance entered into, or proposed to be entered into, for the purposes of a law (including a law of a State or Territory) that relates to:
    - (i) workers' compensation; or
    - (ii) compulsory third party compensation; or
  - (d) insurance that:
    - (i) provides cover for the death of, or injury to, a driver of a motor vehicle which is caused by the fault of that person when driving; and
    - (ii) is provided only in conjunction with, and at no extra cost to, insurance mentioned in subparagraph (c)(ii).

Note: See also regulation 7.9.14B.

**7.1.15 Meaning of *retail client* and *wholesale client*: consumer credit insurance product**

- (1) For subparagraph 761G(5)(b)(v) of the Act, a ***consumer credit insurance product*** is a contract or part of a contract that has the following characteristics:
- (a) the contract provides insurance cover (whether the cover is limited or restricted in any way) in respect of:
    - (i) the death of the insured person; or
    - (ii) the insured person contracting a sickness or disease; or
    - (iii) the insured person sustaining an injury; or
    - (iv) the insured person becoming unemployed;
  - (b) the amount of the liability of the insurer under the contract is to be ascertained by reference to a liability of the insured person under a specified agreement to which the insured person is a party.
- (2) A consumer credit insurance product does not include:
- (a) insurance to or in relation to which the *Marine Insurance Act 1909* applies; or
  - (b) insurance entered into, or proposed to be entered into, for the purposes of a law (including a law of a State or Territory) that relates to:
    - (i) workers' compensation; or
    - (ii) compulsory third party compensation.

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**7.1.16 Meaning of *retail client* and *wholesale client*: travel insurance product**

- (1) For subparagraph 761G(5)(b)(vi) of the Act, a ***travel insurance product*** is a contract or part of a contract that provides insurance cover (whether or not the cover is limited or restricted in any way) in respect of one or more of the following:
  - (a) financial loss in respect of:
    - (i) fares for any form of transport to be used; or
    - (ii) accommodation to be used;  
in the course of the specified journey in the event that the insured person does not commence or complete the specified journey;
  - (b) loss of or damage to personal belongings that occurs while the insured person is on the specified journey;
  - (c) a sickness or disease contracted or an injury sustained by the insured person while on the specified journey;
  - (d) loss, damage or compensation for an event occurring to the insured person during a specified journey that ordinarily forms a part of insurance commonly regarded as travel insurance, including
    - (i) loss of cash or credit cards; and
    - (ii) legal liability; and
    - (iii) hijack; and
    - (iv) kidnap; and
    - (v) ransom.
- (2) A travel insurance product does not include:
  - (a) insurance to or in relation to which the *Marine Insurance Act 1909* applies; or
  - (b) insurance entered into, or proposed to be entered into, for the purposes of a law (including a law of a State or Territory) that relates to:
    - (i) workers' compensation; or
    - (ii) compulsory third party compensation.

- (3) In this regulation:

***specified journey*** means a journey in relation to which insurance cover is provided by the contract.

**7.1.17 Meaning of *retail client* and *wholesale client*: personal and domestic property insurance product**

- (1) For subparagraph 761G(5)(b)(vii) of the Act, a ***personal and domestic property insurance product*** is a contract or part of a contract that provides insurance cover (whether or not the cover is limited or restricted in any way) in respect of loss or damage to property that is:
  - (a) wholly or predominantly used for personal, domestic or household purposes by:
    - (i) the insured; or

- (ii) a relative of the insured; or
  - (iii) any person with whom the insured resides; and
- (b) ordinarily used for that purpose.
- (2) A personal and domestic property insurance product does not include:
- (a) insurance to or in relation to which the *Marine Insurance Act 1909* applies; or
  - (b) insurance entered into, or proposed to be entered into, for the purposes of a law (including a law of a State or Territory) that relates to:
    - (i) workers' compensation; or
    - (ii) compulsory third party compensation.
- (3) In this regulation:

**property** includes any of the following:

- (a) moveables;
- (b) valuables;
- (c) a caravan or mobile home;
- (d) an on-site mobile home;
- (e) a trailer;
- (f) a marine pleasure craft;
- (g) a horse;
- (h) a domestic pet;
- (i) a mobile phone.

**relative** means any of the following relatives of an insured person:

- (a) mother;
- (b) step-mother;
- (c) father;
- (d) step-father;
- (e) brother;
- (f) half-brother;
- (g) sister;
- (h) half-sister;
- (i) spouse (including defacto spouse);
- (j) son;
- (k) step-son;
- (l) adopted son;
- (m) daughter;
- (n) step-daughter;
- (o) adopted daughter;
- (p) grandparent;
- (q) grandchild;
- (r) nephew;
- (s) niece;

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- (t) uncle;
  - (u) aunt;
  - (v) mother-in-law;
  - (w) father-in-law.
- (4) For paragraph (1)(a), property is taken to be wholly or predominantly used for personal, domestic or household purposes if the insured gives the insurer a statement, before the insurance product is issued, that the property is intended to be used wholly or predominantly for 1 or more of those purposes.

**7.1.17A General insurance products: medical indemnity insurance products**

For subparagraph 761G(5)(b)(viii) of the Act, a medical indemnity insurance product is prescribed.

**7.1.17B Retail clients and wholesale clients: aggregation of amounts for price or value of financial product**

- (1) For paragraph 761G(10)(a) of the Act, this regulation applies in relation to a class of financial products that:
- (a) are provided by the same product issuer to:
    - (i) a particular person; or
    - (ii) an associate of the person; or
    - (iii) a body corporate controlled and wholly owned by the person; and
  - (b) are provided at or about the same time.
- (2) The price for the provision of the financial products may be calculated by:
- (a) calculating the total price for the provision of all of the financial products in the class; and
  - (b) treating the total price as the price for the provision to the particular person of a single financial product.
- (3) The value of the financial products may be calculated by:
- (a) calculating the total value of all of the financial products in the class; and
  - (b) treating the total value as the value of a single financial product provided to the particular person.

**7.1.17C Retail clients: traditional trustee company services**

For subsection 761G(6A) of the Act, a traditional trustee company service is not provided to a person as a retail client if:

- (a) the service is provided to the person for use in relation to a business that is not a small business; or
- (b) the person to whom the service is provided is a professional investor.

Note: *Small business* is defined in subsection 761G(12) of the Act and *professional investor* is defined in section 9 of the Act.



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### **7.1.18 Retail clients and wholesale clients: price of investment-based financial products**

- (1) This regulation makes arrangements about the price for the provision of an investment-based financial product.

**Note:** Under paragraph 761G(7)(a) of the Act, if a financial product is not, or a financial service provided to a person does not relate to, a general insurance product, a superannuation product or an RSA product, the financial product or financial service is provided to the person as a retail client unless the price for the provision of the financial product, or the value of the financial product to which the financial service relates, equals or exceeds the amount specified in regulations made for the purposes of that paragraph as being applicable in the circumstances.

Under paragraph 761G(10)(a) of the Act, the regulations may also deal with how a price or value referred to in that paragraph is to be calculated, either generally or in relation to a specified class of financial products.

In general, the 'price' of a product will be the amount that is paid to acquire or be issued with the financial product. The test for the price of the product in paragraph 761G(7)(a) of the Act will be determined at or before the time the client acquires, or is issued with, the financial product. If a client pays over \$500 000 to acquire or be issued with the financial product, the client will be a wholesale client in respect of the product.

#### *Price*

- (2) For paragraph 761G(7)(a) of the Act, the amount applicable in relation to an investment-based financial product is \$500 000.

#### *Working out price: general rule*

- (3) For paragraph 761G(10)(a) of the Act, the price of an investment-based financial product:
- (a) is the amount that is paid or payable to acquire or purchase the investment-based financial product; and
  - (b) does not include any amount paid for or in respect of the investment-based financial product following its issue or acquisition unless the issue or acquisition would not have taken place without an arrangement to pay the amount.

**Note:** An amount deposited in a deposit account will not generally be regarded as part of the 'price' paid to acquire or purchase the financial product.

- (4) For subregulation (3), in calculating any amount payable or paid to acquire or purchase the investment-based financial product:
- (a) disregard any amount payable to the extent to which it is to be paid out of money lent by:
    - (i) the person offering the investment-based financial product; or
    - (ii) an associate of that person; and
  - (b) disregard any amount paid to the extent to which it was paid out of money lent by:
    - (i) the person offering the investment-based financial product; or
    - (ii) an associate of that person; and

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- (c) include any amount paid or payable to cover:
  - (i) fees or charges that are paid to the issuer or any other person that relates to the issue of the investment-based financial product; and
  - (ii) fees or charges that are paid to the issuer or any other person that relates to the issue of the investment-based financial product; and
- (d) despite paragraph (c), disregard any amount of remuneration or other benefits paid or payable to a person for the provision of financial product advice or other related services provided directly to:
  - (i) the client; or
  - (ii) another person acting on behalf of the client.

*Group products*

- (5) If the investment-based financial product is a group product covered by section 1012H of the Act:
  - (a) the amount in subregulation (2) is to be used to determine the status of each person who elects, or may elect, to be covered by the investment-based financial product; and
  - (b) subregulation (3) is to be used to determine the amount to be paid for the person to be covered by the investment-based financial product.

**7.1.19 Retail clients and wholesale clients: value of investment-based financial products**

- (1) This regulation makes arrangements about the value of an investment-based financial product to which a financial service relates.

Note: Under paragraph 761G(7)(a) of the Act, if a financial product is not, or a financial service provided to a person does not relate to, a general insurance product, a superannuation product or an RSA product, the financial product or financial service is provided to the person as a retail client unless the price for the provision of the financial product, or the value of the financial product to which the financial service relates, equals or exceeds the amount specified in regulations made for the purposes of that paragraph as being applicable in the circumstances.

Under paragraph 761G(10)(a) of the Act, the regulations may also deal with how a price or value referred to in that paragraph is to be calculated, either generally or in relation to a specified class of financial products.

In general, the 'value' of a product will be the amount that the product is worth once it is issued or acquired by the client. It is anticipated that the test for the value of the product in paragraph 761G(7)(a) of the Act will usually be used to assess a client's status as a retail or wholesale client at or before the time that a financial service (eg financial product advice, disposal of the product) is provided to the client in respect of an existing product.

*Value*

- (2) For paragraph 761G(7)(a) of the Act, the amount applicable in relation to an investment-based financial product is \$500 000.

*Working out value: general rule*

- (3) For paragraph 761G(10)(a) of the Act, the value of an investment-based financial product on a day is:
- (a) if the financial product is a security, or a financial product under paragraph 764A(1)(j) of the Act—the market value of the investment-based financial product; or
  - (b) if paragraph (a) does not apply—the amount of money that stands to the client’s credit in relation to that investment-based financial product.
- (4) For subregulation (3), in calculating the value of an investment-based financial product:
- (a) disregard any amount standing to the client’s credit in relation to the investment-based financial product to the extent that it is to be paid, or was paid, out of money lent by:
    - (i) the person offering the investment-based financial product; or
    - (ii) an associate of that person; and
  - (b) disregard any amount of fees or charges:
    - (i) that the product issuer has an actual or accrued right to deduct, or otherwise to have access to, from the value of the investment-based financial product (whether or not the amount has been deducted); or
    - (ii) that has accrued as at the time that the client’s status as a retail or wholesale client is assessed.

*Cumulative value of products*

- (5) If, at a single point in time:
- (a) a financial service that is being provided to a client is:
    - (i) financial product advice; or
    - (ii) arranging for a person to engage in conduct in accordance with subsection 766C(2) of the Act; and
  - (b) the financial service is provided in respect of:
    - (i) more than 1 investment-based financial product; or
    - (ii) more than 1 income financial stream financial product; or
    - (iii) a combination of investment-based financial products and income financial stream financial products; and
  - (c) either:
    - (i) the total price for the provision of those financial products is at least \$500 000; or
    - (ii) the price or value of all of those financial products is at least \$500 000;
- the value of the financial products is taken, for subregulation (3), to be greater than the amount mentioned in subregulation (2).
- (6) Subregulation (5) does not affect the operation of Part 7.9 of the Act, and Part 7.9 of these Regulations, to the extent that they require the provision of a Product Disclosure Statement in relation to the financial product advice.

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**Note:** Although the effect of subregulation (5) is that the value of the investment-based financial products is taken to be at least \$500 000 in the circumstances mentioned in that subregulation, a client must still be provided with appropriate product disclosure and other requirements in accordance with Part 7.9 of the Act as a retail client in relation to a particular investment-based financial product where the price of the product is less than \$500 000.

In any situation in which a Product Disclosure Statement would be required for a retail client (the situations described in Subdivision B of Division 2 of Part 7.9 of the Act), the limit of \$500 000 must be reached for any single investment-based financial product, or income stream financial product, before the client will be treated as a wholesale client.

*Group products*

- (7) If the investment-based financial product is a group product covered by subsection 1012H(1) of the Act:
- (a) the amount in subregulation (2) is to be used to determine the status of each person who elects, or may elect, to be covered by the investment-based financial product; and
  - (b) subregulation (3) is to be used to determine the value of the investment-based financial product to the extent that it stands, or will stand, to the credit of, each person who elects, or may elect, to be covered by the investment-based financial product.

*Time of assessment*

- (8) If a financial services provider needs to assess the status of a client as either retail or wholesale at a particular time in order to ensure that the client complies with the Act, or for any related purpose, the value of a financial product may be assessed at any time, whether or not a financial service is being provided at that time in relation to that product.

**Note:** Subregulation (8) will ensure that a provider of financial services may assess a client's status at any time (for example, the provider may need to ascertain whether a periodic statement must be sent to the client under section 1017D of the Act because the client is a retail client).

**7.1.19A Retail clients and wholesale clients: price of margin lending facilities**

- (1) This regulation makes arrangements about the price for the provision of a margin lending facility, or a margin lending facility whose limit is proposed to be increased, within the meaning of subsection 761EA(1) of the Act.

**Note:** Under paragraph 761G(7)(a) of the Act, if a financial product is not, or a financial service provided to a person does not relate to, a general insurance product, a superannuation product or an RSA product, the financial product or financial service is provided to the person as a retail client unless the price for the provision of the financial product, or the value of the financial product to which the financial service relates, equals or exceeds the amount specified in regulations made for the purposes of that paragraph as being applicable in the circumstances.

Under paragraph 761G(10)(a) of the Act, the regulations may also deal with how a price or value referred to in that paragraph is to be calculated, either generally or in relation to a specified class of financial products.

In general, the 'price' of a product will be the amount that is paid to acquire or be issued with the financial product. The test for the price of the product in paragraph 761G(7)(a) of the Act will be determined at or before the time the client acquires, or is issued with, the financial product. If a client pays \$500 000 or more to acquire or be issued with the financial product, the client will be a wholesale client in respect of the product.

*Price*

- (2) For paragraph 761G(7)(a) of the Act, the amount applicable in relation to the margin lending facility is \$500 000.

*Working out price*

- (3) For paragraph 761G(10)(a) of the Act, the price of a margin lending facility is to be worked out so that it is the same as the value of the secured property or transferred securities contributed by the client for establishing the facility.
- (4) For paragraph 761G(10)(a) of the Act, the price of a margin lending facility whose limit is proposed to be increased is to be worked out so that it is the sum of:
- (a) the current value of any secured property or transferred securities previously contributed by a client for establishing the facility or increasing the limit; and
  - (b) the value of any additional secured property or transferred securities contributed by the client in relation to the latest increase of the limit of the facility.
- (5) For subregulations (3) and (4), any secured property or transferred securities contributed by the client that is funded by borrowings from a third party is not to be taken into consideration when working out the price of a margin lending facility.

### **7.1.20 Retail clients and wholesale clients: price of income stream financial products**

- (1) This regulation makes arrangements about the price for the provision of an income stream financial product.

**Note:** Under paragraph 761G(7)(a) of the Act, if a financial product is not, or a financial service provided to a person does not relate to, a general insurance product, a superannuation product or an RSA product, the financial product or financial service is provided to the person as a retail client unless the price for the provision of the financial product, or the value of the financial product to which the financial service relates, equals or exceeds the amount specified in regulations made for the purposes of that paragraph as being applicable in the circumstances.

Under paragraph 761G(10)(a) of the Act, the regulations may also deal with how a price or value referred to in that paragraph is to be calculated, either generally or in relation to a specified class of financial products.

In general, the 'price' of a product will be the amount that is paid to acquire or be issued with the financial product. The test for the price of the product in paragraph 761G(7)(a) of the Act will be determined at or before the time the client acquires, or is issued with, the financial product. If a client pays over \$500 000 to

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acquire or be issued with the financial product, the client will be a wholesale client in respect of the product.

#### *Price*

- (2) For paragraph 761G(7)(a) of the Act, the amount applicable in relation to an income stream financial product is \$500 000.

#### *Working out price: general rule*

- (3) The price of an income stream financial product:
- (a) is the amount that is paid or payable to acquire or purchase the income stream financial product; and
  - (b) does not include any amount paid for or in respect of the income stream financial product following its issue or acquisition unless the issue or acquisition would not have taken place without an arrangement to pay the amount.

Note: Additional amounts contributed to an allocated annuity will not generally be regarded as part of the 'price' paid to acquire or purchase the financial product.

- (4) For subregulation (3), in calculating any amount payable or paid to acquire or purchase the income stream financial product:
- (a) disregard any amount payable to the extent to which it is to be paid out of money lent by:
    - (i) the person offering the income stream financial product; or
    - (ii) an associate of that person; and
  - (b) disregard any amount paid to the extent to which it was paid out of money lent by:
    - (i) the person offering the income stream financial product; or
    - (ii) an associate of that person; and
  - (c) include any amount paid or payable to cover:
    - (i) fees or charges that are paid to the issuer or any other person that relates to the issue of the income stream financial product; and
    - (ii) fees or charges that are paid to the issuer or any other person that relates to the issue of the income stream financial product; and
  - (d) despite paragraph (c), disregard any amount of remuneration or other benefits paid or payable to a person for the provision of financial product advice or other related services provided directly to:
    - (i) the client; or
    - (ii) another person acting on behalf of the client.

#### **7.1.21 Retail clients and wholesale clients: value of income stream financial products**

- (1) This regulation makes arrangements about the value of an income stream financial product.

Note: Under paragraph 761G(7)(a) of the Act, if a financial product is not, or a financial service provided to a person does not relate to, a general insurance product, a

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superannuation product or an RSA product, the financial product or financial service is provided to the person as a retail client unless the price for the provision of the financial product, or the value of the financial product to which the financial service relates, equals or exceeds the amount specified in regulations made for the purposes of that paragraph as being applicable in the circumstances.

Under paragraph 761G(10)(a) of the Act, the regulations may also deal with how a price or value referred to in that paragraph is to be calculated, either generally or in relation to a specified class of financial products.

In general, the 'value' of a product will be the amount that the product is worth once it is issued or acquired by the client. It is anticipated that the test for the value of the product in paragraph 761G(7)(a) of the Act will usually be used to assess a client's status as a retail or wholesale client at or before the time that a financial service (eg financial product advice, disposal of the product) is provided to the client in respect of an existing product.

*Value*

- (2) For paragraph 761G(7)(a) of the Act, the amount applicable in relation to an income stream financial product is \$500 000.

*Working out value: general rule*

- (3) For paragraph 761G(10)(a) of the Act, the value of an income stream product is the amount worked out in accordance with any of the following paragraphs:
- (a) if the terms of the income stream financial product provide for the calculation of a commutation value—the commutation value;
  - (b) if the terms of the income stream financial product do not permit commutation—the minimum commutation amount calculated in accordance with ordinarily accepted actuarial standards;
  - (c) if the income stream financial product is of a kind in relation to which money stands to the client's credit for the income stream financial product—the amount of money standing to the client's credit.
- (4) For subregulation (3), in calculating the value of an income stream financial product:
- (a) disregard any amount standing to the client's credit in relation to the income stream financial product to the extent that it is to be paid, or was to be paid, out of money lent by:
    - (i) the person offering the income stream financial product; or
    - (ii) an associate of that person; and
  - (b) disregard any amount of fees or charges:
    - (i) that the product issuer has an actual or accrued right to deduct from the value of the income stream financial product (whether or not the amount has been deducted); or
    - (ii) that has accrued as at the time that the client's status as a retail or wholesale client is assessed.
- (5) If it is not reasonably practicable to ascertain an amount in accordance with subregulation (3), the value of the income stream product is an amount calculated as follows:
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- (a) identify the price for the provision of the income stream;
- (b) subtract the total of any amounts paid out of the income stream (including any regular payments and any capital amounts);
- (c) subtract an amount representing the reasonable administrative fees or other expenses of the issuer (including any costs or fees relating to the product that were disclosed to the client at or before the time the product was issued);
- (d) add interest on:
  - (i) the amount paid for the income stream financial product; or
  - (ii) an amount, or a reasonable notional amount, representing the value of the income stream financial product;  
based on movements in the rate of the All Groups Consumer Price Index number (being the weighted average of the 8 Australian capital cities) published by the Australian Statistician.

*Group products*

- (6) If the income stream financial product is a group product covered by subsection 1012H(1) of the Act:
  - (a) the amount in subregulation (2) is to be used to determine the status of each person who elects, or may elect, to be covered by the income stream financial product; and
  - (b) subregulation (3) is to be used to determine the value of the income stream financial product to the extent that it stands, or will stand, to the credit of, each person who elects, or may elect, to be covered by the income stream financial product.

*Time of assessment*

- (7) If a financial services provider needs to assess the status of a client as either retail or wholesale at a particular time in order to ensure that the client complies with the Act, or for any related purpose, the value of a financial product may be assessed at any time, whether or not a financial service is being provided at that time in relation to that product.

Note: Subregulation (7) will ensure that a provider of financial services may assess a client's status at any time (for example, the provider may need to ascertain whether a periodic statement must be sent to the client under section 1017D of the Act because the client is a retail client).

**7.1.22 Retail clients and wholesale clients: value of derivatives**

- (1) This regulation makes arrangements about the value of a derivative:
  - (a) that is a financial product under section 761A of the Act; and
  - (b) to which section 765A of the Act does not apply.

Note: Under paragraph 761G(7)(a) of the Act, if a financial product is not, or a financial service provided to a person does not relate to, a general insurance product, a superannuation product or an RSA product, the financial product or financial service is provided to the person as a retail client unless the price for the provision of the financial product, or the value of the financial product to which the financial service



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relates, equals or exceeds the amount specified in regulations made for the purposes of that paragraph as being applicable in the circumstances.

Under paragraph 761G(10)(a) of the Act, the regulations may also deal with how a price or value referred to in that paragraph is to be calculated, either generally or in relation to a specified class of financial products.

*Value*

- (2) For paragraph 761G(7)(a) of the Act:
  - (a) the amount applicable in relation to a single derivative is \$500 000; and
  - (b) if the derivative is included in 2 or more related financial products, the amount applicable in relation to the related financial products is \$500 000.

*Working out value: general rule*

- (3) For paragraph 761G(10)(a) of the Act, the value of a derivative is the face value, or the notional amount in respect of, the financial product (in dollar terms) as at the date on which the relevant arrangement is entered into by the parties.

*Time of assessment*

- (4) If a financial services provider needs to assess the status of a client as either retail or wholesale at a particular time in order to ensure that the client complies with the Act, or for any related purpose, the value of a financial product may be assessed at any time, whether or not a financial service is being provided at that time in relation to that product.

Note: Subregulation (4) will ensure that a provider of financial services may assess a client's status at any time (for example, the provider may need to ascertain whether ongoing disclosure of a significant event must be sent to the client under section 1017B of the Act because the client is a retail client).

**7.1.22A Retail clients and wholesale clients: value of foreign exchange contracts**

- (1) This regulation makes arrangements about the value of a foreign exchange contract that is not a derivative.

*Value*

- (2) For paragraph 761G(7)(a) of the Act, the amount applicable to a foreign exchange contract is \$500 000.

*Working out value: general rule*

- (3) For paragraph 761G(10)(a) of the Act, the value of a foreign exchange contract is the amount paid or payable under the foreign exchange contract.

**7.1.23 Retail clients and wholesale clients: price of non-cash payment financial products**

- (1) This regulation makes arrangements about the price for the provision of a non-cash payment financial product.

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**Note:** Under paragraph 761G(7)(a) of the Act, if a financial product is not, or a financial service provided to a person does not relate to, a general insurance product, a superannuation product or an RSA product, the financial product or financial service is provided to the person as a retail client unless the price for the provision of the financial product, or the value of the financial product to which the financial service relates, equals or exceeds the amount specified in regulations made for the purposes of that paragraph as being applicable in the circumstances.

In general, the 'price' of a product will be the amount that is paid to acquire or be issued with the financial product. The test for the price of the product in paragraph 761G(7)(a) of the Act will be determined at or before the time the client acquires, or is issued with, the financial product. If a client pays over \$500 000 to acquire or be issued with the financial product, the client will be a wholesale client in respect of the product.

#### *Price*

- (2) For paragraph 761G(7)(a) of the Act, the amount applicable in relation to a non-cash payment financial product is \$500 000.

#### *Working out price: general rule*

- (3) The price of a non-cash payment financial product:
- (a) is the amount that is paid or payable to acquire or purchase the non-cash payment financial product; and
  - (b) does not include any amount paid for or in respect of the non-cash payment financial product following its issue or acquisition unless the issue or acquisition would not have taken place without an arrangement to pay the amount.

**Note:** Additional amounts paid into a smart card or cheque account after its issue will not generally be regarded as part of the 'price' paid to acquire or purchase the financial product.

- (4) For subregulation (3), in calculating any amount payable or paid to acquire or purchase the non-cash payment financial product:
- (a) include any amount paid or payable to cover:
    - (i) fees or charges that are paid to the issuer or any other person that relates to the issue of the non-cash payment financial product; and
    - (ii) fees or charges that are paid to the issuer or any other person that relates to the issue of the non-cash payment financial product; and
  - (b) despite paragraph (a), disregard any amount of remuneration or other benefits paid or payable to a person for the provision of financial product advice or other related services provided directly to:
    - (i) the client; or
    - (ii) another person acting on behalf of the client.

### **7.1.24 Retail clients and wholesale clients: value of non-cash payment products**

- (1) This regulation makes arrangements about the value of a non-cash payment financial product to which a financial service relates.

**Note:** Under paragraph 761G(7)(a) of the Act, if a financial product is not, or a financial service provided to a person does not relate to, a general insurance product, a

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superannuation product or an RSA product, the financial product or financial service is provided to the person as a retail client unless the price for the provision of the financial product, or the value of the financial product to which the financial service relates, equals or exceeds the amount specified in regulations made for the purposes of that paragraph as being applicable in the circumstances.

In general, the 'value' of a product will be the amount that the product is worth once it is issued or acquired by the client. It is anticipated that the test for the value of the product in paragraph 761G(7)(a) of the Act will usually be used to assess a client's status as a retail or wholesale client at or before the time that a financial service (eg financial product advice, disposal of the product) is provided to the client in respect of an existing product.

*Value*

- (2) For paragraph 761G(7)(a) of the Act, the amount applicable in relation to a non-cash payment financial product is \$500 000.

*Working out value: general rule*

- (3) For paragraph 761G(10)(a) of the Act, the value of a non-cash payment financial product on a day is the amount of money that stands to the client's credit in respect of that product.
- (4) For subregulation (3), in calculating an amount of money, disregard any amount of fees or charges:
- (a) that the product issuer has an actual or accrued right to deduct, or otherwise to have access to, from the value of the non-cash payment financial product (whether or not the amount has been deducted); or
  - (b) that has accrued as at the time that the client's status as a retail or wholesale client is assessed.

*Time of assessment*

- (5) If a financial services provider needs to assess the status of a client as either retail or wholesale at a particular time in order to ensure that the client complies with the Act, or for any related purpose, the value of a financial product may be assessed at any time, whether or not a financial service is being provided at that time in relation to that product.

Note: Subregulation (5) will ensure that a provider of financial services may assess a client's status at any time (for example, the provider may need to ascertain whether ongoing disclosure of a significant event must be sent to the client under section 1017B of the Act because the client is a retail client).

**7.1.25 Retail clients and wholesale clients: life risk insurance and other risk-based financial products**

- (1) This regulation makes arrangements about the value of a risk-based financial product.
- (2) Paragraph 761G(7)(a) of the Act does not apply to a risk-based financial product.

Note: Under paragraph 761G(7)(a) of the Act, if a financial product is not, or a financial service provided to a person does not relate to, a general insurance product, a

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superannuation product or an RSA product, the financial product or financial service is provided to the person as a retail client unless the price for the provision of the financial product, or the value of the financial product to which the financial service relates, equals or exceeds the amount specified in regulations made for the purposes of that paragraph as being applicable in the circumstances.

Under paragraph 761G(10)(a) of the Act, the regulations may also deal with how a price or value referred to in that paragraph is to be calculated, either generally or in relation to a specified class of financial products.

Under paragraph 761G(10)(b) of the Act, the regulations may also modify the way in which paragraph 761G(7)(a) applies in particular circumstances.

### 7.1.26 Superannuation-sourced money

For the purpose of assessing the price of a financial product, or the value of a financial product to which a financial service relates, under paragraph 761G(7)(a) of the Act, superannuation-sourced money is not to be counted if:

- (a) the financial service provided to a person is:
  - (i) financial product advice; or
  - (ii) if the person was a retail client—the provision of a financial product in circumstances in which a Product Disclosure Statement would need to be given to the client under Part 7.9 of the Act (including section 1012A, 1012B, 1012C or 1012IA); and
- (b) the financial product to which the financial service relates is a product other than a non-cash payment financial product; and
- (c) the person who was the holder of the relevant superannuation interest in the regulated superannuation fund was or would have been a retail client under subsection 761G(6) of the Act if they had held or acquired the product after FSR commencement.

Example: If:

- (a) the price for an income stream financial product or an investment-based financial product is \$700 000; and
- (b) the client uses \$400 000 of superannuation-sourced money and \$300 000 of other funds;

then, unless the client is a wholesale client for another reason, the client will be a retail client due to the operation of paragraph 761G(7)(a) of the Act.

Note: Under subsections 761G(5), (6) and (7) of the Act, general insurance products, superannuation products and RSA products are not financial products to which the restriction on counting superannuation-sourced money towards the price applies. This applies in addition to the exclusion for non-cash payment products under paragraph (b) of this regulation.

### 7.1.27 Retail clients and wholesale clients: effect of wholesale status

- (1) For subsection 761G(10) of the Act if, at any time, the holder of a financial product is a wholesale client in relation to the product because of paragraph 761G(7)(a) of the Act:
  - (a) the holder is taken, on and after that time, to be a wholesale client in relation to the product as between the holder and:

- (i) the issuer of the product; or
  - (ii) if a related body corporate of the issuer of the product provides a custodial or depository service to the holder of the product in relation to the product—the related body corporate;
- for the period during which the holder holds the product; and
- (b) paragraph (a) applies whether or not the holder would, but for that paragraph, have otherwise been or become a retail client in relation to that product at some time.
- (2) For subsection 761G(10) of the Act, if:
- (a) a person is a wholesale client in relation to the product because of paragraph 761G(7)(a) or paragraph (1)(a); and
  - (b) another person becomes a holder of the financial product; and
  - (c) the issuer did not know, and could not reasonably be expected to have known:
    - (i) whether another person had become the holder of the financial product; or
    - (ii) whether any subsequent holder of the financial product was a retail client or a wholesale client;
- the issuer is taken not to be guilty of any offence, or to be liable under civil penalty or civil liability provisions under the Act, merely because the issuer has not treated any subsequent holder of that financial product as a retail client.

### **7.1.28 Retail clients and wholesale clients: assets and income**

- (1) For subparagraph 761G(7)(c)(i) of the Act, \$2.5 million is specified.
- (2) For subparagraph 761G(7)(c)(ii) of the Act, \$250 000 is specified.

- Note: Under paragraph 761G(7)(c) of the Act, if a financial product is not, or a financial service provided to a person does not relate to, a general insurance product, a superannuation product or an RSA product, the product or service is provided to the person as a retail client unless:
- (a) the client is a wholesale client under paragraph 761G(7)(a), (b) or (d) of the Act; or
  - (b) the person who acquires the product or service gives the provider of the product or service, before the provision of the product or service, a copy of a certificate given within the preceding 6 months by a qualified accountant that states that the person:
    - (i) has net assets of at least the amount specified in regulations made for the purposes of subparagraph 761G(7)(c)(i) of the Act; or
    - (ii) has a gross income for each of the last 2 financial years of at least the amount specified in regulations made for the purposes of subparagraph 761G(7)(c)(ii) of the Act a year.

## Division 3—When does a person provide a financial service?

### 7.1.28AA Provision of financial product advice about default funds

For paragraph 766A(1)(f) of the Act, the provision of financial product advice to an employer about the choice of a fund to which to contribute for the benefit of those employees for whom there is no chosen fund (within the meaning of the *Superannuation Guarantee (Administration) Act 1992*) is prescribed.

Note: The financial product advice provided to the employer is a financial service provided to a person as a retail client: see paragraph 761G(6)(b) of the Act.

### 7.1.28A Circumstances in which a person is taken to be provided a traditional trustee company service

For subsection 766A(1B) of the Act, a person who is one of the following:

- (a) a person who may request an annual information return under subregulation 5D.2.01(3);
- (b) a person who requests the preparation of a will, a trust instrument, a power of attorney or an agency arrangement;

is, in relation to an estate management function, prescribed as the person to whom the service is taken to be provided.

### 7.1.29 Circumstances in which a person is taken not to provide a financial service

- (1) For paragraph 766A(2)(b) of the Act, a person who provides an eligible service is taken not to provide a financial service if:
  - (a) the person provides the eligible service in the course of conducting an exempt service; and
  - (b) it is reasonably necessary to provide the eligible service in order to conduct the exempt service; and
  - (c) the eligible service is provided as an integral part of the exempt service.
- (2) For this regulation, a person provides an **eligible service** if the person engages in conduct mentioned in paragraphs 766A(1)(a) to (f) of the Act.
- (3) For this regulation, a person who does any of the following provides an **exempt service**:
  - (a) provides advice in relation to the preparation or auditing of financial reports or audit reports;
  - (b) provides advice on a risk that another person might be subject to and identifies generic financial products or generic classes of financial product that will mitigate that risk, other than advice for inclusion in an exempt document or statement;
  - (c) provides advice on the acquisition or disposal, administration, due diligence, establishment, structuring or valuation of an incorporated or unincorporated entity, if the advice:

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- (i) is given to a person who is, or is likely to become, an interested party in the entity; and
  - (ii) to the extent that it is financial product advice—is confined to advice on a decision about:
    - (A) securities of a body corporate, or related body corporate, that carries on or may carry on the business of the entity; or
    - (B) interests in a trust (other than a superannuation fund, a managed investment scheme that is registered or required to be registered under Part 5C.1 of the Act, or a notified foreign passport fund), the trustee of which carries on or may carry on the business of the entity in the capacity of trustee; and
  - (iii) does not relate to other financial products that the body corporate or the trustee of the trust may acquire or dispose of; and
  - (iv) is not advice for inclusion in an exempt document or statement;
  - (d) provides advice on financial products that are:
    - (i) securities in a company (other than securities that are to be offered under a disclosure document under Chapter 6D of the Act); or
    - (ii) interests in a trust (other than a superannuation fund, a managed investment scheme that is registered or required to be registered under Part 5C.1 of the Act, or a notified foreign passport fund);
 if the company or trust is not carrying on a business and has not, at any time, carried on a business;
  - (e) provides advice in relation to the transfer of financial products between associates;
  - (f) arranges for another person to engage in conduct referred to in subsection 766C(1) in relation to interests in a self managed superannuation fund in the circumstances in paragraphs (5)(b) and (c);
  - (g) arranges for another person to engage in conduct referred to in subsection 766C(1), by preparing a document of registration or transfer in order to complete administrative tasks on instructions from the person;
  - (h) provides advice about the provision of financial products as security, other than where the security is provided for the acquisition of other financial products.
- (3A) For this regulation, a person also provides an **exempt service** if the person:
- (a) is registered as an auditor under Part 9.2 of the Act; and
  - (b) performs any of the functions of a cover pool monitor mentioned in subsection 30(4) of the *Banking Act 1959*.
- (4) For this regulation, a person also provides an **exempt service** if:
- (a) the person provides advice to another person on taxation issues including advice in relation to the taxation implications of financial products; and
  - (b) the person will not receive a benefit (other than from the person advised or an associate of the person advised) as a result of the person advised acquiring a financial product mentioned in the advice, or a financial product that falls within a class of financial products mentioned in the advice; and
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- (c) either:
- (i) the advice does not constitute financial product advice to a retail client; or
  - (ii) the advice constitutes financial product advice to a retail client and it includes, or is accompanied by, a written statement that:
    - (A) the person providing the advice is not licensed to provide financial product advice under the Act; and
    - (B) taxation is only one of the matters that must be considered when making a decision on a financial product; and
    - (C) the client should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.
- (5) For this regulation, a person also provides an *exempt service* if:
- (a) the person provides advice in relation to the establishment, operation, structuring or valuation of a superannuation fund, other than advice for inclusion in an exempt document or statement; and
  - (b) the person advised is, or is likely to become:
    - (i) a trustee; or
    - (ii) a director of a trustee; or
    - (iii) an employer sponsor; or
    - (iv) a person who controls the management; of the superannuation fund; and
  - (c) except for advice that is given for the sole purpose, and only to the extent reasonably necessary for the purpose, of ensuring compliance by the person advised with the SIS Act (other than paragraph 52(2)(f)), the SIS Regulations (other than regulation 4.09) or the *Superannuation Guarantee (Administration) Act 1992*—the advice:
    - (i) does not relate to the acquisition or disposal by the superannuation fund of specific financial products or classes of financial products; and
    - (ii) does not include a recommendation that a person acquire or dispose of a superannuation product; and
    - (iii) does not include a recommendation in relation to a person's existing holding in a superannuation product to modify an investment strategy or a contribution level; and
  - (d) if the advice constitutes financial product advice provided to a retail client—the advice includes, or is accompanied by, a written statement that:
    - (i) the person providing the advice is not licensed to provide financial product advice under the Act; and
    - (ii) the client should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.
- (6) In this regulation:
- employer sponsor*** has the meaning given by subsection 16(1) of the SIS Act.
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**exempt document or statement** has the meaning given by subsection 766B(9) of the Act.

**generic** means without reference to a particular brand or product issuer.

**interested party** means:

- (a) an associate within the meaning of Division 2 of Part 1.2 of the Act; or
- (b) a manager; or
- (c) an officer; or
- (d) a trustee or director of a trustee.

**self managed superannuation fund** has the meaning given by section 17A of the SIS Act.

### 7.1.30 Information and advice about voting

For paragraph 766A(2)(b) of the Act, a circumstance in which a person is taken not to provide a financial service within the meaning of paragraph 766A(1)(a) of the Act is that:

- (a) the service provided by the person consists only of advising another person in relation to the manner in which:
  - (i) voting rights attaching to securities; or
  - (ii) voting rights attaching to interests in managed investment schemes; may or should be exercised; and
- (b) the advice is not intended to influence any decision in relation to financial products other than a decision about voting; and
- (c) the advice could not be reasonably be regarded as intended to influence a decision in relation to financial products, other than a decision about voting; and
- (d) the advice does not relate to a vote that relates to a dealing in financial products.

Note: A service that includes advice which is intended to influence the decision to acquire securities in another company would be not provided in circumstances covered by this regulation.

### 7.1.31 Passing on prepared documents

For paragraph 766A(2)(b) of the Act, a circumstance in which a person (**person 1**) is taken not to provide a financial service within the meaning of paragraph 766A(1)(a) of the Act is that:

- (a) person 1 provides a service to a person; and
- (b) the service consists only of passing on, publishing, distributing or otherwise disseminating a document that contains financial product advice; and
- (c) the document was provided by another person (**person 2**); and
- (d) person 2 is not acting on behalf of person 1; and

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- (e) person 1 is not the holder of a financial services licence that authorises person 1 to provide financial product advice; and
- (f) person 1 does not select the content of the document, modify the content of the document or otherwise exercise control over the content of the document; and
- (g) a reasonable person would not consider that person 1 provided, endorsed or otherwise assumed responsibility for the financial product advice contained in the document.

**7.1.32 Remuneration packages**

For paragraph 766A(2)(b) of the Act, a circumstance in which a person (*person I*) is taken not to provide a financial service within the meaning of paragraph 766A(1)(a) of the Act is that:

- (a) person 1 provides advice to another person; and
- (b) the advice relates only to the structuring of remuneration packages for the other person's employees.

**7.1.33 Handling insurance claims**

- (1) For paragraph 766A(2)(b) of the Act, a circumstance in which a person is taken not to provide a financial service within the meaning of paragraph 766A(1)(a) of the Act is the giving of advice that consists only of a recommendation or statement of opinion provided in the course of, and as a necessary or incidental part of, either or both of:
  - (a) the handling of claims or potential claims in relation to an insurance product; and
  - (b) the settlement of claims or potential claims in relation to an insurance product.
- (2) For paragraph 766A(2)(b) of the Act, a circumstance in which a person is taken not to provide a financial service within the meaning of paragraph 766A(1)(b) of the Act is a dealing in an insurance product that is a necessary or incidental part of either or both of:
  - (a) the handling of claims or potential claims in relation to that product; and
  - (b) the settlement of claims or potential claims in relation to that product.

Examples of services:

- 1 Negotiations on settlement amounts.
- 2 Interpretation of relevant policy provisions.
- 3 Estimates of loss or damage.
- 4 Estimate of value or appropriate repair.
- 5 Recommendations on mitigation of loss.
- 6 Recommendations, in the course of handling a claim as described in subregulations (1) and (2), on increases in limits or different cover options to protect against the same loss in the future.
- 7 Claims strategy such as the making of claims under alternate policies.

(3) In this regulation:

***insurance product*** includes a self-insurance arrangement through which a person manages financial risk.

### **7.1.33A Allocation of funds available for investment**

For paragraph 766A(2)(b) of the Act, a circumstance in which a person is taken not to provide a financial service within the meaning of paragraph 766A(1)(a) of the Act is the provision of a service that consists only of a recommendation or statement of opinion provided to a person about the allocation of the person's funds that are available for investment among 1 or more of the following:

- (a) shares;
- (b) debentures;
- (c) debentures, stocks or bonds issued, or proposed to be issued, by a government;
- (d) deposit products;
- (e) managed investment products;
- (ea) foreign passport fund products;
- (f) investment life insurance products;
- (g) superannuation products;
- (h) other types of asset.

Note: This regulation does not apply to a recommendation or statement of opinion that relates to specific financial products or classes of financial products.

### **7.1.33B General advice**

- (1) For paragraph 766A(2)(b) of the Act, this regulation applies in relation to the provision of a service by a person to another person in the following circumstances:
  - (a) the service consists only of general advice in relation to a financial product or class of financial products;
  - (b) the advice is prepared by a product issuer of the financial product or class of financial products who is not a financial services licensee;
  - (c) the advice is provided by a financial services licensee whose financial services licence covers the provision of the advice.
- (2) The product issuer is taken not to provide a financial service within the meaning of paragraph 766A(1)(a) of the Act.
- (3) The financial services licensee is taken to provide a financial service within the meaning of paragraph 766A(1)(a) of the Act.

### **7.1.33D Investment-linked life insurance products**

For paragraph 766A(2)(b) of the Act, a person is taken not to provide a financial service if:

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- (a) the person makes a market for a financial product (within the meaning of section 766D of the Act); and
- (b) the person is the issuer of the product; and
- (c) the product is an investment-linked life insurance policy under an investment-linked contract (within the meaning of subsection 14(4) of the *Life Insurance Act 1995*).

**7.1.33E Advice about the existence of a custodial or depository service**

For paragraph 766A(2)(b) of the Act, a person is taken not to provide a financial service if:

- (a) the person provides advice about a custodial or depository service; and
- (b) the advice is not about a financial product; and
- (c) the advice is not intended to influence, and could not reasonably be regarded as being intended to influence, a decision about a financial product other than a product that is a financial product only because it is an equitable right or interest in:
  - (i) a share in a body; or
  - (ii) a debenture of a body; or
  - (iii) an interest in a registered scheme; or
  - (iv) an interest in a notified foreign passport fund.

Note: Paragraph (c) describes financial products under paragraph (c) of the definition of *security* in section 761A of the Act and financial products under subparagraphs 764A(1)(b)(ii) and (bb)(ii) of the Act.

**7.1.33F School banking**

- (1) For paragraph 766A(2)(b) of the Act, a person is taken not to provide a financial service if:
  - (a) the service is:
    - (i) arranging for the issue, or the acquisition, of a school banking product; or
    - (ii) the provision of general advice intended to influence a decision in relation to a school banking product; and
  - (b) the person:
    - (i) is employed by a school; or
    - (ii) provides the service on behalf of a school; and
  - (c) the person does not receive any financial benefit for the provision of the service; and
  - (d) the Product Disclosure Statement for the product discloses any commissions or other benefits that the school might receive in connection with the issue of the product.

- (2) In this regulation:

***school banking product*** means a basic deposit product, issued by an ADI in the following circumstances:

- (a) it is offered for issue to pupils at a school;
- (b) there is no regular account keeping fee charged for the product.

### **7.1.33G Certain general advice that does not attract remuneration etc.**

For subsection 766A(2) of the Act, a person (the *advisor*) is taken not to provide a financial service if:

- (a) the advisor gives advice to another person; and
- (b) the advice:
  - (i) is not about a particular financial product or an interest in a particular financial product; and
  - (ii) is not personal advice; and
- (c) the advice:
  - (i) is not intended to influence the other person in making a decision in relation to a particular financial product or an interest in a particular financial product; or
  - (ii) could not reasonably be regarded as being intended to have such an influence; and
- (d) by giving the advice neither the advisor, nor an associate of the advisor, receives any remuneration (including commission) or other benefit that is related to the advice given apart from remuneration (including commission) or other benefit that the advisor or the associate would have received if the advice was not given.

### **7.1.33H Certain general advice given by a financial product issuer**

For subsection 766A(2) of the Act, a financial product issuer is not taken to provide a financial service if:

- (a) the issuer gives advice to another person about:
  - (i) a particular financial product or class of financial products issued by the issuer; or
  - (ii) an interest in a particular financial product or a class of financial products issued by the issuer; and
- (b) the advice is not personal advice; and
- (c) the advice is given to the person at the same time as the issuer:
  - (i) advises the person that the issuer is not licensed to provide financial product advice in relation to the product, class or interest, as the case may be; and
  - (ii) recommends to the person that the person obtain a Product Disclosure Statement, if appropriate, and read it before making a decision to acquire the product or a product from the class of products, as the case may be; and

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- (iii) if it is advice about the offer, issue or sale of a financial product—  
notifies the person about the availability or otherwise of a cooling-off  
regime that applies in respect of the acquisition of the product, a  
product from the class of products or an interest in a product as the  
case may be (whether the regime is provided for by law or otherwise).

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## **Division 4—Dealings in financial products**

### **7.1.34 Conduct that does not constitute dealing in a financial product**

- (1) This regulation does not apply in relation to a margin lending facility.
- (2) For subsection 766C(7) of the Act, the following conduct does not constitute dealing in a financial product:
  - (a) the enforcement of rights under a credit facility, including the enforcement of rights by a person acting under a power of attorney;
  - (b) the disposal of a financial product that is subject to a mortgage or the transfer of such a product to the mortgagor, whether the disposal or transfer is carried out at the direction of the mortgagor or occurs as a result of the mortgagor fulfilling its obligations under the mortgage.

Example for paragraph (a):      A mortgagee exercising a power of sale under a mortgage.

### **7.1.35 Conduct that does not constitute dealing in a financial product**

- (1) For subsection 766C(7) of the Act, conduct is not taken to be dealing in a financial product if:
  - (a) the conduct is of a kind:
    - (i) mentioned in paragraph 766C(1)(a), (d) or (e) of the Act; or
    - (ii) mentioned in paragraph 766C(1)(b) of the Act, where it is the issue of a beneficial interest in a financial product, that arises from conduct that would constitute providing a custodial or depository service but for the operation of regulation 7.1.40; and
  - (b) the conduct is carried out by a person (*person 1*) in relation to a product that person 1 holds on trust for, or on behalf of, another person (*person 2*) and the holding of that financial product would not constitute the provision of a custodial or depository service because of paragraphs 7.1.40(a), (b), (c), (d), (g) and (i).
- (2) Subregulation (1) does not apply to conduct carried out by person 1 in relation to a financial product that is held under a custodial arrangement as defined in section 1012IA of the Act unless:
  - (a) person 2 is an associate of person 1; or
  - (b) the financial product is held in the manner mentioned in paragraph 7.1.40(d).

### **7.1.35A Conduct that does not constitute dealing in a financial product— lawyers acting on instructions**

For subsection 766C(7) of the Act, a financial service provided by a lawyer is taken not to be dealing in a financial product if:

- (a) the financial service consists of:
  - (i) arranging for a person to engage in conduct referred to in subsection 766C(1) of the Act; or

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- (ii) dealing as an agent or otherwise on behalf of a client, an associate of a client or a relative of a client; and
- (b) the lawyer is acting:
  - (i) on the instructions of the client, an associate of the client or a relative of the client; and
  - (ii) in his or her professional capacity; and
  - (iii) in the ordinary course of his or her activities as a lawyer; and
- (c) the financial service can reasonably be regarded as a necessary part of those activities; and
- (d) the lawyer has not received, and will not receive, a benefit in connection with those activities other than:
  - (i) the payment of professional charges in relation to those activities; and
  - (ii) reimbursement for expenses incurred or payment on account of expenses to be incurred on behalf of the client, an associate of the client or a relative of the client;from the client or from another person on behalf of the client.

**7.1.35B Conduct that does not constitute dealing in a financial product—issuing carbon units, Australian carbon credit units or eligible international emissions units**

For subsection 766C(7) of the Act, a financial service provided by a person is taken not to be dealing in a financial product if:

- (a) the financial product is a carbon unit, an Australian carbon credit unit or an eligible international emissions unit; and
- (b) the person is:
  - (i) the Clean Energy Regulator; or
  - (ii) the Clean Development Mechanism Executive Board; or
  - (iii) the government of a country other than Australia; or
  - (iv) an authority acting on behalf of the government of a country other than Australia; and
- (c) the financial service consists of issuing the carbon unit, Australian carbon credit unit or eligible international emissions unit.

**7.1.35C Conduct that does not constitute dealing in a financial product—carbon units, Australian carbon credit units or eligible international emissions units**

For subsection 766C(7) of the Act, a financial service provided by a person is taken not to be dealing in a financial product if:

- (a) the financial product is a carbon unit, an Australian carbon credit unit or an eligible international emissions unit; and
- (b) the financial service consists of dealing in the carbon unit, Australian carbon credit unit or eligible international emissions unit on behalf of:
  - (i) a related body corporate of the person; or
  - (ii) an associated entity of the person; and



- (c) the related body corporate or associated entity is an entity that is a liable entity entered in the information database under section 183 of the *Clean Energy Act 2011*.

## Division 5—Custodial or depository services

### 7.1.40 Conduct that does not constitute the provision of a custodial or depository service

- (1) For paragraph 766E(3)(e) of the Act, conduct that is mentioned in subsection 766E(1) of the Act does not constitute providing a custodial or depository service if:
  - (a) the financial product held by the provider is a basic deposit product (within the definition in section 761A of the Act) or is an account mentioned in subsection 981B(1) of the Act; or
  - (b) the client is an associate of the provider (within the meaning of Division 2 of Part 1.2 of the Act); or
  - (c) the provider and its associates have no more than 20 clients in aggregate for all custodial or depository services that they provide; or
  - (d) the financial product is held as part of the arrangements for securing obligations under:
    - (i) a credit facility; or
    - (ii) a debenture that is held as trustee under a trust deed:
      - (A) entered into under section 283AA of the Act or former section 260FA of the Corporations Law of a State or Territory; or
      - (B) mentioned in former section 1052 of the Corporations Law of a State or Territory; or
  - (e) the provider is a participant in a licensed market and the financial product held is a derivative acquired on the licensed market by the provider on behalf of a client; or
  - (f) the provider is a participant in a licensed clearing and settlement facility and the financial product held is a derivative registered on the licensed clearing and settlement facility by the provider on behalf of the client; or
  - (g) the financial product is held under:
    - (i) an order of a court; or
    - (ii) an order of a board or tribunal established under a law of a State or Territory; or
    - (iii) a direction by the holder of a statutory office established under a law of a State or Territory; or
  - (h) the service is provided by a lawyer in the following circumstances:
    - (i) the financial service consists of acquiring, holding or disposing of a cash management trust interest, being an interest to which a law of a State or Territory relating to the audit of trust or controlled monies applies;
    - (ii) the lawyer is acting:
      - (A) on instructions from the client, an associate of the client or a relative of the client; and
      - (B) in his or her professional capacity; and

- (C) in the ordinary course of his or her activities as a lawyer;
  - (iii) the financial service can reasonably be regarded as a necessary part of those activities;
  - (iv) the lawyer has not received, and will not receive, a benefit in connection with the activities other than:
    - (A) the payment of professional charges related to those activities; and
    - (B) reimbursement for expenses incurred or payment on account of expenses to be incurred on behalf of the client, an associate of the client or a relative of the client;  
from the client or from another person on behalf of the client; or
  - (i) the financial product is held by a trustee appointed under:
    - (i) a law of a State or Territory to administer monies awarded to a person as compensation; or
    - (ii) a trust formed for a charitable purpose.
- (2) For paragraph 766E(3)(e) of the Act, conduct that is mentioned in subsection 766E(1) of the Act does not constitute providing a custodial or depository service if the financial product is an Australian carbon credit unit that has been issued to:
- (a) a special native title account in accordance with section 49 of the *Carbon Credits (Carbon Farming Initiative) Act 2011*; or
  - (b) a nominee account in accordance with section 141 of that Act.

## Division 6—Operating a financial market

### 7.1.50 Operating a financial market

For paragraph 767A(2)(a) of the Act, the following circumstances are specified as circumstances in which the conduct of a person making or accepting offers or invitations to acquire or dispose of financial products, on the person's own behalf or on behalf of one party to the transaction only, constitutes the operating of a financial market for the purposes of Chapter 7 of the Act:

- (a) the Clean Energy Regulator making or accepting offers or invitations to acquire or dispose of carbon units on its own behalf, or on behalf of the Commonwealth only, in the course of conducting an auction of carbon units under the *Clean Energy Act 2011*;
- (b) a person making or accepting offers or invitations to acquire or dispose of carbon units on behalf of the Clean Energy Regulator only, in the course of assisting the Clean Energy Regulator to conduct an auction of carbon units under the *Clean Energy Act 2011*.

## **Part 7.2—Licensing of financial markets**

### **Division 1—Market licensees' obligations**

#### **7.2.01 Obligation to inform ASIC of certain matters: contraventions of licence or Act**

For paragraph 792B(3)(b) of the Act, a matter to which that paragraph relates is any matter that, in the opinion of a market licensee, constitutes or may constitute a contravention of:

- (a) a condition of a licence held by a financial services licensee; or
- (b) Subdivision A or B of Division 2 of Part 7.8 of the Act; or
- (c) Division 3 of Part 7.8 of the Act; or
- (d) Subdivision B of Division 6 of Part 7.8 of the Act.

#### **7.2.02 Obligation to inform ASIC of certain matters: becoming director, secretary or executive officer of market licensee**

- (1) This regulation applies if a person becomes a director, secretary or executive officer of a market licensee or of a holding company of a market licensee (including when the person changes from one of those positions to another).
- (2) For subsection 792B(5) of the Act, the information to be given to ASIC by the market licensee is:
  - (a) the person's name and contact details; and
  - (b) the date of appointment to the position; and
  - (c) the person's educational qualifications and financial market experience; and
  - (d) if the market licensee is aware of any details of a conviction of the kind mentioned in subsection 206B(1) of the Act—the details; and
  - (e) whether the market licensee knows whether the person:
    - (i) is an undischarged bankrupt; or
    - (ii) has entered into a deed of arrangement or composition of a kind mentioned in subsections 206B(3) and (4) of the Act;and, if the market licensee knows the information, details of what the market licensee knows.

#### **7.2.03 Obligation to inform ASIC of certain matters: ceasing to be director, secretary or executive officer of market licensee**

- (1) For subsection 792B(5) of the Act, this regulation applies if a person ceases to be a director, secretary or executive officer of a market licensee or of a holding company of a market licensee (including when the person changes from one of those positions to another).
  - (2) The information to be given to ASIC by the market licensee is:
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- (a) the person's name and contact details; and
- (b) the position that the person held; and
- (c) the date on which the person ceased to hold the position; and
- (d) if the person ceases to be a director, secretary or executive officer because the person is changing from the position to another in the company, the new position; and
- (e) if the reason for ceasing to hold the position is:
  - (i) because of a contravention of the Corporations Act or another law of a State or Territory; or
  - (ii) because the person has become an undischarged bankrupt; details of the reason.

**7.2.04 Obligation to inform ASIC of certain matters: voting power in market licensee**

- (1) This regulation applies if a market licensee becomes aware that a person has come to have, or has ceased to have, more than 15% of the voting power in the market licensee or in a holding company of the market licensee.
- (2) For subsection 792B(5) of the Act, the information to be given to ASIC by the market licensee is:
  - (a) the person's name and contact details; and
  - (b) if known by the market licensee, the date on which the person came to have, or ceased to have, more than 15% of the voting power; and
  - (c) if the market licensee knows the voting power that the person had immediately before the person came to have, or ceased to have, more than 15% of the voting power, that voting power; and
  - (d) whether the market licensee knows the manner in which the person came to have, or ceased to have, more than 15% of the voting power, and, if the market licensee knows the manner, details of what the market licensee knows.

**7.2.05 Giving ASIC information about a listed disclosing entity**

- (1) For subsection 792C(2) of the Act, the following information is prescribed:
  - (a) a stock exchange automated trading system notification message;
  - (b) an Australian Stock Exchange voicemail announcement.
- (2) In this regulation:

***Australian Stock Exchange voicemail announcement*** means a message from the Australian Stock Exchange that is:

- (a) spoken over an announcement system; and
- (b) a summary of information lodged with the Australian Stock Exchange by a company or other entity that is included in the official list of a financial market.

***Stock exchange automated trading system notification message*** means a brief message that is:

- (a) transmitted to computer terminals of persons linked to the Stock Exchange Automated Trading System; and
- (b) a summary of information lodged with the Australian Stock Exchange by a company or other entity that is included in the official list of a financial market.

### **7.2.06 Annual report of market licensee**

For subsection 792F(2) of the Act, if an annual report by a market licensee does not contain any of the following information, the information must accompany the annual report:

- (a) a description of the activities the market licensee has undertaken in the financial year;
- (b) the resources (including financial, technological and human resources) that the market licensee had available, and used, in order to ensure that it has complied with its obligations in Chapter 7 of the Act, and, in particular, the obligation contained in subparagraph 792A(c)(i) of the Act;
- (c) an analysis of the extent to which the market licensee considers that the activities undertaken, and resources used, have resulted in full compliance with all its obligations under Chapter 7 of the Act.

## Division 2—The market's operating rules and procedures

### 7.2.07 Content of licensed market's operating rules

For subsection 793A(1) of the Act, the following matters are matters with which the operating rules of a licensed market must deal to the extent that a matter is not dealt with in the market integrity rules:

- (a) access to the licensed market, including the criteria for determining persons who are eligible to be participants;
- (b) ongoing requirements for participants, including:
  - (i) the conduct of participants in relation to the licensed market with the objective of promoting honesty and fair practice; and
  - (ii) provision for the monitoring of participants' compliance with the operating rules; and
  - (iv) provision for the expulsion or suspension of, or enforcement action against, a participant for breaches of the operating rules; and
  - (v) provision for the expulsion or suspension of a participant for breaches of Chapter 7 of the Act, or regulations made under that Chapter; and
  - (vii) provision for the expulsion or suspension of, or enforcement action against, a participant for a failure or expected failure to meet the participant's obligations under commitments entered into on the licensed market;
- (c) execution of orders;
- (d) the way in which disorderly trading conditions are to be dealt with, including disruptions to trading;
- (e) the class or classes of financial products that are to be dealt with on the licensed market by participants, including:
  - (i) a description of the nature of each class of financial product; and
  - (ii) for a class of derivatives, if most of the terms of the arrangement constituting the derivative are determined in advance by the market operator (including price, if determined in advance):
    - (A) the standard terms of the arrangement that constitutes the derivative; and
    - (B) a description of the asset, rate, index, commodity or other thing that is used for the matters mentioned in paragraph 761D(1)(c) of the Act;
- (f) the terms of the contract formed between participants that enter into a transaction through the licensed market (to the extent to which paragraph (e) does not require that information);
- (g) if appropriate, the listing of entities, including:
  - (i) admitting an entity to the official list of the licensed market for the purpose of enabling financial products of the entity to be traded on the licensed market, and removing an entity from the official list; and



- (ii) the activities or conduct of an entity that is included on the official list of the licensed market, including a description of the arrangements for the disciplining of the entity for a breach of the operating rules;
- (h) mechanisms through which market-related disputes between participants may be settled (for example, arbitration arrangements);
- (i) the power to facilitate the assessment and, if appropriate, the investigation of market-related disputes between participants;
- (j) any obligations on participants and listed entities that are necessary to ensure that the market licensee is able to comply with subparagraph 792A(c)(i) of the Act and regulations made under section 798E of the Act.

### **7.2.08 Content of licensed market's written procedures**

For subsection 793A(2) of the Act, the following matters are matters in respect of which a licensed market must have written procedures to the extent that the market integrity rules do not deal with a matter:

- (a) exchange of appropriate information with:
  - (i) clearing and settlement facilities; and
  - (ii) other financial markets; and
  - (iii) ASIC;
- (b) arrangements to ensure the integrity and security of systems (including computer systems);
- (c) arrangements for the monitoring of compliance by participants and listed entities with the operating rules of the licensed market;
- (d) the assessment, investigation (if justified) and settlement of market-related disputes between participants;
- (f) the recording and effective disclosure of transactions;
- (g) the provision of information about market processes.

## **Division 3—Powers of the Minister and ASIC**

### **7.2.09 Agencies for compliance assessment**

For paragraph 794C(5)(d) of the Act, the following agencies are prescribed:

- (a) the Clean Energy Regulator;
- (aa) the Australian Competition and Consumer Commission;
- (b) the Australian Prudential Regulation Authority;
- (c) the Australian Taxation Office;
- (d) the Australian Transaction Reports and Analysis Centre;
- (e) an authority of a State or Territory having functions and powers similar to those of the Director of Public Prosecutions;
- (f) the police force or service of each State and the Northern Territory;
- (g) the Department of Consumer and Employment Protection of Western Australia;
- (ga) the Commissioner of State Revenue of Western Australia;
- (h) the Department of Fair Trading of New South Wales;
- (i) the Office of Fair Trading and Business Affairs of Victoria;
- (ia) the State Revenue Office of Victoria;
- (j) the Office of Consumer Affairs of Queensland;
- (ja) the Office of State Revenue of Queensland;
- (k) the Office of Consumer and Business Affairs of South Australia;
- (l) the Office of Consumer Affairs and Fair Trading of Tasmania;
- (la) the Department of Treasury and Finance of Tasmania;
- (m) the Consumer Affairs Bureau of the Australian Capital Territory;
- (n) the Fair Trading Group of the Northern Territory.

## **Division 4—The Australian market licence: applications (general)**

### **7.2.10 Application of Division 4**

This Division applies in relation to a body corporate that applies for an Australian market licence that may be granted under subsection 795B(1) of the Act.

### **7.2.11 Information**

For paragraph 795A(1)(a) of the Act, the following information is required as part of an application by the body corporate for an Australian market licence:

- (a) the body corporate's name, address and contact details;
- (b) the name, address and contact details of any person who will act on behalf of the body corporate in relation to the application;
- (c) details of the body corporate's major shareholders and organisation, including:
  - (i) the name, address and contact details of each director; and
  - (ii) the name, address and contact details of each secretary; and
  - (iii) the name, address and contact details of each executive officer of the body corporate; and
  - (iv) whether any director, secretary or executive officer is, or has been, disqualified from managing a corporation under a law of this jurisdiction or another jurisdiction;
- (d) a description of the body corporate's business or functions, other than the operation of the proposed market;
- (e) details of the financial products to be traded on the proposed market;
- (f) whether the proposed market will involve the provision of a financial product to a person as a retail client;
- (g) details of the clearing and settlement arrangements that have been made, or are proposed, for the proposed market;
- (h) details of the technological resources that will be used in the operation of the market, including details of:
  - (i) the purpose of the resources; and
  - (ii) how the resources are to be supplied, managed, maintained and upgraded; and
  - (iii) how the security of information technology systems is to be protected;
- (i) details of the arrangements for dealing with conflicts between the body corporate's commercial interests and its obligations to supervise and monitor the market;
- (j) details of the arrangements for the supervision of employees of the body corporate who have duties and responsibilities of a kind that supervision of the employees is necessary to protect the integrity of the operation of the proposed market;

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- (k) if the ACCC has made a decision in relation to the market that the body corporate will operate—details of the decision.

### 7.2.12 Documents

For paragraph 795A(1)(b) of the Act, the following documents are required as part of an application by the body corporate for an Australian market licence:

- (a) the body corporate's current or proposed operating rules and written procedures;
- (b) if applicable—the body corporate's constitution;
- (c) a copy of any agreement material to:
  - (i) the way in which the proposed market is to be operated; and
  - (ii) the way in which the financing of the proposed market, and the other resources used to operate it, will be organised; and
  - (iii) the body corporate's constitution or governance; and
  - (iv) the appointment or employment of directors, secretaries and executive officers of the body corporate;
- (d) a copy of any agreement, or proposed agreement, relating to the outsourcing or delegation of a function, facility or service in relation to the proposed market by the body corporate to another person;
- (e) if the body corporate is a disclosing entity—a copy of each half-year financial report of the body corporate for:
  - (i) the period of 3 years immediately before the application was made; or
  - (ii) the shorter period in which the body corporate has carried on a business;
- (f) if the body corporate is not a disclosing entity—a copy of each annual financial report of the body corporate for:
  - (i) the period of 3 years immediately before the application was made; or
  - (ii) the shorter period in which the body corporate has carried on a business;
- (g) if the body corporate is a related body corporate—a copy of the relevant consolidated annual and half-year financial reports for:
  - (i) the period of 3 years immediately before the application was made; or
  - (ii) the shorter period in which the body corporate has carried on a business;
- (h) a report, by a qualified person who is independent of the body corporate, about the anticipated financial resource requirements of the proposed market, including details of:
  - (i) the total anticipated fixed expenditure and variable expenditure for the first 12 months of operation of the market; and
  - (ii) the total anticipated revenue for the first 12 months of operation of the market and other sources of financial resources; and
  - (iii) the body corporate's contingency arrangements in the event of circumstances occurring that affect the body corporate's ability to operate the market;

- (i) details of the body corporate's business plan, or other strategic planning, for the first 12 months of operation of the market, that are not included in the other documents mentioned in this regulation.

## **Division 5—The Australian market licence: applications (financial market in foreign country)**

### **7.2.13 Application of Division 5**

This Division applies in relation to a body corporate that applies for an Australian market licence that may be granted under subsection 795B(2) of the Act.

### **7.2.14 Information**

For paragraph 795A(1)(a) of the Act, the following information is required as part of an application by the body corporate for an Australian market licence:

- (a) the body corporate's name, address and contact details in this jurisdiction;
- (b) the address and contact details of the body corporate's principal place of business in the foreign country in which its financial market is located (the *home country*);
- (c) whether the body corporate is registered under Division 2 of Part 5B.2 of the Act;
- (d) details of the financial products that are traded on the financial market in the home country;
- (e) details of the clearing and settlement arrangements for the financial market in the home country;
- (f) details of the body corporate's major shareholders and organisation, including any details that have not already been given to ASIC in accordance with Division 2 of Part 5B.2 of the Act of:
  - (i) each person whose duties are comparable to those of a director; and
  - (ii) each person whose duties are comparable to those of a secretary; and
  - (iii) each person whose duties are comparable to those of an executive officer of the body corporate.

### **7.2.15 Documents**

For paragraph 795A(1)(b) of the Act, the documents required as part of an application by the body corporate for an Australian market licence are:

- (a) the body corporate's authorisation to operate the financial market in its home country, including a copy of any conditions imposed on the body corporate's operation of its financial market in the home country; and
- (b) sufficient documentation to allow the Minister to be satisfied that the regulation of the financial market in its home country is equivalent to regulation under the Act.

Example for paragraph (b):      Copies of the relevant legislation, rules and procedures in the home country.

## **Division 6—The Australian market licence: other matters**

### **7.2.16 Potential conflict situations**

- (1) For subsection 798E(1) of the Act, this regulation applies in relation to specific and significant conflicts, or potential conflicts that would be specific and significant, between:
  - (a) the commercial interests of Australian Stock Exchange Limited (**ASX**) in dealing with a body (the **competitor**) that operates a business with which:
    - (i) ASX is in competition; or
    - (ii) a subsidiary of ASX is in competition; or
    - (iii) a joint venture (however described) to which ASX is a party is in competition; or
    - (iv) a joint venture (however described) to which a subsidiary of ASX is a party is in competition; and
  - (b) the need for ASX to ensure that the market operated by it operates in the way mentioned in paragraph 792A(a) of the Act.
- (2) The competitor may lodge with ASIC in the prescribed form, an application for ASIC to decide that ASIC, instead of ASX, will make decisions and take action (or require ASX to take action on ASIC's behalf) in relation to:
  - (a) if the competitor is seeking to be listed—the compliance by the competitor with the applicable listing rules of the market operated by ASX; or
  - (b) if the competitor is listed on the market operated by ASX—the compliance by the competitor with the applicable listing rules of the market operated by ASX.
- (3) As soon as practicable after receiving an application under subregulation (2), ASIC must:
  - (a) consider whether a conflict, or potential conflict, exists as described in subregulation (1); and
  - (b) if it considers that a conflict, or potential conflict, exists—consider whether, having regard to ASX's obligations under subparagraph 792A(c)(i) of the Act, the conflict, or potential conflict, would be dealt with more appropriately and efficiently by a means other than taking the action mentioned in subregulation (2); and
  - (c) decide whether (and to what extent):
    - (i) to make decisions and take action; or
    - (ii) to require ASX to take action on ASIC's behalf;in relation to the matters mentioned in paragraphs (2)(a) and (b).
- (4) If ASIC decides to make decisions and take action (or to require ASX to take action on ASIC's behalf) as mentioned in subregulation (2), ASIC:
  - (a) may consult with ASX and the competitor to identify the listing rules of the market operated by ASX for which ASIC needs to make the decisions and take the action; and

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- (b) must, as soon as practicable, decide the extent of ASIC's role, having regard to:
  - (i) the rationale for the listing rules of the market operated by ASX; and
  - (ii) the desirability of treating the competitor consistently with other entities listed, or seeking to be listed, on that market; and
  - (iii) the extent to which action taken by ASIC is severable from the wider supervision of the competitor's compliance with the listing rules; and
  - (iv) its consultations (if any) with the competitor and ASX.
- (5) ASIC must, as soon as practicable, advise ASX and the competitor, in writing, of decisions under paragraphs (3)(c) and (4)(b).
- (6) If ASIC decides to make decisions and take action (or to require ASX to take action on ASIC's behalf) as mentioned in subregulation (2):
  - (a) the decisions made and actions taken have effect despite anything in the listing rules of the market operated by ASX; and
  - (b) decisions made and actions taken by ASIC (or action taken by ASX on ASIC's behalf) have effect as if they were decisions made and actions taken under the listing rules.
- Note 1: It is expected that the listing rules of the market will support ASIC's power to take a supervisory role in relation to compliance with some or all of the listing rules.
- Note 2: Under section 246 of the *Australian Securities and Investments Commission Act 2001*, ASIC is not liable to an action or other proceeding for damages for or in relation to an act done or omitted in good faith in performance or purported performance of any function, or in exercise or purported exercise of any power, conferred or expressed to be conferred by or under the corporations legislation.
- Note 3: The powers available to ASIC include the power:
  - (a) to grant, or not to grant, waivers of the listing rules; and
  - (b) to impose conditions on which the grant of a waiver is made.
- (7) If ASIC believes, on reasonable grounds, that:
  - (a) the period during which decisions will be made and action will be taken in a particular case is likely to be more than 3 months; and
  - (b) the decisions and actions likely to be required are not adequately reflected in the listing rules of the market operated by ASX;ASIC must notify ASX, in writing, of its belief.
- (8) ASX must, as soon as practicable after being notified under subregulation (7), amend the listing rules of the market operated by ASX to the extent necessary to meet ASIC's concerns.
  - Note: Amendments of the listing rules are subject to procedural requirements, including possible disallowance, mentioned in sections 793D and 793E of the Act.
- (9) If ASIC decides that it is no longer necessary for decisions to be made and action to be taken in relation to the particular conflict or potential conflict, ASIC must notify ASX and the competitor of its decision as soon as practicable.
- (10) ASX may repeal any listing rule or amendment made for subregulation (8) only if:



- (a) the repeal or amendment is necessary or convenient to meet ASIC's concerns more effectively; or
  - (b) ASIC has notified ASX under subregulation (9).
- (11) Paragraph (10)(b) does not prevent ASIC from:
- (a) reviewing a particular conflict or potential conflict; and
  - (b) deciding, at any time (with or without complying with paragraph (4)(a)), that it has again become necessary for ASIC to make decisions and take action (or for ASIC to require ASX to take action on ASIC's behalf) in relation to the conflict or potential conflict.
- (12) If ASIC makes the decision mentioned in paragraph (11)(b), ASIC must notify ASX and the competitor of its decision as soon as practicable.
- (13) For this regulation, ASX must:
- (a) give ASIC the information and documentation that ASIC reasonably needs to make decisions and take action under this regulation; and
  - (b) establish administrative and procedural arrangements for that purpose.
- (14) A competitor may notify ASIC that the competitor no longer wishes ASIC to make decisions and take action (or for ASIC to require ASX to take action on ASIC's behalf) in relation to the conflict or potential conflict.
- (15) If ASIC is notified under subregulation (14), ASIC must, as soon as practicable:
- (a) decide whether it will cease to make the decisions and take the action (or cease to require ASX to take action on ASIC's behalf); and
  - (b) notify ASX and the competitor of its decision.
- (16) If ASIC decides to cease to make decisions and take action (or to cease to require ASX to take action on ASIC's behalf), ASIC must cease to make decisions and take action (or must cease to require ASX to take action on ASIC's behalf) in relation to the conflict or potential conflict.
- (17) If ASIC decides not to cease to make decisions and take action (or not to cease to require ASX to take action on ASIC's behalf), ASIC must continue to make decisions and take action (or must require ASX to take action on ASIC's behalf) in relation to the conflict or potential conflict.

## Part 7.2A—Supervision of financial markets

### Division 7.2A.1—Enforceable undertakings

#### 7.2A.01 Enforceable undertakings

- (1) For paragraph 798K(1)(d) of the Act, ASIC may accept a written undertaking, entered into by a person who is alleged to have contravened subsection 798H(1) of the Act, as an alternative to civil proceedings.
- (2) Without limiting subregulation (1), ASIC may accept an undertaking that includes any of the following:
  - (a) an undertaking to take specified action within a specified period;
  - (b) an undertaking to refrain from taking specified action;
  - (c) an undertaking to pay a specified amount within a specified period to the Commonwealth or to some other specified person.

Note: An undertaking may relate to an infringement notice given under Division 7.2A.2 in relation to the alleged contravention. For example, an infringement notice may require a person to enter into an undertaking; a person may enter into an undertaking to comply with an infringement notice; a person may enter into an undertaking if the person does not comply with an infringement notice or the infringement notice is withdrawn.

- (3) If ASIC agrees, in writing, to the withdrawal or variation of the undertaking, the person who entered into the undertaking may withdraw or vary the undertaking.
- (4) If ASIC is satisfied that the person who entered into the undertaking has breached a term of the undertaking, ASIC may apply to a Court for an order under subregulation (5).
- (5) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make one or more of the following orders:
  - (a) an order directing the person to comply with the term of the undertaking;
  - (b) an order directing the person to pay to the Commonwealth an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
  - (c) an order directing the person to compensate another person who has suffered loss or damage as a result of the breach;
  - (d) any other order that the Court considers appropriate.
- (6) This regulation does not affect the liability of a person to civil proceedings if ASIC does not accept an undertaking in relation to the alleged contravention of subsection 798H(1) of the Act.

## **Division 7.2A.2—Infringement notices**

### **7.2A.02 Purpose of Division**

- (1) For subsection 798K(1) of the Act, the purpose of this Division is to set out a scheme under which a person who is alleged to have contravened subsection 798H(1) of the Act may do one or more of the following as an alternative to civil proceedings:
  - (a) pay a penalty to the Commonwealth;
  - (b) undertake or institute remedial measures (including education programs);
  - (c) accept sanctions other than the payment of a penalty to the Commonwealth (including public censure, suspension for no more than six months from performing certain financial services in relation to a licensed market, or disgorgement of profits);
  - (d) enter into an undertaking under regulation 7.2A.01, including an undertaking to do an action mentioned in paragraph (a), (b) or (c).
- (2) This Division does not require ASIC to give an infringement notice to a person in relation to the alleged contravention of subsection 798H(1) of the Act.
- (3) This Division does not affect the liability of a person to civil proceedings if ASIC does not give an infringement notice to the person in relation to the alleged contravention of subsection 798H(1) of the Act.
- (4) This Division does not affect the liability of a person to civil proceedings if:
  - (a) ASIC gives an infringement notice to the person in relation to the alleged contravention of subsection 798H(1) of the Act; and
  - (b) either:
    - (i) the notice is withdrawn; or
    - (ii) the person does not comply with the notice in accordance with regulation 7.2A.08.
- (5) This Division does not limit or otherwise affect the penalty that a Court could impose on the person for a contravention of subsection 798H(1) of the Act.

### **7.2A.03 Definitions for Division 7.2A.2**

In this Division:

***compliance period*** has the meaning given by subregulation 7.2A.08(2).

***infringement notice*** means an infringement notice given under regulation 7.2A.04.

***recipient***, in relation to an infringement notice, means the person to whom ASIC gives the infringement notice or intends to give the infringement notice under regulation 7.2A.04.

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### 7.2A.04 When infringement notice can be given

- (1) If ASIC has reasonable grounds to believe that a person has contravened subsection 798H(1) of the Act, ASIC may give to the person an infringement notice in relation to the alleged contravention.
- (2) ASIC may give a person an infringement notice that is in relation to more than one alleged contravention of subsection 798H(1) of the Act.
- (3) If ASIC withdraws an infringement notice given to a person in relation to the alleged contravention of subsection 798H(1) of the Act, ASIC may give the person a new infringement notice in relation to the alleged contravention.

Example for subregulation (3): An infringement notice given to a person in relation to an alleged contravention of subsection 798H(1) of the Act may be withdrawn, and a new infringement notice given to the person in relation to that alleged contravention, if the original infringement notice contained an error.

### 7.2A.05 Statement of reasons must be given

- (1) Before giving a recipient an infringement notice, ASIC must:
  - (a) give the recipient a written statement that sets out ASIC's reasons for believing that the recipient has contravened subsection 798H(1) of the Act; and
  - (b) give the recipient, or a representative of the recipient, an opportunity to:
    - (i) appear at a private hearing before ASIC; and
    - (ii) give evidence to ASIC; and
    - (iii) make submissions to ASIC;in relation to the alleged contravention of subsection 798H(1) of the Act.
- (2) If a recipient, or a representative of a recipient, gives ASIC evidence or information under paragraph (1)(b) in relation to the alleged contravention of subsection 798H(1) of the Act, the evidence or information is not admissible in evidence in any proceedings against the recipient, other than proceedings relating to the evidence or information being false or misleading.

### 7.2A.06 Contents of infringement notice

An infringement notice:

- (a) must state the date on which it is given; and
- (b) must be identified by a unique code; and
- (c) must state the name and address of the recipient; and
- (d) must state that it is being given by ASIC under regulation 7.2A.04; and
- (e) must specify details of each alleged contravention of subsection 798H(1) of the Act to which the infringement notice relates, including:
  - (i) the conduct that made up each alleged contravention (including, to the extent known, the date on which it occurred and the place at which it occurred); and

- (ii) each market integrity rule that ASIC alleges the recipient has contravened; and
- (f) must, in relation to each market integrity rule that ASIC alleges the recipient has contravened, state the maximum pecuniary penalty that a Court could order the recipient to pay for contravening the market integrity rule; and
- (g) must, in relation to each alleged contravention of subsection 798H(1) of the Act to which the infringement notice relates:
  - (i) specify the penalty (if any) payable for each alleged contravention of subsection 798H(1) of the Act; and
  - (ii) if subparagraph (i) applies:
    - (A) specify the total penalty that the recipient must pay to the Commonwealth; and
    - (B) state that the penalty is payable to ASIC on behalf of the Commonwealth; and
    - (C) explain how payment of the penalty can be made; and
  - (iii) specify the remedial measures (if any) that the recipient must undertake or institute; and
  - (iv) specify the sanctions (if any) that the recipient must accept; and
  - (v) specify the terms of an undertaking (if any) that the recipient must enter into under regulation 7.2A.01; and
- (h) must state that the recipient may choose not to comply with the infringement notice, but that if the recipient does not comply, civil proceedings may be brought against the recipient in relation to the alleged contravention; and
- (i) must explain what the recipient must do to comply with the infringement notice and the effect of compliance with the infringement notice; and
- (j) must state that the recipient may apply to ASIC:
  - (i) for withdrawal of the notice under regulation 7.2A.11; and
  - (ii) for an extension of time under regulation 7.2A.09; and
- (k) must state that ASIC may publish details of the infringement notice under regulation 7.2A.15; and
- (l) may include any other information that ASIC considers necessary.

Note: For sub-subparagraph (g)(ii)(A), the total penalty is the sum of the penalties payable under subparagraph (g)(i).

### **7.2A.07 Amount of penalty payable to the Commonwealth**

- (1) The penalty payable (if any) for an alleged contravention of subsection 798H(1) of the Act is the amount determined by ASIC.

Note: Subsection 798K(2) of the Act states that the penalty payable under paragraph 798K(1)(a) of the Act in relation to a market integrity rule must not exceed three-fifths of the penalty amount set out in the market integrity rules in relation to the rule.

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- (2) If an infringement notice is in relation to more than one alleged contravention of subsection 798H(1) of the Act, the total penalty payable under the infringement notice is the sum of the penalties payable (if any) for the alleged contraventions.

**7.2A.08 Compliance with infringement notice**

- (1) A recipient complies with an infringement notice if, during the compliance period, the recipient does all of the following:
- (a) pays the penalty specified in the infringement notice under sub-subparagraph 7.2A.06(g)(ii)(A) (if any);
  - (b) undertakes or institutes the remedial measures specified in the infringement notice under subparagraph 7.2A.06(g)(iii) (if any);
  - (c) accepts the sanctions specified in the infringement notice under subparagraph 7.2A.06(g)(iv) (if any);
  - (d) enters into an undertaking (including an undertaking to comply with the infringement notice) with the terms specified in the infringement notice under subparagraph 7.2A.06(g)(v) (if any).
- (2) The *compliance period* for an infringement notice:
- (a) starts on the day on which the infringement notice is given to the recipient; and
  - (b) ends:
    - (i) 27 days after the day on which the infringement notice is given to the recipient; or
    - (ii) on another day permitted by this regulation.
- (3) If the recipient applies for a further period of time in which to comply with the infringement notice, and the application is granted, the compliance period ends at the end of the further period allowed.
- (4) If the recipient applies for a further period of time in which to comply with the infringement notice, and the application is refused, the compliance period ends on the later of:
- (a) 28 days after the day on which the infringement notice was given to the recipient; and
  - (b) 7 days after the notice of refusal is given to the recipient.
- (5) If the recipient applies for the infringement notice to be withdrawn, and the application is refused, the compliance period ends 28 days after the notice of refusal is given to the recipient.

**7.2A.09 Extension of compliance period**

- (1) During the compliance period, a recipient may apply, in writing, to ASIC for a further period of no more than 28 days in which to comply with the infringement notice.
- (2) The application must:
- (a) specify the infringement notice's unique identification code; and
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- (b) set out the reasons for the application.
- (3) Within 14 days after receiving the application, ASIC must:
  - (a) grant or refuse a further period no longer than the period sought (and no more than 28 days); and
  - (b) notify the recipient in writing of the decision and, if the decision is a refusal, the reasons for the decision.
- (4) If ASIC refuses a further period under paragraph (3)(a), the recipient may not make a further application under subregulation (1) in relation to that infringement notice.
- (5) If ASIC has not granted or refused a further period under paragraph (3)(a) within 14 days after receiving the application, ASIC is taken to have refused a further period.

#### **7.2A.10 Effect of compliance with infringement notice**

- (1) Subject to subregulation (3), if:
    - (a) an infringement notice is given to a recipient in relation to an alleged contravention of subsection 798H(1) of the Act; and
    - (b) the infringement notice is not withdrawn; and
    - (c) the recipient complies with the infringement notice;the effects in subregulation (2) apply.
  - (2) The effects are:
    - (a) any liability of the recipient to the Commonwealth for the alleged contravention of subsection 798H(1) of the Act is discharged; and
    - (b) no civil or criminal proceedings may be brought or continued by the Commonwealth against the recipient for the conduct specified in the infringement notice as being the conduct that made up the alleged contravention of subsection 798H(1) of the Act; and
    - (c) no administrative action may be taken by ASIC under section 914A, 915B, 915C or 920A of the Act against the recipient for the conduct specified in the infringement notice as being the conduct that made up the alleged contravention of subsection 798H(1) of the Act; and
    - (d) the recipient is not taken to have admitted guilt or liability in relation to the alleged contravention; and
    - (e) the recipient is not taken to have contravened subsection 798H(1) of the Act.
- Note: Third parties are not prevented from commencing civil proceedings against the recipient, including under sections 793C and 1101B of the Act, and under section 1317J of the Act in relation to sections 1317G and 1317HB of the Act. ASIC is not prevented from applying for an order on behalf of a plaintiff in accordance with the Act.
- (3) Subregulation (2) does not apply if the recipient has knowingly:
    - (a) provided false or misleading information to ASIC; or
    - (b) withheld evidence or information from ASIC;

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in relation to the alleged contravention of subsection 798H(1) of the Act.

#### **7.2A.11 Application to withdraw infringement notice**

- (1) During the compliance period, a recipient of an infringement notice may apply, in writing, to ASIC for the infringement notice to be withdrawn.
- (2) The application must:
  - (a) specify the infringement notice's unique identification code; and
  - (b) set out the reasons for the application.
- (3) Within 14 days after receiving the application, ASIC must:
  - (a) withdraw or refuse to withdraw the infringement notice; and
  - (b) notify the recipient in writing of the decision and, if the decision is a refusal, the reasons for the decision.
- (4) Without limiting subregulation (3), ASIC may withdraw the infringement notice after taking into account the following matters:
  - (a) whether the recipient has previously been found to have contravened subsection 798H(1) of the Act;
  - (b) the circumstances in which the contravention set out in the infringement notice is alleged to have occurred;
  - (c) whether an infringement notice has previously been given to the recipient in relation to an alleged contravention of subsection 798H(1) of the Act, and whether the recipient complied with the infringement notice;
  - (d) any other relevant matter.
- (5) If, under paragraph (3)(a), ASIC refuses to withdraw the infringement notice, the recipient may not make a further application under subregulation (1) in relation to that infringement notice.
- (6) If ASIC has not withdrawn, or refused to withdraw, the infringement notice within 14 days after receiving the application, ASIC is taken to have refused to withdraw the infringement notice.

#### **7.2A.12 Withdrawal of infringement notice by ASIC**

- (1) ASIC may withdraw an infringement notice given by ASIC without an application under regulation 7.2A.11 having been made.
- (2) Without limiting subregulation (1), ASIC may withdraw the infringement notice after taking into account a matter mentioned in paragraph 7.2A.11(4)(a), (b), (c) or (d).

#### **7.2A.13 Notice of withdrawal of infringement notice**

- (1) A notice withdrawing an infringement notice must include the following information:
  - (a) the name and address of the recipient;



- (b) the date the infringement notice was given;
  - (c) the infringement notice's unique identification code.
- (2) The notice must also state that the infringement notice is withdrawn.

#### **7.2A.14 Withdrawal of notice after compliance**

- (1) ASIC may withdraw an infringement notice after the recipient has complied with the infringement notice only if the recipient agrees, in writing, to the withdrawal.
- (2) If an infringement notice is withdrawn after the penalty specified in it (if any) has been paid, the Commonwealth must refund the amount of the penalty to the person who paid it.
- (3) If an infringement notice is withdrawn after the recipient has complied with a requirement specified in the infringement notice:
  - (a) to undertake or institute remedial measures; or
  - (b) to accept sanctions other than a payment of a penalty to the Commonwealth; or
  - (c) to enter into an undertaking;the remedial measures, sanctions or undertaking are taken to no longer be enforceable by ASIC.

#### **7.2A.15 Publication of details of infringement notice**

- (1) If ASIC gives an infringement notice to a recipient, ASIC may, at the end of the compliance period, publish details of the infringement notice.
- (2) If ASIC decides to publish details of the infringement notice, ASIC must publish the details in accordance with either or both of subregulations (3) and (4).
- (3) ASIC may publish details of an infringement notice by publishing in the *Gazette*:
  - (a) a copy of the infringement notice; and
  - (b) the following statements:
    - (i) a statement as to whether the recipient has complied with the infringement notice;
    - (ii) if the recipient has complied with the infringement notice, a statement that:
      - (A) compliance is not an admission of guilt or liability; and
      - (B) the recipient is not taken to have contravened subsection 798H(1) of the Act;
    - (iii) if the recipient has not complied with the infringement notice, a statement that:
      - (A) the giving of an infringement notice to a recipient is only an allegation that the recipient has contravened subsection 798H(1) of the Act; and
      - (B) the recipient is not taken to have contravened subsection 798H(1) of the Act.

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- (4) ASIC may publish details of an infringement notice by issuing a written or oral statement that:
- (a) includes an accurate summary of the details of the infringement notice, including:
    - (i) the name of the recipient; and
    - (ii) the amount of the penalty specified in the infringement notice (if any); and
    - (iii) the remedial measures specified in the infringement notice (if any); and
    - (iv) the sanctions specified in the infringement notice (if any); and
    - (v) the terms of an undertaking specified in the infringement notice (if any); and
    - (vi) the conduct specified in the infringement notice as being the conduct that made up the alleged contravention of subsection 798H(1) of the Act; and
  - (b) includes the following statements:
    - (i) a statement as to whether the recipient has complied with the infringement notice;
    - (ii) if the recipient has complied with the infringement notice, a statement that:
      - (A) compliance is not an admission of guilt or liability; and
      - (B) the recipient is not taken to have contravened subsection 798H(1) of the Act;
    - (iii) if the recipient has not complied with the infringement notice, a statement that:
      - (A) the giving of an infringement notice to a recipient is only an allegation that the recipient has contravened subsection 798H(1) of the Act; and
      - (B) the recipient is not taken to have contravened subsection 798H(1) of the Act.

## **Part 7.3—Licensing of clearing and settlement facilities**

### **Division 1—Regulation of CS facility licensees: licensees' obligations**

#### **7.3.01 Obligation to inform ASIC of certain matters: becoming director, secretary or executive officer of CS facility licensee**

- (1) This regulation applies if a person becomes a director, secretary or executive officer of a market licensee or of a holding company of a CS facility licensee (including when the person changes from one of those positions to another).
- (2) For subsection 821B(4) of the Act, the information to be given to ASIC by the CS facility licensee is:
  - (a) the person's name and contact details; and
  - (b) the date of appointment to the position; and
  - (c) the person's educational qualifications and financial market experience; and
  - (d) if the CS facility licensee is aware of any details of a conviction of the kind mentioned in subsection 206B(1) of the Act—the details; and
  - (e) whether the CS facility licensee knows whether the person:
    - (i) is an undischarged bankrupt; or
    - (ii) has entered into a deed of arrangement or composition of a kind mentioned in subsections 206B(3) and (4) of the Act;and, if the CS facility licensee knows the information, details of what the CS facility licensee knows.

#### **7.3.02 Obligation to inform ASIC of certain matters: ceasing to be director, secretary or executive officer of CS facility licensee**

- (1) This regulation applies if a person ceases to be a director, secretary or executive officer of a CS facility licensee or of a holding company of a CS facility licensee (including when the person changes from one of those positions to another).
- (2) For subsection 821B(4) of the Act, the information to be given to ASIC by the CS facility licensee is:
  - (a) the name and contact details of the person; and
  - (b) the position that the person held; and
  - (c) the date on which the person ceased to hold the position; and
  - (d) if the person ceases to be a director, secretary or executive officer because the person is changing from the position to another in the company, the new position; and
  - (e) if the reason for ceasing to hold the position is:
    - (i) because of a contravention of the Corporations Act or another law of a State or Territory; or
    - (ii) because the person has become an undischarged bankrupt;

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details of the reason.

**7.3.03 Obligation to inform ASIC of certain matters: voting power in CS facility licensee**

- (1) This regulation applies if a CS facility licensee becomes aware that a person has come to have, or has ceased to have, more than 15% of the voting power in the CS facility licensee or in a holding company of the CS facility licensee.
- (2) For subsection 821B(4) of the Act, the information to be given to ASIC by the CS facility licensee is:
  - (a) the person's name and contact details; and
  - (b) if known by the CS facility licensee, the date on which the person came to have, or ceased to have, more than 15% of the voting power; and
  - (c) if the CS facility licensee knows the voting power that the person had immediately before the person came to have, or ceased to have, more than 15% of the voting power, that voting power; and
  - (d) whether the CS facility licensee knows the manner in which the person came to have, or ceased to have, more than 15% of the voting power, and, if the CS facility licensee knows the manner, details of what the CS facility licensee knows.

**7.3.04 Annual report of CS facility licensee**

For subsection 821E(2) of the Act, if an annual report by a CS facility licensee does not contain any of the following information, the information must accompany the annual report:

- (a) a description of the activities the CS facility licensee has undertaken in the financial year;
- (b) the resources (including financial, technological and human resources) that the CS facility licensee had available, and used, in order to ensure that it has complied with its obligations in Chapter 7 of the Act, and, in particular, the obligation contained in subparagraph 821A(c)(i) of the Act;
- (c) an analysis of the extent to which the CS facility licensee considers that the activities undertaken, and resources used, have resulted in full compliance with all its obligations under Chapter 7 of the Act.

## **Division 2—Regulation of CS facility licensees: the facility's operating rules and procedures**

### **7.3.05 Content of licensed CS facility's operating rules**

For subsection 822A(1) of the Act, the following matters are matters with which the operating rules of a licensed CS facility must deal:

- (a) the regulated services provided by the licensed CS facility, including the means by which obligations of parties to transactions relating to financial products will be met through the licensed CS facility;
- (b) matters relating to risk in the licensed CS facility;
- (c) access to the licensed CS facility, including the criteria for determining persons who are eligible to be participants and the ongoing requirements for participants;
- (d) suspension and expulsion of participants from the licensed CS facility;
- (e) disciplinary action against participants;
- (f) procedures, to be followed by participants, to address risks that are relevant to the licensed CS facility;
- (g) requirements to facilitate the monitoring of compliance by participants with the operating rules of the licensed CS facility;
- (h) the handling of defaults;
- (i) any obligations on participants and issuers that are necessary to ensure that the CS facility licensee is able to comply with subparagraph 821A(c)(i) of the Act;
- (j) if the licensed CS facility is a prescribed CS facility—arrangements for the transfer of financial products that are likely to be transferred using the licensed CS facility.

### **7.3.06 Content of licensed CS facility's written procedures**

For subsection 822A(2) of the Act, the following matters are matters in respect of which a licensed CS facility must have written procedures:

- (a) arrangements to ensure the integrity and security of systems (including computer systems);
- (b) identifying and monitoring risks that are relevant to the licensed CS facility;
- (c) the development of rules and procedures to address those risks;
- (d) exchange of appropriate information with:
  - (i) other clearing and settlement facilities; and
  - (ii) financial markets; and
  - (iii) ASIC and the Reserve Bank of Australia;relating to participants and their activities that are relevant to the licensed CS facility;
- (e) the provision of information about the procedures of the licensed CS facility, including rights, obligations and risks relating to the facility;

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- (f) arrangements for supervising the licensed CS facility, including the monitoring of compliance by participants and issuers with the operating rules of the licensed CS facility.

## **Division 3—Regulation of CS facility licensees: powers of the Minister and ASIC**

### **7.3.07 Agencies for compliance assessment**

For paragraph 823C(5)(d) of the Act, the following agencies are prescribed:

- (a) the Clean Energy Regulator;
- (aa) the Australian Competition and Consumer Commission;
- (b) the Australian Prudential Regulation Authority;
- (c) the Australian Taxation Office;
- (d) the Australian Transaction Reports and Analysis Centre;
- (e) an authority of a State or Territory having functions and powers similar to those of the Director of Public Prosecutions;
- (f) the police force or service of each State and the Northern Territory;
- (g) the Department of Consumer and Employment Protection of Western Australia;
- (ga) the Commissioner of State Revenue of Western Australia;
- (h) the Department of Fair Trading of New South Wales;
- (i) the Office of Fair Trading and Business Affairs of Victoria;
- (ia) the State Revenue Office of Victoria;
- (j) the Office of Consumer Affairs of Queensland;
- (ja) the Office of State Revenue of Queensland;
- (k) the Office of Consumer and Business Affairs of South Australia;
- (l) the Office of Consumer Affairs and Fair Trading of Tasmania;
- (la) the Department of Treasury and Finance of Tasmania;
- (m) the Consumer Affairs Bureau of the Australian Capital Territory;
- (n) the Fair Trading Group of the Northern Territory.

### **7.3.08 Agencies for compliance assessment**

For paragraph 823CA(4)(d) of the Act, the following agencies are prescribed:

- (a) the Clean Energy Regulator;
- (aa) the Australian Competition and Consumer Commission;
- (b) the Australian Prudential Regulation Authority;
- (c) the Australian Taxation Office;
- (d) the Australian Transaction Reports and Analysis Centre;
- (e) an authority of a State or Territory having functions and powers similar to those of the Director of Public Prosecutions;
- (f) the police force or service of each State and the Northern Territory;
- (g) the Department of Consumer and Employment Protection of Western Australia;
- (ga) the Commissioner of State Revenue of Western Australia;
- (h) the Department of Fair Trading of New South Wales;

**Chapter 7** Financial services and markets

**Part 7.3** Licensing of clearing and settlement facilities

**Division 3** Regulation of CS facility licensees: powers of the Minister and ASIC

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- (i) the Office of Fair Trading and Business Affairs of Victoria;
- (ia) the State Revenue Office of Victoria;
- (j) the Office of Consumer Affairs of Queensland;
- (ja) the Office of State Revenue of Queensland;
- (k) the Office of Consumer and Business Affairs of South Australia;
- (l) the Office of Consumer Affairs and Fair Trading of Tasmania;
- (la) the Department of Treasury and Finance of Tasmania;
- (m) the Consumer Affairs Bureau of the Australian Capital Territory;
- (n) the Fair Trading Group of the Northern Territory.



## **Division 4—The Australian CS facility licence: applications (general)**

### **7.3.09 Application of Division 4**

This Division applies in relation to a body corporate that applies for an Australian CS facility licence that may be granted under subsection 824B(1) of the Act.

### **7.3.10 Information**

For paragraph 824A(1)(a) of the Act, the following information is required as part of an application by the body corporate for an Australian CS facility licence:

- (a) the body corporate's name, address and contact details;
- (b) the name, address and contact details of any person who will act on behalf of the body corporate in relation to the application;
- (c) details of the body corporate's major shareholders and organisation, including:
  - (i) the name, address and contact details of each director; and
  - (ii) the name, address and contact details of each secretary; and
  - (iii) the name, address and contact details of each executive officer of the body corporate; and
  - (iv) whether any director, secretary or executive officer is, or has been, disqualified from managing a corporation under a law of this jurisdiction or another jurisdiction;
- (d) a description of the body corporate's business or functions, other than the operation of the clearing and settlement facility;
- (e) the services in respect of which the Australian CS facility licence is sought, including details of:
  - (i) the financial products for which clearing and settlement facilities are to be provided; and
  - (ii) the nature of each interest in a financial product that is to be transferred using the clearing and settlement facility; and
  - (iii) the mechanisms to be used by the body corporate to operate the clearing and settlement facility, including (if applicable) arrangements to limit the risk of default by a party to a transaction;
- (f) whether the body corporate has applied, or intends to apply, to become a prescribed CS facility under section 761A of the Act;
- (g) details of the technological resources that will be used in the operation of the clearing and settlement facility, including details of:
  - (i) the purpose of the resources; and
  - (ii) how the resources are to be supplied, managed, maintained and upgraded; and
  - (iii) how the security of information technology systems is to be protected;

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- (h) details of the arrangements for dealing with conflicts between the body corporate's commercial interests and its obligations to supervise and monitor the clearing and settlement facility;
- (i) details of the arrangements for the supervision of employees of the body corporate who have duties and responsibilities of a kind that supervision of the employees is necessary to protect the integrity of the operation of the clearing and settlement facility;
- (j) details of the arrangements for managing counterparty risk, including the risks arising from a counterparty being unable to meet its obligations arising out of clearing, settlement or clearing and settlement transactions using the facility;
- (k) if the ACCC has made a decision in relation to the clearing and settlement facility that the body corporate will operate—details of the decision.

Example of interests in a financial product: Legal title or an equitable interest.

Example of mechanisms to operate the clearing and settlement facility:

- 1 The way in which transfers are to be effected.
- 2 The way in which payment obligations are to be settled.

**7.3.11 Documents**

For paragraph 824A(1)(b) of the Act, the following documents are required as part of an application by the body corporate for an Australian CS facility licence:

- (a) the body corporate's current or proposed operating rules and written procedures;
- (b) if applicable—the body corporate's constitution;
- (c) a copy of any agreement material to:
  - (i) the way in which the clearing and settlement facility is to be operated; and
  - (ii) the way in which the financing of the clearing and settlement facility, and the other resources used to operate it, will be organised; and
  - (iii) the body corporate's constitution or governance; and
  - (iv) the appointment or employment of directors, secretaries and executive officers of the body corporate;
- (d) a copy of any agreement, or proposed agreement, between the body corporate and a market licensee relating to services to be offered to the market licensee;
- (e) a copy of any agreement, or proposed agreement, relating to the outsourcing or delegation of a function, facility or service in relation to the facility by the body corporate to another person;
- (f) if the body corporate:
  - (i) uses, or is likely to use, a counterparty; or
  - (ii) will be operating as a central counterparty;an assessment by an independent auditor of the adequacy of the body corporate's arrangements for managing counterparty risk;

- (g) if the body corporate is a disclosing entity—a copy of each half-year financial report of the body corporate for:
  - (i) the period of 3 years immediately before the application was made; or
  - (ii) the shorter period in which the body corporate has carried on a business;
- (h) if the body corporate is not a disclosing entity—a copy of each annual financial report of the body corporate for:
  - (i) the period of 3 years immediately before the application was made; or
  - (ii) the shorter period in which the body corporate has carried on a business;
- (i) if the body corporate is a related body corporate—a copy of the relevant consolidated annual and half-year financial reports for:
  - (i) the period of 3 years immediately before the application was made; or
  - (ii) the shorter period in which the body corporate has carried on a business;
- (j) a report, by a qualified person who is independent of the body corporate, about the anticipated financial resource requirements of the clearing and settlement facility, including details of:
  - (i) the total anticipated fixed expenditure and variable expenditure for the first 12 months of operation of the clearing and settlement facility; and
  - (ii) the total anticipated revenue for the first 12 months of operation of the clearing and settlement facility and other sources of financial resources; and
  - (iii) the body corporate's contingency arrangements in the event of circumstances occurring that affect the body corporate's ability to operate the clearing and settlement facility;
- (k) details of the body corporate's business plan, or other strategic planning, for the first 12 months of operation of the clearing and settlement facility, that are not included in the other documents mentioned in this regulation.

## **Division 5—The Australian CS facility licence: applications (overseas clearing and settlement facility)**

### **7.3.12 Application of Division 5**

This Division applies in relation to a body corporate that applies for an Australian CS facility licence that may be granted under subsection 824B(2) of the Act.

### **7.3.13 Information**

For paragraph 824A(1)(a) of the Act, the following information is required as part of an application by the body corporate for an Australian CS facility licence:

- (a) the body corporate's name, address and contact details in this jurisdiction;
- (b) the address and contact details of the body corporate's principal place of business in the foreign country in which its clearing and settlement facility is located;
- (c) whether the body corporate is registered under Division 2 of Part 5B.2 of the Act;
- (d) the services in respect of which the Australian CS facility licence is sought, including details of the financial products for which clearing and settlement facilities are to be provided;
- (e) details of the body corporate's major shareholders and organisation, including any details that have not already been given to ASIC in accordance with Division 2 of Part 5B.2 of the Act of:
  - (i) each person whose duties are comparable to those of a director; and
  - (ii) each person whose duties are comparable to those of a secretary; and
  - (iii) each person whose duties are comparable to those of an executive officer of the body corporate.

### **7.3.14 Documents**

For paragraph 824A(1)(b) of the Act, the documents required as part of an application by the body corporate for an Australian CS facility licence are:

- (a) the body corporate's authorisation to operate the clearing and settlement facility in the foreign country in which its clearing and settlement facility is located (the *home country*), including any conditions imposed on the body corporate's operation of its clearing and settlement facility in the home country; and
- (b) a copy of any agreement, or draft agreement, between the body corporate and a market licensee relating to the clearing and settlement facility services to be provided; and
- (c) sufficient documentation to allow the Minister to be satisfied that the regulation of the clearing and settlement facility in its home country is equivalent to regulation under the Act.

Example for paragraph (c):  
home country.

Copies of the relevant legislation, rules and procedures in the

## Part 7.4—Limits on involvement with licensees

### 7.4.01 Widely held market body

For section 850A of the Act, the following bodies corporate are prescribed:

- (a) Australian Stock Exchange Limited (in its capacity as a body corporate that has an Australian market licence or an Australian CS facility licence);
- (b) ASX Settlement and Transfer Corporation Pty Limited (also known as 'ASTC') (in its capacity as a body corporate that has an Australian CS facility licence);
- (c) SFE Corporation Limited, in its capacity as the holding company of the following bodies corporate that have an Australian market licence or an Australian CS facility licence:
  - (i) Austraclear Limited;
  - (ii) SFE Clearing Corporation Pty Limited;
  - (iii) Sydney Futures Exchange Limited;
- (d) SFE Clearing Corporation Pty Limited (in its capacity as a body corporate that has an Australian CS facility licence);
- (e) Sydney Futures Exchange Limited (in its capacity as a body corporate that has an Australian market licence);
- (f) ACH (in its capacity as a body corporate that has an Australian CS facility licence);
- (g) Austraclear Limited (in its capacity as a body corporate that has an Australian CS facility licence).

### 7.4.02 Record-keeping: market licensee

- (1) For paragraph 854A(1)(b) of the Act, a market licensee must keep the following records:
  - (a) a list of names and contact details of the directors, secretaries and executive officers of the market licensee;
  - (b) a list of names and contact details of individuals who hold more than 15% of the voting power in the market licensee, prepared in accordance with the information given under regulation 7.4.04.
- (2) The market licensee must keep the records for at least 5 years.

### 7.4.03 Record-keeping: CS facility licensee

- (1) For paragraph 854A(1)(b) of the Act, a CS facility licensee must keep the following records:
  - (a) a list of names and contact details of the directors, secretaries and executive officers of the CS facility licensee;

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- (b) a list of names and contact details of individuals who hold more than 15% of the voting power in the CS facility licensee, prepared in accordance with the information given under regulation 7.4.04.
- (2) The CS facility licensee must keep the records for at least 5 years.

**7.4.04 Information for widely held market body**

- (1) This regulation applies to a person who has:
  - (a) a substantial holding in a widely held market body; and
  - (b) voting power in the widely held market body.
- (2) For paragraph 854A(1)(d) of the Act, the person must give that information to the widely held market body.
- (3) However, subregulation (2) does not require the person to give information that the person has already given to the widely held market body in accordance with Chapter 6C of the Act.
- (4) The person must give the information by the time described in subsection 671B(6) of the Act.

## Part 7.5—Compensation regimes for financial markets

### Division 1—Preliminary

#### 7.5.01 Definitions for Part 7.5

In this Part:

*becoming insolvent* has the meaning given by regulation 7.5.02.

*claim* means a claim against the SEGC.

*dealer* has the meaning given by regulation 7.5.03.

*discharge*, in relation to an obligation, means:

- (a) in the case of a purchase obligation—discharge the whole of the obligation; or
- (b) in any other case—discharge the whole or a part of the obligation.

*excluded person* has the meaning given by regulation 7.5.04.

*obligations*:

- (a) in relation to a participant of a participating market licensee, in relation to a person, includes obligations arising under:
  - (i) a law; or
  - (ii) the participating market licensee's operating rules; or
  - (iv) an agreement between:
    - (A) in any case—the participant and the person; or
    - (B) if the participant is a partner in a participant of the participating market licensee—the last-mentioned participant and the person; and
- (b) in relation to a participant of the licensed CS facility operated by ACH, in relation to a person, includes obligations arising under:
  - (i) a law; or
  - (ii) the operating rules of ACH; or
  - (iv) an agreement between:
    - (A) in any case—the participant and the person; or
    - (B) if the participant is a partner in a participant of the licensed CS facility operated by ACH—the last-mentioned participant and the person; and
- (c) in relation to a participant of the licensed CS facility operated by ASTC, in relation to a person, includes obligations arising under:
  - (i) a law; or
  - (ii) the ASTC operating rules; or
  - (iii) an agreement between:
    - (A) in any case—the participant and the person; or



- (B) if the participant is a partner in a participant of the licensed CS facility operated by ASTC—the last-mentioned participant and the person.

**orderly market** means an orderly market on a financial market of:

- (a) a participating market licensee; or
- (b) an Exchange body.

**participating market licensee** means a market licensee that is a member of the SEGC.

**prescribed period**, in relation to a sale or purchase of securities by a dealer, means:

- (a) if the operating rules of ACH or a participating market licensee, in which the dealer is a participant, being those operating rules as in force when the agreement for the sale or purchase is made, prescribe a period, for this paragraph, in relation to a class of sales or purchases that includes the sale or purchase—that period; or
- (b) in any other case—a period that is reasonable, having regard to all the circumstances relating to the sale or purchase.

**property** includes money, securities and scrip.

**purchase obligation** means an obligation to transfer securities under an agreement for the purchase of securities, if the purchase is, for Subdivision 4.3, a reportable transaction.

**purchase price**, in relation to a purchase of securities by a dealer on behalf of a person, means the total of:

- (a) the amount of the consideration for the purchase; and
- (b) any brokerage fees and other charges, and any stamp duty and other duties and taxes, payable by the person to the dealer in connection with the purchase.

**relative**, in relation to a person, means a parent or remoter lineal ancestor, son, daughter or remoter issue, or brother or sister, of the person.

**reportable transaction** means a transaction that is entered into before or after the commencement of this Part in relation to securities, and:

- (a) is or has at any time been a sale or purchase, by a participant (the **first dealer**) of a participating market licensee, of securities, if the securities are quoted on a financial market of a participating market licensee when the agreement for the sale or purchase is made, and:
  - (i) in any case—the participating market licensee’s operating rules, as in force when the agreement for the sale or purchase is made, require or permit the first dealer to report the sale or purchase to the participating market licensee; or
  - (ii) if the sale or purchase is to or from, as the case may be, a participant (the **second dealer**) of a participating market licensee—the last-mentioned participating market licensee’s operating rules, as in

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force when the agreement for the sale or purchase is made, require or permit the second dealer to report to the last-mentioned participating market licensee the purchase or sale of the securities by the second dealer from or to, as the case may be, the first dealer; or

- (b) is an agreement to buy or sell securities, because of the exercise of an option contract over securities, if:
- (i) the option contract was entered into on the financial market of a participating market licensee; and
  - (ii) the agreement is required or permitted, by the operating rules of ACH or the participating market licensee, to be reported to the participating market licensee.

*sale and purchase of securities* has the meaning given by regulation 7.5.06.

*securities business* has the meaning given by regulations 7.5.07 and 7.5.08.

*security* has the meaning given by regulation 7.5.09.

*transfer of securities* has the meaning given by regulation 7.5.10.

*transferor* has the meaning given by paragraph 7.5.53(4)(b).

*transferred securities* has the meaning given by paragraph 7.5.53(4)(c).

*unauthorised execution* has the meaning given by paragraph 7.5.53(4)(a).

Note: Definitions of other expressions that are used in this Part, including:

- participant
- prescribed CS facility
- SEGC

are found in sections 9, 761A and 880B of the Act.

### 7.5.01A Modification of Act: compensation regimes

For subsection 893A(1) of the Act, Part 7.5 of the Act is modified in relation to a licensed market as set out in Schedule 8C.

### 7.5.02 Meaning of *becoming insolvent*

- (1) A body corporate becomes insolvent at a particular time if, and only if, at that time:
- (a) an administrator of the body corporate is appointed under section 436A, 436B or 436C; or
  - (b) the body corporate commences to be wound up or ceases to carry on business; or
  - (c) a receiver, or a receiver and manager, of property of the body corporate is appointed, whether by a court or otherwise; or
  - (d) the body corporate enters into a compromise or arrangement with its creditors or a class of them.

- (2) A natural person becomes insolvent at a particular time if, and only if, at that time:
- (a) a creditor's petition or a debtor's petition is presented under Division 2 or 3 of Part IV of the *Bankruptcy Act 1966* against:
    - (i) the person; or
    - (ii) a partnership in which the person is a partner; or
    - (iii) 2 or more joint debtors who include the person; or
  - (b) the person's property becomes subject to control under Division 2 of Part X of the *Bankruptcy Act 1966*; or
  - (c) the person executes a deed of assignment or deed of arrangement under Part X of the *Bankruptcy Act 1966*; or
  - (d) the person's creditors accept a composition under Part X of the *Bankruptcy Act 1966*.
- (3) A reference in subregulation (2) to a Division or Part of the *Bankruptcy Act 1966* includes a reference to provisions of a law of an external Territory, or a country other than Australia or an external Territory, that correspond to that Division or Part.

### 7.5.03 Meaning of *dealer*

- (1) For this Part (other than Subdivisions 4.7, 4.9 and 4.10), a person is a dealer if the person is, or has been at any time, a participant of a participating market licensee.
- (3) For Subdivisions 4.7, 4.9 and 4.10, a person is a **dealer** if the person is:
- (a) a participant of a participating market licensee; or
  - (b) a participant of the licensed CS facility operated by ACH.

### 7.5.04 Meaning of *excluded person*

- (1) For this Part, an **excluded person**, in relation to a participant of a participating market licensee, or a participant of the licensed CS facility operated by ACH, means:
- (a) in any case—the participant; or
  - (b) if the participant is not a body corporate:
    - (i) a person who is the spouse, or who is a relative, of the participant; or
    - (ii) a trustee of a trust in relation to which the participant or a person of a kind mentioned in subparagraph (i) is capable of benefiting; or
    - (iii) a body corporate of which the participant is an officer; or
    - (iv) a body corporate in which the participant or a person of a kind mentioned in subparagraph (i) has a controlling interest; or
    - (v) a body corporate in which the participant, and a person of a kind mentioned in subparagraph (i) have a controlling interest; or
    - (vi) a body corporate in which the participant and 2 or more persons of a kind mentioned in subparagraph (i) have a controlling interest; or

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- (vii) a body corporate in which 2 or more persons of a kind mentioned in subparagraph (i) together have a controlling interest; or
- (c) if the participant is:
  - (i) a person who is an officer of the body corporate; or
  - (ii) a body corporate that is related to the first-mentioned body corporate; or
  - (iii) a person who is the spouse, or who is a relative, of a person of a kind mentioned in subparagraph (i); or
  - (iv) a trustee of a trust in relation to which a person of a kind mentioned in subparagraph (i) or (iii) is capable of benefiting; or
  - (v) a body corporate in which a person of a kind mentioned in subparagraph (i) or (iii) has, or 2 or more such persons together have, a controlling interest; or
- (d) if the participant is a partner in a participant of the participating market licensee or licensed CS facility and is not a body corporate:
  - (i) a person who is a partner in the participant; or
  - (ii) a person who is the spouse, or who is a relative, of a partner (not being a body corporate) in the participant; or
  - (iii) a trustee of a trust in relation to which a person of a kind mentioned in subparagraph (i) or (ii) is capable of benefiting; or
  - (iv) a person who is an officer of a body corporate that is a partner in the participant; or
  - (v) a body corporate of which a person of a kind mentioned in subparagraph (i), (ii) or (iii) is an officer, or in which such a person has, or 2 or more such persons together have, a controlling interest; or
  - (vi) a person who is a participant of the licensed CS facility operated by ACH; or
- (e) if the participant is a partner in a participant of the participating market licensee or licensed CS facility and is a body corporate:
  - (i) a person who is an officer of a body corporate that is a partner in the participant; or
  - (ii) a body corporate that is related to the first-mentioned body corporate; or
  - (iii) a person who is a partner in the participant; or
  - (iv) a person who is the spouse, or who is a relative, of a person (other than a body corporate) of a kind mentioned in subparagraph (i) or (iii); or
  - (v) a trustee of a trust in relation to which a person of a kind mentioned in subparagraph (i), (iii) or (iv) is capable of benefiting; or
  - (vi) a body corporate in which a person of a kind mentioned in subparagraph (i), (iii) or (iv) has, or 2 or more such persons together have, a controlling interest; or
  - (vii) a person who is a participant of the licensed CS facility operated by ACH.

- (2) A reference in subregulation (1) or (1A) to a relative of a person includes a reference to a relative of the spouse (if any) of the person.
- (3) A reference in subregulation (1) or (1A) to an officer of a body corporate is a reference to:
  - (a) a director, secretary or executive officer of the body corporate; or
  - (b) a person who is an officer of the body corporate by virtue of paragraph (b), (c), (d) or (e) of the definition of *officer* in section 9 of the Act.

#### **7.5.06 Meaning of *sale and purchase of securities***

- (1) A *sale and purchase of securities* are taken to consist of 2 distinct transactions:
  - (a) the sale of the securities by the seller to the buyer; and
  - (b) the purchase of the securities by the buyer from the seller.
- (2) Except so far as the contrary intention appears, a reference in this Part to a sale, or to a purchase, includes a reference to a sale or purchase the agreement for which is made outside this jurisdiction.
- (3) For this Part, an agreement to buy or sell securities, because of the exercise of an option contract over securities, if:
  - (a) the option contract was entered into on the financial market of a participating market licensee; and
  - (b) the agreement is required, by the operating rules of ACH or the participating market licensee, to be reported to the participating market licensee;is taken to be a *sale and purchase of securities*.

#### **7.5.07 Meaning of *securities business: general***

- (1) For this Part (other than Subdivision 4.9), a *securities business* is a financial services business of dealing in securities.
- (2) Subregulations (4), (5) and (6) apply for the purposes of determining:
  - (a) whether or not a person carries on, or holds himself, herself or itself out as carrying on, a securities business; and
  - (b) what constitutes such a business carried on by a person.
- (3) Subregulation (6) also applies for the purposes of determining whether or not a person deals in securities.
- (4) An act done on behalf of the person by:
  - (a) the holder of a dealers licence; or
  - (b) an exempt dealer; or
  - (c) the holder of an Australian financial services licence; or
  - (d) a person who is exempted from holding an Australian financial services licence by virtue of subsection 911A(2), (2A), (2B), (2C), (2D) or (2E) of the Act;must be disregarded.

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- (5) An act that the person does:
- (a) while employed by, or acting for or by arrangement with, a dealer; and
  - (b) as an employee or agent of, or otherwise on behalf of, on account of, or for the benefit of, the dealer; and
  - (c) in connection with a securities business carried on by the dealer;
- is to be disregarded.
- (6) An act or acts done by the person that constitutes or together constitute a dealing by the person in a futures contract (within the meaning of the old Corporations Act) is or are to be disregarded.

### 7.5.08 Meaning of *securities business*: Subdivision 4.9

For Subdivision 4.9, each of the following is a *securities business*:

- (a) a financial services business of dealing in securities;
- (b) a financial services business of dealing in financial products that were option contracts within the meaning of paragraph 92(1)(e) of the old Corporations Act.

### 7.5.09 Meaning of *security*

- (1) For this Part (other than Subdivision 4.7), each of the following is a *security*:
- (a) a security mentioned in section 761A of the Act;
  - (b) Division 3 securities;
  - (c) non-Division 3 securities;
  - (d) an interest in a notified foreign passport fund that is quoted on the financial market of the Australian Stock Exchange Limited;
  - (e) rights (whether existing or future, and whether contingent or not) to acquire, by way of issue, an interest referred to in paragraph (d) (whether or not on payment of any money or for any other consideration).
- (2) For Subdivision 4.7, each of the following is a *security*:
- (a) Division 3 securities;
  - (b) non-Division 3 securities;
  - (c) an interest in a notified foreign passport fund that is quoted on the financial market of the Australian Stock Exchange Limited;
  - (d) rights (whether existing or future, and whether contingent or not) to acquire, by way of issue, an interest referred to in paragraph (c) (whether or not on payment of any money or for any other consideration).

### 7.5.10 Meaning of *transfer of securities*

- (1) A *transfer of securities* takes place between a person (the *transferor*) and another person (the *transferee*) only if:
- (a) in the case of an ASTC-regulated transfer—the transferor does, or causes to be done, all things that the ASTC operating rules require to be done by or on behalf of the transferor to effect the transfer; or

- (b) in any other case—the transferor delivers, or causes to be delivered, to the transferee documents (*transfer documents*) that are sufficient to enable the transferee:
  - (i) except in the case of Division 3 rights—to become registered as the holder of the securities; or
  - (ii) in the case of Division 3 rights—to obtain the issue to the transferee of the securities to which the Division 3 rights relate;  
without the transferor doing anything more, or causing anything more to be done, by way of executing or supplying documents.
- (2) If a person:
  - (a) causes property (other than securities or money) to be transferred to another person; or
  - (b) causes documents that are sufficient to enable another person to become the legal owner of property (other than securities or money) to be delivered to another person;  
the first-mentioned person is taken to have transferred the property to the other person.
- (3) If a person causes money to be paid to another person, the first-mentioned person is taken to have paid the money to the other person.

### **7.5.13 Effect of contravention of Part 7.5**

A contravention of a provision of this Part does not constitute an offence.

## **Division 2—When there must be a compensation regime**

### **7.5.14 Application for Australian market licence: information about compensation arrangements**

For paragraph 881B(2)(c) of the Act, the following information, relating to proposed compensation arrangements, is prescribed:

- (a) the services and products provided by the financial market, and participants connected with the financial market;
- (b) the sources of all funds to be used for compensation;
- (c) the proposed minimum amount of cover, and how that amount has been calculated;
- (d) the number of markets to which the compensation arrangements are intended to apply;
- (e) details of any arrangement between the market operator and any other person associated with the operation of the compensation arrangement;
- (f) details of the payments that will be able to be made, in accordance with the compensation arrangements, that will not be payments required by the Act or another law;
- (g) the names of the persons responsible for the administration and monitoring functions mentioned in paragraphs 885I(1)(a), (b) and (c) of the Act, and details of the financial, technological and other resources to be used for those purposes;
- (h) the name of the proposed auditor of the accounts relating to the compensation arrangements;
- (i) the way in which the compensation arrangements will be monitored to ensure that they comply with the Act and these Regulations;
- (j) the way in which the compensation arrangements will be monitored to ensure that they are adequate.



## **Division 3—Approved compensation arrangements**

### **7.5.15 Application for approval of compensation arrangements after grant of Australian market licence: information about compensation arrangements**

For paragraph 882B(2)(a) of the Act, the following information, relating to proposed compensation arrangements, is prescribed:

- (a) the services and products provided by the financial market, and participants connected with the financial market;
- (b) the sources of all funds to be used for compensation;
- (c) the proposed minimum amount of cover, and how that amount has been calculated;
- (d) the number of markets to which the compensation arrangements are intended to apply;
- (e) details of any arrangement between the market operator and any other person associated with the operation of the compensation arrangement;
- (f) details of the payments that will be able to be made, in accordance with the compensation arrangements, that will not be payments required by the Act or another law;
- (g) the names of the persons responsible for the administration and monitoring functions mentioned in paragraphs 885I(1)(a), (b) and (c) of the Act, and details of the financial, technological and other resources to be used for those purposes;
- (h) the name of the proposed auditor of the accounts relating to the compensation arrangements;
- (i) the way in which the compensation arrangements will be monitored to ensure that they comply with the Act and these Regulations;
- (j) the way in which the compensation arrangements will be monitored to ensure that they are adequate.

### **7.5.16 Notification of payment of levies**

For subsection 883D(6) of the Act, a notification to the Commonwealth of payments of levy received by the operator of a market as agent for the Commonwealth must:

- (a) be given for each period of 6 months ending on 31 December and 30 June; and
- (b) be given in writing to:
  - (i) the Secretary of the Department of the Treasury; or
  - (ii) another officer of that Department notified in writing by the Secretary to the receiver of the levy; and
- (c) set out the total of the levies (if any) that became payable in the period; and
- (d) set out the total of the levies (if any) received in the period; and
- (e) be given not later than 2 weeks after the end of the period.

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**7.5.17 Amount of compensation**

For subsection 885E(5) of the Act, the rate of interest is 5%.

## **Division 4—NGF Compensation regime**

### **Subdivision 4.1—Preliminary**

#### **7.5.18 Application of Division 4**

For sections 888A, 888B, 888C, 888D and 888E of the Act, this Division sets out arrangements relating to compensation in respect of a loss that is connected with a financial market to which Division 4 of Part 7.5 of the Act applies.

Note: The financial markets to which Division 4 of Part 7.5 of the Act applies are set out in section 887A of the Act.

### **Subdivision 4.2—Third party clearing arrangements**

#### **7.5.19 Clearing arrangements**

- (1) For Subdivision 4.3, if:
- (a) a participant of Australian Stock Exchange Limited (the *transacting participant*) enters into a reportable transaction; and
  - (b) under Australian Stock Exchange Limited's operating rules or under ACH's operating rules, another participant (the *clearing participant*) has the obligation to complete the transaction and all obligations ancillary to that completion;

regulations 7.5.24 to 7.5.27 (inclusive) apply in relation to the function of completing the transaction, as if the clearing participant, and not the transacting participant, had entered into the transaction.

- (2) For Subdivision 4.9, if:
- (a) a participant of Australian Stock Exchange Limited (the *transacting member*) enters into a reportable transaction; and
  - (b) under Australian Stock Exchange Limited's operating rules or under ACH's operating rules, another participant (the *clearing participant*) has the obligation to complete the transaction and all obligations ancillary to that completion;

regulation 7.5.66 applies in relation to the function of completing the transaction as if the clearing participant, and not the transacting participant, had entered into the transaction.

- (3) For Subdivision 4.3, if:
- (a) a participant of the licensed CS facility operated by ACH (the *transacting participant*) enters into a reportable transaction; and
  - (b) under the operating rules of ACH, another participant (the *clearing participant*) has the obligation to complete the transaction and all obligations ancillary to that completion;

regulations 7.5.24 to 7.5.27 (inclusive) apply in relation to the function of completing the transaction, as if the clearing participant, and not the transacting participant, had entered into the transaction.

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- (3A) For Subdivision 4.3, if:
- (a) a participant of Australian Stock Exchange Limited (the *transacting participant*) enters into a reportable transaction; and
  - (b) under the operating rules of Australian Stock Exchange Limited or ACH, a participant of the licensed CS facility operated by ACH (the *clearing participant*) has the obligation to complete the transaction and all obligations ancillary to that completion;
- regulations 7.5.24 to 7.5.27 (inclusive) apply in relation to the function of completing the transaction, as if the clearing participant, and not the transacting participant, had entered into the transaction.
- (4) For Subdivision 4.9, if:
- (a) a participant of the licensed CS facility operated by ACH (the *transacting member*) enters into a reportable transaction; and
  - (b) under the operating rules of ACH, another participant (the *clearing participant*) has the obligation to complete the transaction and all obligations ancillary to that completion;
- regulation 7.5.66 applies in relation to the function of completing the transaction as if the clearing participant, and not the transacting participant, had entered into the transaction.
- (5) For Subdivision 4.9, if:
- (a) a participant of Australian Stock Exchange Limited (the *transacting participant*) enters into a reportable transaction; and
  - (b) under the operating rules of Australian Stock Exchange Limited or ACH, a participant of the licensed CS facility operated by ACH (the *clearing participant*) has the obligation to complete the transaction and all obligations ancillary to that completion;
- regulation 7.5.66 applies in relation to the function of completing the transaction, as if the clearing participant, and not the transacting participant, had entered into the transaction.

### Subdivision 4.3—Contract guarantees

#### 7.5.24 Claim by selling client in respect of default by selling dealer: ASTC-regulated transfer

- (1) This regulation applies to a person (the *selling client*) if:
- (a) a dealer enters into a reportable transaction on behalf of the selling client; and
  - (b) the reportable transaction is a sale of securities; and
  - (c) a transfer of the securities concerned pursuant to the sale would be an ASTC-regulated transfer; and
  - (d) at the end of the prescribed period for the transaction:
    - (i) if subparagraph (ii) does not apply—the selling client has done all things necessary to enable the dealer to do all things that the dealer is required to do under the operating rules of a participating market

- licensee or ACH to effect a transfer of the securities pursuant to the sale; and
- (ii) the dealer has been suspended by the participating market licensee concerned or ACH, that suspension has not been removed and the selling client has done, or is ready, willing and able to do, all things necessary to enable the dealer to do all things that the dealer is required to do under the operating rules of the participating market licensee or ACH to effect a transfer of the securities pursuant to the sale; and
  - (iii) the dealer's obligations to the selling client in respect of the sale, in so far as they relate to the consideration for the sale, have not been discharged.
- (2) The selling client may make a claim in respect of the sale.
- (3) The selling client may make a single claim under this regulation in respect of 2 or more sales.
- (4) A claim made under subregulation (3) is to be treated for subregulation (5) as if it consisted of a separate claim in respect of each of the sales to which it relates.
- (5) The SEGC must allow the claim if the SEGC is satisfied that:
- (a) subregulation (1) entitles the selling client to make the claim; and
  - (b) the selling client:
    - (i) has done all things necessary to enable the dealer to do all things that the dealer is required to do under the operating rules of ACH to effect a transfer of the securities pursuant to the sale; or
    - (ii) has, for the purposes of the claim, in accordance with the operating rules of ACH, transferred to the SEGC or to an Exchange body securities of the same kind and number as the first-mentioned securities; and
  - (c) the dealer's obligations to the selling client in respect of the sale, in so far as they relate to the consideration for the sale, have not been discharged.
- (6) If the SEGC allows a claim, the SEGC must pay to the selling client the amount of the consideration less so much (if any) of the total of any brokerage fees and other charges, and any stamp duty and other duties and taxes, payable by the selling client in connection with the sale as has not already been paid by the selling client.
- (7) If a selling client transfers securities to an Exchange body as mentioned in subparagraph (5)(b)(ii), the Exchange body must account to the SEGC for those securities in accordance with the operating rules of ACH.

### **7.5.25 Claim by selling client in respect of default by selling dealer: transaction other than ASTC-regulated transfer**

- (1) This regulation applies to a person (the *selling client*) if:
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### Regulation 7.5.26

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- (a) a dealer enters into a reportable transaction on behalf of the selling client; and
  - (b) the reportable transaction is a sale of securities; and
  - (c) a transfer of the securities concerned pursuant to the sale would not be an ASTC-regulated transfer; and
  - (d) at the end of the prescribed period for the transaction:
    - (i) if subparagraph (ii) does not apply—the selling client has supplied to the dealer settlement documents for the purposes of the sale; and
    - (ii) if the dealer has been suspended by the participating market licensee concerned or ACH, and that suspension has not been removed—the selling client has supplied, or is ready, willing and able to supply, to the dealer settlement documents for the purposes of the sale; and
    - (iii) the dealer’s obligations to the selling client in respect of the sale, in so far as they relate to the consideration for the sale, have not been discharged.
- (2) The selling client may make a claim in respect of the sale.
- (3) The selling client may make a single claim under this regulation in respect of 2 or more sales.
- (4) A claim made under subregulation (3) is to be treated for subregulation (5) as if it consisted of a separate claim in respect of each of the sales to which it relates.
- (5) The SEGC must allow the claim if the SEGC is satisfied that:
- (a) subregulation (1) entitles the selling client to make the claim; and
  - (b) the selling client has:
    - (i) supplied to the dealer settlement documents in relation to the sale under the agreement for the sale; or
    - (ii) supplied to the SEGC settlement documents in relation to the sale for the purposes of the claim; and
  - (c) the dealer’s obligations to the selling client in respect of the sale, in so far as they relate to the consideration for the sale, have not been discharged.
- (6) If the SEGC allows a claim, the SEGC must pay to the selling client the amount of the consideration less so much (if any) of the total of any brokerage fees and other charges, and any stamp duty and other duties and taxes, payable by the selling client in connection with the sale as has not already been paid by the selling client.

#### **7.5.26 Claim by buying client in respect of default by buying dealer: ASTC-regulated transfer**

- (1) This regulation applies to a person (the *buying client*) if:
- (a) a dealer enters into a reportable transaction on behalf of the buying client; and
  - (b) the reportable transaction is a purchase of securities; and

- (c) a transfer of the securities concerned pursuant to the purchase would be an ASTC-regulated transfer; and
- (d) at the end of the prescribed period for the transaction:
  - (i) if subparagraph (ii) does not apply, the buying client has paid to the dealer the purchase price in relation to the purchase; and
  - (ii) the dealer has been suspended by the participating market licensee concerned or ACH, that suspension has not been removed and the buying client has paid, or is ready, willing and able to pay, to the dealer the purchase price in relation to the purchase; and
  - (iii) the dealer's obligations to the buying client in respect of the purchase, in so far as they relate to the transfer of securities to the person, have not been discharged.
- (2) The buying client may make a claim in respect of the purchase.
- (3) The buying client may make a single claim under this regulation in respect of 2 or more purchases.
- (4) A claim made under subregulation (3) is to be treated for subregulation (5) as if it consisted of a separate claim in respect of each of the purchases to which it relates.
- (5) The SEGC must allow the claim if the SEGC is satisfied that:
  - (a) subregulation (1) entitles the buying client to make the claim; and
  - (b) either:
    - (i) the buying client has paid to the dealer the amount of the consideration for the purchase under the agreement for the purchase; or
    - (ii) the buying client has paid to the SEGC the amount of the consideration for the purchase for the purposes of the claim; and
  - (c) the dealer's obligations to the buying client in respect of the purchase, in so far as they relate to the transfer of securities to the buying client, have not been discharged.
- (6) If the SEGC allows a claim in respect of a purchase of securities, the SEGC must, subject to regulation 7.5.28, transfer to the buying client securities of the same kind and number as the first-mentioned securities.

**7.5.27 Claim by buying client in respect of default by buying dealer: transaction other than ASTC-regulated transfer**

- (1) This regulation applies to a person (the *buying client*) if:
    - (a) a dealer enters into a reportable transaction on behalf of the buying client; and
    - (b) the reportable transaction is a purchase of securities; and
    - (c) a transfer of the securities concerned pursuant to the purchase would not be an ASTC-regulated transfer; and
    - (d) at the end of the prescribed period for the transaction:
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- (i) if subparagraph (ii) does not apply, the buying client has paid to the dealer the purchase price in relation to the purchase; and
  - (ii) the dealer has been suspended by the participating market licensee concerned or ACH, that suspension has not been removed and the buying client has paid, or is ready, willing and able to pay, to the dealer the purchase price in relation to the purchase; and
  - (iii) the dealer's obligations to the buying client in respect of the purchase, in so far as they relate to settlement documents in relation to the purchase, have not been discharged.
- (2) The buying client may make a claim in respect of the purchase.
- (3) The buying client may make a single claim under this regulation in respect of 2 or more purchases.
- (4) A claim made under subregulation (3) is to be treated for subregulation (5) as if it consisted of a separate claim in respect of each of the purchases to which it relates.
- (5) The SEGC must allow the claim if the SEGC is satisfied that:
- (a) subregulation (1) entitles the buying client to make the claim; and
  - (b) either:
    - (i) the buying client has paid to the dealer the amount of the consideration for the purchase under the agreement for the purchase; or
    - (ii) the buying client has paid to the SEGC the amount of the consideration for the purchase for the purposes of the claim; and
  - (c) the dealer's obligations to the buying client in respect of the purchase, in so far as they relate to settlement documents in relation to the purchase, have not been discharged.
- (6) If the SEGC allows a claim in respect of a purchase of securities, the SEGC must, subject to regulation 7.5.29, supply to the buying client settlement documents in relation to the purchase.

**7.5.28 Cash settlement of claim: ASTC-regulated transfer**

- (1) This regulation applies if:
- (a) the SEGC allows a claim under subregulation 7.5.26(5) in respect of a purchase of securities by a dealer on behalf of a buying client; and
  - (b) it is not reasonably practicable for the SEGC to obtain securities of the same kind and number as the first-mentioned securities from the dealer before the end of:
    - (i) if the ASTC operating rules, as in force when the SEGC allows the claim, prescribe a period, for this regulation, in relation to a class of claims that includes the claim—that period; or
    - (ii) in any other case—such period as the SEGC, having regard to all the circumstances of the claim, considers reasonable; and



- (c) it is not reasonably practicable for the SEGC to obtain, otherwise than from the dealer, securities of that kind and number before the end of that period because:
  - (i) that dealing in those securities is suspended or for any other reason, there exists at no time during that period an orderly market in those securities; or
  - (ii) the total number of those securities offered for sale on financial markets of participating market licensees or Exchange bodies at times during that period when there exists an orderly market in those securities is insufficient.
- (2) The SEGC must satisfy the claim by paying to the claimant the amount that, when the claimant became entitled to make the claim, was the amount of the actual pecuniary loss suffered by the claimant in respect of the purchase.

### **7.5.29 Cash settlement of claim: transfer other than ASTC-regulated transfer**

- (1) This regulation applies if:
  - (a) the SEGC allows a claim under subregulation 7.5.27(5) in respect of a purchase of securities by a dealer on behalf of a buying client; and
  - (b) it is not reasonably practicable for the SEGC to obtain from the dealer settlement documents in relation to the purchase before the end of:
    - (i) if the operating rules of a participating market licensee of which the dealer is a participant, being those operating rules as in force when the SEGC allows the claim, prescribe a period, for this regulation, in relation to a class of claims that includes the claim—that period; or
    - (ii) in any other case—such period as the SEGC, having regard to all the circumstances of the claim, considers reasonable; and
  - (c) it is not reasonably practicable for the SEGC to obtain otherwise than from the dealer settlement documents in relation to the purchase before the end of that period because:
    - (i) there exists at no time during that period an orderly market in those securities, whether because that dealing in those securities is suspended or for any other reason; or
    - (ii) the total number of those securities offered for sale on financial markets of participating market licensees or Exchange bodies at times during that period when there exists an orderly market in those securities is insufficient.
- (2) The SEGC must satisfy the claim by paying to the claimant the amount that, when the claimant became entitled to make the claim, was the amount of the actual pecuniary loss suffered by the claimant in respect of the purchase.

### **7.5.30 Making of claims**

- (2) Subregulations 7.5.24(1), 7.5.25(1), 7.5.26(1) and 7.5.27(1) do not entitle a person (*person 1*) to make a claim in respect of:
  - (a) a sale of securities by another person on behalf of person 1; or

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- (b) a purchase of securities by another person on behalf of person 1; as the case may be, unless, on the day on which the agreement for the sale or purchase was entered into, the other person was a participant and carried on a securities business in Australia.
- (3) A claim must be in writing and must be served on the SEGC within 6 months after the day on which the claimant became entitled to make the claim.
- (4) A claim that is not made within the period prescribed by subregulation (3) is barred unless the SEGC otherwise determines.
- (5) The SEGC may publish, in each State and Territory in a daily newspaper circulating in that State or Territory, a notice that:
  - (b) names a particular dealer; and
  - (c) requires that all claims under this Subdivision, by the named dealer, during a period (the *applicable period*) specified in the notice in accordance with subregulation (6) must be served on the SEGC before the day (the *last application day*) specified in the notice in accordance with subregulation (7).
- (6) The applicable period must be a period that starts and ends before:
  - (a) if each publication of the notice occurs on the same day—the day on which the notice is published; or
  - (b) in any other case—the first day on which the notice is published.
- (7) The last application day must be at least 3 months after:
  - (a) if each publication of the notice occurs on the same day—the day on which the notice is published; or
  - (b) in any other case—the last day on which the notice is published.
- (8) The SEGC, a member of the Board and any employee of, or person acting on behalf of, the SEGC each has qualified privilege in respect of the publication of a notice under subregulation (5).

**Subdivision 4.7—Unauthorised transfer**

**7.5.53 Application of Subdivision 4.7**

- (1) This Subdivision applies if:
  - (a) a dealer executes a document of transfer of securities on behalf of a person as transferor of the securities; and
  - (b) the transfer is not an ASTC-regulated transfer; and
  - (c) apart from the effect of subregulation 7.11.17(3), the person did not authorise the dealer to execute the document.
- (2) For subregulation (1), a dealer is taken to have executed a document of transfer in relation to securities on behalf of a person as transferor of the securities if the document states that the person is the transferor of the securities and purports to have been stamped with the dealer's stamp as the transferor's broker.

- (3) This Subdivision also applies if:
- (a) a dealer effects, or purports to effect, a proper ASTC transfer of securities on behalf of a person; and
  - (b) apart from the effect of regulation 7.11.26, the person did not authorise the dealer to effect the transfer.
- (4) In this Subdivision:
- (a) the dealer's action mentioned in whichever of paragraphs (1)(a) and (3)(a) is applicable is an ***unauthorised execution***; and
  - (b) the person mentioned in whichever of those paragraphs is applicable is the ***transferor***; and
  - (c) the securities mentioned in whichever of those paragraphs is applicable are the ***transferred securities***.

#### **7.5.54 Claim by transferor**

If, as a result of the unauthorised execution, the transferor suffers loss in respect of any of the transferred securities, the transferor may make a claim in respect of the loss.

#### **7.5.55 Claim by transferee or sub-transferee**

- (1) If, as a result of the unauthorised execution, a person (the ***claimant***), being:
- (a) in any case:
    - (i) if subregulation 7.5.53(1) applies—the person stated in the document as the transferee of the transferred securities; or
    - (ii) if subregulation 7.5.53(3) applies—the person in whose favour the proper ASTC transfer was effected, or purported to be effected; or
  - (b) if that person has disposed of any of the transferred securities—a successor in title of that person to any of the transferred securities;
- suffers loss in respect of any of the transferred securities, the claimant may make a claim in respect of that loss.
- (2) A person is not entitled to make a claim under this regulation if the person:
- (a) had actual knowledge that the transferor did not in fact authorise the unauthorised execution; or
  - (b) is an excluded person in relation to the dealer.

#### **7.5.56 How and when claim may be made**

- (1) A claim must:
- (a) be in writing; and
  - (b) be served on the SEGC:
    - (i) if a notice under subregulation (4) applies to the claim—before the end of the last application day specified in the notice; or

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- (ii) in any other case—within 6 months after the day on which the claimant first became aware that the claimant had suffered loss as a result of the unauthorised execution.
- (2) For subregulation (1), a notice under subregulation (4) applies to a claim if the claim is in respect of an unauthorised execution, by the dealer named in the notice, during the applicable period specified in the notice.
- (3) A claim that is not served on the SEGC by the time required by paragraph (1)(b) is barred unless the SEGC otherwise determines.
- (4) The SEGC may publish, in each State and Territory in a daily newspaper circulating in that State or Territory, a notice, using Form 719A, that:
  - (a) names a particular dealer; and
  - (b) requires that all claims in respect of unauthorised executions, by the named dealer, during a period (the **applicable period**) specified in the notice in accordance with subregulation (5) must be served on the SEGC before the day (the **last application day**) specified in the notice in accordance with subregulation (6).
- (5) The applicable period must be a period that starts and ends before:
  - (a) if each publication of the notice occurs on the same day—the day on which the notice is published; or
  - (b) in any other case—the first day on which the notice is published.
- (6) The last application day must be at least 3 months after:
  - (a) if each publication of the notice occurs on the same day—the day on which the notice is published; or
  - (b) in any other case—the last day on which the notice is published.
- (7) The SEGC, a member of the Board and any employee of, or person acting on behalf of, the SEGC each has qualified privilege in respect of the publication of a notice under subregulation (4).

#### 7.5.57 How claim is to be satisfied

- (1) The SEGC must allow a claim if the SEGC is satisfied that regulation 7.5.54 or 7.5.55 entitles the claimant to make the claim.
- (2) If the SEGC allows the claim, and the claimant has, as a result of the unauthorised execution, ceased to hold some or all of the transferred securities, the SEGC must:
  - (a) subject to paragraph (b), supply to the claimant securities of the same kind and number as those of the transferred securities that the claimant has so ceased to hold; or
  - (b) if the SEGC is satisfied that it is not practicable for the SEGC to obtain such securities, or to obtain such securities within a reasonable time—pay to the claimant the amount that, as at the time when the SEGC decides that it is so satisfied, is the actual pecuniary loss suffered by the claimant, in

respect of the transferred securities, as a result of the unauthorised execution (other than loss suffered as mentioned in subregulation (3)).

- (3) If the SEGC allows the claim, it must pay to the claimant the amount that, as at the time when the claim is allowed, or when the SEGC decides as mentioned in paragraph (2)(b), as the case requires, is the actual pecuniary loss suffered by the claimant, as a result of the unauthorised execution, in respect of payments or other benefits:
  - (a) in any case—to which the claimant would have become entitled, as the holder of such of the transferred securities as the claimant has, as a result of the unauthorised execution, ceased to hold, if the claimant had continued to hold the securities concerned until that time; or
  - (b) if the claim was made under regulation 7.5.55—that the claimant has received as holder of any of the transferred securities.
- (4) For this regulation, if securities are purportedly transferred from a person to another person, the first-mentioned person is taken to cease to hold, and the other person is taken to hold, the securities even if the other person did not by virtue of the transfer get a good title to the securities.

#### **7.5.58 Discretionary further compensation to transferor**

- (1) If:
  - (a) the SEGC allows a claim made under regulation 7.5.54; and
  - (b) the SEGC is satisfied that the supply of securities, or the payment of money, or both, as the case requires, to the claimant under regulation 7.5.57 will not adequately compensate the claimant for a pecuniary or other gain that the claimant might, if the claimant had continued to hold the transferred securities, have made but did not in fact make;

the SEGC may determine in writing that there be paid to the claimant in respect of that gain a specified amount that the SEGC considers to be fair and reasonable in all the circumstances.

- (2) If a determination is made under subregulation (1), the SEGC must pay to the claimant the amount specified in the determination.

#### **7.5.59 Nexus with Australia**

Regulations 7.5.54 and 7.5.55 do not entitle a person to make a claim unless the dealer was on the day of the unauthorised execution a participant of a participating market licensee and:

- (a) the dealer was carrying on a securities business in Australia on that day; or
- (b) if the dealer was not so carrying on such a business and was not carrying on a securities business outside Australia on that day—the last securities business that the dealer carried on before that day was carried on in Australia.

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**Subdivision 4.8—Contraventions of ASTC certificate cancellation provisions**

**7.5.60 Claim in respect of contravention of ASTC certificate cancellation provisions**

- (1) A person who suffers pecuniary loss in respect of a contravention, by a dealer, of the ASTC certificate cancellation provisions may make a claim in respect of the loss.
- (2) The loss must not be a loss in respect of an unauthorised execution (within the meaning of paragraph 7.5.53(4)(a)) in respect of which the person has made, or is entitled to make, a claim under Subdivision 4.7.
- (3) The person must not have been involved in the contravention.
- (4) The following paragraphs must be satisfied in relation to the dealer:
  - (a) the dealer was a participant of a participating market licensee on the day of the contravention;
  - (b) either:
    - (i) the dealer was carrying on a securities business in Australia on that day; or
    - (ii) if the dealer was not so carrying on such a business on that day—the last securities business that the dealer carried on before that day was carried on in Australia.

**7.5.61 How and when claim may be made**

- (1) A claim must:
  - (a) be in writing; and
  - (b) be served on the SEGC:
    - (i) if a notice under subregulation (4) applies to the claim—before the end of the last application day specified in the notice; or
    - (ii) in any other case—within 6 months after the day on which the claimant first became aware that the claimant had suffered loss as a result of the dealer’s contravention of the ASTC certificate cancellation provisions.
- (2) For subregulation (1), a notice under subregulation (4) applies to a claim if the claim is in respect of a contravention of the ASTC certificate cancellation provisions, by the dealer named in the notice, during the applicable period specified in the notice.
- (3) A claim that is not served on the SEGC by the time required by paragraph (1)(b) is barred unless the SEGC otherwise determines.
- (4) The SEGC may publish, in each State and Territory in a daily newspaper circulating in that State or Territory, a notice, using Form 719B, that:
  - (a) names a particular dealer; and

- (b) requires that all claims in respect of contraventions of the ASTC certificate cancellation provisions, by the named dealer, during a period (the ***applicable period***) specified in the notice in accordance with subregulation (5) must be served on the SEGC before the day (the ***last application day***) specified in the notice in accordance with subregulation (6).
- (5) The applicable period must be a period that starts and ends before:
  - (a) if each publication of the notice occurs on the same day—the day on which the notice is published; or
  - (b) in any other case—the first day on which the notice is published.
- (6) The last application day must be at least 3 months after:
  - (a) if each publication of the notice occurs on the same day—the day on which the notice is published; or
  - (b) in any other case—the last day on which the notice is published.
- (7) The SEGC, a member of the Board and any employee of, or person acting on behalf of, the SEGC each has qualified privilege in respect of the publication of a notice under subregulation (4).

#### **7.5.62 How claim is to be satisfied**

- (1) The SEGC must allow a claim if the SEGC is satisfied that regulation 7.5.60 entitles the claimant to make the claim.
- (2) If the SEGC allows the claim, it must pay to the claimant the amount that, when the claim is allowed, is the actual pecuniary loss suffered by the claimant because of the contravention in respect of which the claim was made.
- (3) For subregulation (2), the actual pecuniary loss suffered by the claimant does not include any loss in respect of an unauthorised execution (within the meaning of paragraph 7.5.53(4)(a)) in respect of which the claimant has made, or is entitled to make, a claim under Subdivision 4.7.

#### **7.5.63 Discretionary further compensation**

- (1) If:
  - (a) the SEGC allows a claim made under regulation 7.5.60; and
  - (b) the SEGC is satisfied that the payment of money to the claimant under regulation 7.5.62 will not adequately compensate the claimant for a pecuniary or other gain that the claimant did not make, but might have made, were it not for the contravention in respect of which the claim was made;the SEGC may determine in writing that the claimant should be paid in respect of that gain a specified amount that the SEGC considers to be fair and reasonable in all the circumstances.
- (2) If a determination is made under subregulation (1), the SEGC must pay the claimant the amount specified in the determination.

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**Subdivision 4.9—Claims in respect of insolvent participants**

**7.5.64 Claim in respect of property entrusted to, or received by, dealer before dealer became insolvent**

- (1) A person may make a claim in respect of property if:
  - (a) a dealer has become insolvent at a particular time (whether before or after the commencement of this regulation); and
  - (b) at an earlier time (whether before or after that commencement), the property was, in the course of, or in connection with, the dealer's securities business entrusted to, or received by:
    - (i) if the dealer was, at the earlier time, a partner in a participant—the participant, or a partner in, or an employee of, the participant; or
    - (ii) in any other case—the dealer or an employee of the dealer; and was so entrusted or received on behalf of, or because the dealer was a trustee of the property for, the person (other than an excluded person in relation to the dealer); and
  - (c) at the time the dealer became insolvent, the obligations of the dealer, or of a participant of which the dealer is a partner, as the case requires, to the person in respect of the property have not been discharged.
- (2) The SEGC must allow the claim if the SEGC is satisfied that:
  - (a) subregulation (1) entitles the claimant to make the claim; and
  - (b) at the time the SEGC considers the claim, the obligations of the dealer, or of a participant of which the dealer is a partner, as the case requires, to the claimant in respect of the property have not been discharged.
- (3) If the property is, or includes, money, the SEGC must pay to the claimant an amount equal to the amount of that money.
- (4) If the property is, or includes, property other than money, the SEGC must, subject to subregulation (5) and regulation 7.5.65, supply the property other than money to the claimant.
- (5) If:
  - (a) the SEGC allows a claim in respect of property that is, or includes:
    - (i) a number of securities of a particular kind; or
    - (ii) documents of title to a number of securities of a particular kind; and
  - (b) it is not reasonably practicable for the SEGC to obtain those securities, or those documents of title to securities, as the case may be, from the dealer or, if the dealer has disposed of them, from the dealer's successor in title, before the end of:
    - (i) if the operating rules of a participating market licensee or licensed CS facility of which the dealer is a participant, being those operating rules as in force when the SEGC allows the claim, prescribe a period, for this regulation, in relation to a class of claims that includes that claim—that period; or



(ii) in any other case—such period as the SEGC, having regard to all the circumstances relating to the claim, considers reasonable;

the SEGC must, subject to regulation 7.5.65, supply to the person, instead of those securities, or those documents of title to securities, the number of securities of that kind, or documents of title to the number of securities of that kind, as the case may be.

### **7.5.65 Cash settlement of claims if property unobtainable**

(1) If:

- (a) the SEGC allows a claim in respect of property that is, or includes, a number of securities of a particular kind or documents of title to a number of securities of a particular kind; and
- (b) it is not reasonably practicable for the SEGC to obtain those securities, or those documents of title to securities, as the case may be, from the dealer or, if the dealer has disposed of them, from the dealer's successor in title, before the end of:
  - (i) if the operating rules of a participating market licensee or licensed CS facility of which the dealer is a participant, being those operating rules as in force when the SEGC allows the claim, prescribe a period, for this regulation, in relation to a class of claims that includes the claim—that period; or
  - (ii) in any other case—such period as the SEGC, having regard to all the circumstances relating to the claim, considers reasonable; and
- (c) it is not reasonably practicable for the SEGC to obtain that number of securities of that kind, or documents of title to that number of securities of that kind, as the case may be, before the end of that period because:
  - (i) whether by reason that dealing in securities of that kind is suspended or for any other reason, there exists at no time during that period an orderly market in such securities; or
  - (ii) the total number of securities of that kind offered for sale on financial markets of market licensees or Exchange bodies at times during that period when there exists an orderly market in such securities is insufficient;

the SEGC may decide to pay to the claimant the amount that, when the decision is made, is the actual pecuniary loss suffered by the claimant in respect of the first-mentioned securities, or the first-mentioned documents of title, as the case may be, and if the SEGC does so, the SEGC must pay that amount to the claimant.

(2) If:

- (a) the SEGC allows a claim that, because of a dealer having become insolvent, this Division entitles a person to make in respect of property that is, or includes, property (the *relevant property*) other than money, securities or documents of title to securities; and
- (b) it is not reasonably practicable for the SEGC to obtain the relevant property from the dealer or, if the dealer has disposed of it, from the dealer's

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successor in title, before the end of such period as the SEGC considers reasonable;

the SEGC may decide to pay to the claimant the amount that, when the decision is made, is the actual pecuniary loss suffered by the claimant in respect of the relevant property, and if the SEGC does so, the SEGC must pay that amount to the claimant.

**7.5.66 Ordering of alternative claims and prevention of double recovery**

(1) Subregulation (2) applies if:

- (a) a participant has received under the agreement for a sale or purchase of securities by the participant on behalf of a person, the consideration for the sale or settlement documents in relation to the purchase, as the case may be; and
- (b) subregulation 7.5.24(1), 7.5.25(1), 7.5.26(1) or 7.5.27(1) entitles the person to make a claim against the SEGC under Subdivision 4.3 in respect of the sale or purchase.

(2) This Subdivision does not, because of:

- (a) a dealer, being the participant or a partner in the participant, having become insolvent at a particular time; and
- (b) the participant having received, under the agreement, the consideration or the settlement documents;

entitle the person to make a claim in respect of the consideration or the settlement documents, as the case may be, unless the participant's obligations to the person in respect of the sale or purchase, as the case may be, in so far as those obligations related to the consideration or the settlement documents, were discharged before that time.

(3) If:

- (a) because of a dealer having become insolvent on a particular day, this Subdivision entitles a person to make a claim (the *first claim*) in respect of property; and
- (b) because of a dealer having become insolvent on a later day, this Subdivision entitles a person to make another claim in respect of the property;

the SEGC must not allow the other claim unless:

- (c) the person has made the first claim and the SEGC has allowed or disallowed it; or
- (d) the SEGC is satisfied that if the first claim had been made the SEGC would have disallowed it; or
- (e) the SEGC is satisfied that, when the person first became aware of the dealer mentioned in paragraph (b) having become insolvent on the later day:
  - (i) the first claim was barred; or
  - (ii) it was no longer reasonably practicable for the person to make the first claim before it became barred.

- (4) If:
- (a) at a particular time, the SEGC allows a claim in respect of property; and
  - (b) because of:
    - (i) a dealer having become insolvent (whether before, at or after that time); and
    - (ii) the property having, before that time, been entrusted or received as mentioned in paragraph 7.5.64(1)(b);this Subdivision entitles the claimant to make another claim in respect of the property;
- the SEGC must not allow the other claim.

#### **7.5.67 No claim in respect of money lent to dealer**

If, at the time when a dealer becomes insolvent:

- (a) a person has lent money to the dealer; and
- (b) the liability of the dealer to repay the money remains undischarged;

this Subdivision does not, because of the dealer having become insolvent at that time, entitle the person to make a claim in respect of the money.

#### **7.5.68 Nexus with Australia**

This Subdivision does not, because of a person (the *dealer*) having become insolvent at a particular time, entitle a person to make a claim in respect of property unless:

- (a) the dealer was at that time a participant of at least 1 of the following:
  - (i) a participating market licensee;
  - (ii) the licensed CS facility operated by ACH; and
- (b) either:
  - (i) the dealer was carrying on a securities business in Australia at that time; or
  - (ii) the last business that the dealer carried on in Australia before that time was a securities business, and the person's claim relates to that business as it was carried on in Australia.

#### **7.5.69 No claim in certain other cases**

This Subdivision does not, because of a dealer having become insolvent on a particular day, entitle a person to make a claim in respect of property if:

- (a) before that day the property had, in due course of the administration of a trust, ceased to be under the sole control of the dealer; or
- (b) the SEGC, or the Court, is satisfied that circumstances that materially contributed to the dealer becoming insolvent on that day were due to, or caused directly or indirectly by, an act or omission of the person.

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### 7.5.70 Making of claims

- (1) The SEGC may publish, in each State and Territory, in a daily newspaper circulating generally in that State or Territory, a notice, using Form 720, specifying a day, not being earlier than 3 months after the publication of the notice, on or before which claims against the SEGC may be made, being claims that, because of a dealer specified in the notice having become insolvent, this Subdivision entitles persons to make.
- (2) If this Subdivision entitles a person to make a claim, the claim must be in writing and must be served on the SEGC:
  - (a) if there has been published in accordance with subregulation (1) a notice specifying a day on or before which claims may be made, being claims that, because of the dealer having become insolvent on that day, this Subdivision entitles persons to make—on or before that day; or
  - (b) in any other case—within 6 months after the person becomes aware of the dealer having become insolvent on that day.
- (3) A claim that is not made in accordance with subregulation (2) is barred unless the SEGC otherwise determines.
- (4) The SEGC, a member of the Board and any employee of, or person acting on behalf of, the SEGC each has qualified privilege in respect of the publication of a notice under subregulation (1).

### 7.5.71 Limits of compensation

- (1) The total amounts paid out of the Fund in connection with claims that:
  - (a) because of a dealer having become insolvent on a particular day, this Subdivision entitles persons to make; and
  - (b) are allowed by the SEGC;must not exceed an amount equal to 15% of the minimum amount of the Fund as at the end of that day.
- (2) In determining the total of the amounts paid out of the Fund in connection with claims in respect of property (the *main property*):
  - (a) an amount paid out of the Fund in connection with any of the claims must be disregarded, to the extent to which it is repaid to the Fund; and
  - (b) if, because of the exercise of a right or remedy in relation to property that is, or is included in, the main property, being a right or remedy of the claimant, or of any of the claimants, to which the SEGC is subrogated, money or other property has been recovered by, or on behalf, of the SEGC—so much of the amount, or of the total of the amounts, paid out of the Fund in connection with any of the claims as does not exceed:
    - (i) the amount of that money; or
    - (ii) the value of so much (if any) of that other property as has not been, and is not required to be, supplied under subregulation 7.5.64(2) in respect of any of the claims;must be disregarded.

- (3) To ensure compliance with subregulation (1) in relation to particular claims:
  - (a) the SEGC may, in relation to each of those claims, determine in writing an amount to be the maximum amount in relation to the claim; and
  - (b) if paragraph (a) empowers the SEGC to make determinations in relation to the respective claims of 2 or more claimants—the SEGC must, in making those determinations:
    - (i) take into account, in relation to each of those claimants, any money or other property that the claimant has received, or is likely to receive, from sources other than the Fund as compensation for property to which the claimant’s claim relates; and
    - (ii) ensure, as far as practicable, that the proportion of the property to which a claim relates that is represented by the money and other property received from all sources (including the Fund) as compensation for property to which the claim relates is, as nearly as practicable, the same for each of those claimants.
- (4) If a determination of an amount as the maximum amount in relation to a claim is in force under subregulation (3), the amount, or the total of the amounts, paid out of the Fund in connection with the claim must not exceed the amount that has been determined.

## **Subdivision 4.10—General**

### **7.5.72 Power of SEGC to allow and settle claim**

- (1) The SEGC may, at any time after a person becomes entitled to make a claim, allow and settle the claim.
- (2) Subregulation (1) authorises the SEGC to partially allow a claim (including, for example, in a case where the SEGC considers that the claimant’s conduct contributed to the loss).

### **7.5.73 Application of Fund in respect of certain claims**

- (1) This regulation applies if the SEGC acquires financial products in accordance with section 888K of the Act for the purpose of providing compensation.
- (2) The financial products form part of the Fund until they are supplied in accordance with this Part to a claimant or sold in accordance with subregulation (3).
- (3) If the SEGC:
  - (a) acquires the financial products; and
  - (b) satisfies the claim by paying an amount to the claimant;the SEGC must, as soon as practicable after satisfying the claim, sell the financial products and pay the proceeds of the sale into the Fund.

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**7.5.74 Discretion to pay amounts not received etc because of failure to transfer securities**

- (1) This regulation applies if the SEGC is satisfied that:
  - (a) a person (the *defaulter*) has failed to discharge an obligation to transfer securities to another person (the *entitled entity*); and
  - (b) the entitled entity:
    - (i) has made a claim in respect of the failure and has had securities transferred to it, or an amount paid to it, in satisfaction of the claim; or
    - (ii) would have been entitled to make a claim in respect of the failure if securities had not been transferred to it for the purpose of remedying the failure; and
  - (c) if the defaulter had duly transferred securities in accordance with the obligation, an amount would have been paid, or property would have been transferred, to the entitled entity as the holder of the securities; and
  - (d) the entitled entity has not received, and is not entitled to receive (otherwise than from the defaulter):
    - (i) the amount or property; or
    - (ii) an equivalent amount or equivalent property in respect of securities transferred or obtained as mentioned in paragraph (b); and
  - (e) if subparagraph (b)(i) applies, and an amount has been paid in satisfaction of the claim, the amount paid does not adequately compensate the entitled entity for the loss of the amount or property mentioned in paragraph (c).
- (2) The SEGC may determine in writing that the entitled entity is to be paid, in respect of the loss of the amount or property mentioned in paragraph (1)(c), a specified amount that the SEGC considers to be fair and reasonable in the circumstances.
- (3) If a determination is made under subregulation (1), the SEGC must pay to the entitled entity the amount specified in the determination.

**7.5.75 Reduction in compensation**

- (1) The SEGC may reduce an amount of compensation by reference to 1 or more of the following:
  - (a) a right of set-off available to the claimant;
  - (b) the extent to which the claimant was responsible for causing the loss.
- (2) If:
  - (a) the claimant has assigned any of its rights or remedies in relation to the loss; and
  - (aa) the claimant has received a benefit from any person for assigning the right or remedy; and
  - (b) the claimant assigned rights or remedies as mentioned in paragraph (a) without the written consent of the SEGC; and
  - (c) the claimant continues to suffer a loss at the date of the determination of the claim;

the SEGC may reduce the amount of compensation by the amount that fairly represents the extent to which the claimant has, without the written consent of the SEGC, adversely affected the SEGC's ability under section 892F of the Act to recover the amount of the compensation that would otherwise be payable to the claimant in respect of the claimant's claim.

#### **7.5.76 Claimant may be required to exercise right of set-off**

- (1) If:
- (a) a person (the *claimant*) has made a claim in respect of a liability of another person (the *defaulter*); and
  - (b) the claimant has a right, whether under an agreement or otherwise, to set off a liability of the claimant to the defaulter against the liability mentioned in paragraph (a);
- the SEGC may refuse to allow the claim until the claimant has exercised the right.
- (2) The SEGC may, by notice in writing served on a person, require the person to give the SEGC specified information relating to the existence or exercise of rights of set-off.

#### **7.5.77 Effect of set-off on claim**

- (1) If:
- (a) the SEGC allows a claim by a person (the *claimant*) in respect of a liability of another person (the *defaulter*); and
  - (b) the liability of the defaulter to the claimant has been reduced, by an amount of money or a number of securities (the *set-off reduction*), because of:
    - (i) the exercise by the claimant or the defaulter of a right of set-off, whether under an agreement or otherwise; or
    - (ii) the operation of an agreement so far as it provides for the automatic set-off of liabilities; and
  - (c) but for this regulation, the reduction of the defaulter's liability would not be taken into account when working out the obligations of the SEGC in respect of the claim;
- this regulation applies for the purposes of working out those obligations.
- (2) If:
- (a) the SEGC is required to satisfy the claim by paying an amount; and
  - (b) the set-off reduction consists of an amount;
- the amount the SEGC must pay in respect of the claim is reduced by the amount of the set-off reduction.
- (3) If:
- (a) the SEGC is required to satisfy the claim by paying an amount; and
  - (b) the set-off reduction consists of a number of securities;
- then:

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- (c) the SEGC must work out the value of the securities; and
  - (d) the amount the SEGC must pay in respect of the claim is reduced by the value worked out under paragraph (c).
- (4) If:
- (a) the SEGC is required to satisfy the claim by transferring securities of a particular kind; and
  - (b) the set-off reduction consists of a number of securities of that kind; the number of securities that the SEGC must transfer in respect of the claim is reduced by the number mentioned in paragraph (b).
- (5) If:
- (a) the SEGC is required to satisfy the claim by transferring securities of a particular kind; and
  - (b) the set-off reduction consists of a number of securities that are not of that kind;
- then:
- (c) the SEGC must work out:
    - (i) the value of the securities that constitute the set-off reduction; and
    - (ii) the number of securities of the kind mentioned in paragraph (a) that are equal in value to the value worked out under subparagraph (i); and
  - (d) the number of securities that the SEGC is required to transfer in respect of the claim is reduced by the number worked out under subparagraph (c)(ii).
- (6) If:
- (a) the SEGC is required to satisfy the claim by transferring securities of a particular kind; and
  - (b) the set-off reduction consists of an amount of money;
- then:
- (c) the SEGC must work out the number of securities of that kind that are equal in value to that amount; and
  - (d) the number of securities that the SEGC must transfer in respect of the claim is reduced by the number worked out under paragraph (c).

**7.5.78 Claimant entitled to costs and disbursements**

- (1) This regulation applies if the SEGC:
  - (a) allows a claim in whole or in part; or
  - (b) disallows a claim in whole in the following circumstances:
    - (i) the dealer compensated the claimant before the claim was determined;
    - (ii) the claim would have been allowed if the dealer had not compensated the claimant.
- (2) The claimant is entitled to be paid out of the Fund an amount equal to the total of the reasonable costs of, and the reasonable disbursements incidental to, the making and proof of the claim.



- (3) The claimant is also entitled to be paid out of the Fund an amount in respect of the claimant's reasonable costs of, and disbursements incidental to, attempting to recover the loss.
- (4) Subregulations (2) and (3) apply in addition to the claimant's other rights under this Division.

### **7.5.79 Interest**

- (1) In addition to an amount that is payable to a person out of the Fund in respect of a claim, interest at the rate of 5% per annum or, if another rate is determined in writing by the SEGC, at that other rate, is payable to the person out of the Fund, on so much of that amount as is not attributable to costs and disbursements, in respect of the period beginning on the day on which the person became entitled to make the claim and ending on:
  - (a) if the SEGC has made a determination under subregulation 7.5.82(1) to pay that amount in instalments—the day on which that amount would, if no such determination had been made and the money in the Fund were unlimited, have been paid to the person; or
  - (b) if, because of insufficiency of the Fund, no part of that amount is paid to the person on the day on which that amount would, if the money in the Fund were unlimited, have been so paid—that day; or
  - (c) in any other case—the day on which that amount is paid to the person.
- (2) A rate of interest determined by the SEGC for subregulation (1):
  - (a) must not exceed the rate that, when the determination is made, is fixed by Rules of Court for the purposes of paragraph 52(2)(a) of the *Federal Court of Australia Act 1976*; and
  - (b) must not be less than 5% per year.
- (3) As soon as practicable after determining a rate of interest, the SEGC must publish a copy of the determination in the *Gazette*.
- (4) If:
  - (a) under subregulation (1), interest is payable to a person on an amount in respect of a period; and
  - (b) that amount, or a part of that amount, remains unpaid throughout a period beginning immediately after the period mentioned in paragraph (a);interest, in addition to that amount and that interest, is payable to the person, at the rate of 5% per annum, out of the Fund on that amount, or on that part of that amount, as the case may be, in respect of that period first mentioned in paragraph (b).

### **7.5.80 SEGC to notify claimant if claim disallowed**

The SEGC must, after wholly or partly disallowing a claim, serve on the claimant, or on the claimant's solicitor, notice of the disallowance using Form 721.

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**7.5.81 Arbitration of amount of cash settlement of certain claims**

- (1) If:
- (a) a cash settlement provision requires the SEGC to pay an amount in respect of a claim; and
  - (b) the amount cannot be determined by agreement between the SEGC and the claimant;
- the amount must be determined by arbitration in accordance with this regulation.
- (2) If:
- (a) in relation to a claim, paragraph 7.5.77(3)(c), (5)(c) or (6)(c) requires the SEGC to work out the value of securities, or the number of securities that are equal in value to another value or amount; and
  - (b) the value or number cannot be determined by agreement between the SEGC and the claimant;
- the value or number is to be determined by arbitration in accordance with this regulation.
- (3) The reference to arbitration is a reference to persons appointed, in accordance with subregulation (4), for the purposes of the reference.
- (4) For the purposes of the reference to arbitration:
- (a) if the claim relates to a participating market licensee—the participating market licensee must make the appointment, or the participating market licensees must jointly make the appointment; and
  - (aa) if the claim relates to the licensed CS facility operated by ACH—ACH must make the appointment; and
  - (ab) if the claim relates to a participating market licensee and to the licensed CS facility operated by ACH—the participating market licensee and ACH must jointly make the appointment; and
  - (b) 3 persons must be appointed; and
  - (c) the Minister must have approved the appointment of each person in writing; and
  - (d) at least 2 of the persons must not be any of the following:
    - (i) if the claim relates to a participating market licensee:
      - (A) a representative of the participating market licensee;
      - (B) a participant of the participating market licensee;
      - (C) a representative of a participant of the participating market licensee;
    - (ii) if the claim relates to the licensed CS facility operated by ACH:
      - (A) a representative of ACH;
      - (B) a participant of the licensed CS facility;
      - (C) a representative of a participant of the licensed CS facility;
    - (iii) if the claim relates to a participating market licensee and to the licensed CS facility operated by ACH:
      - (A) a representative of the participating market licensee;

- (B) a participant of the participating market licensee;
  - (C) a representative of a participant of the participating market licensee;
  - (D) a representative of ACH;
  - (E) a participant of the licensed CS facility;
  - (F) a representative of a participant of the licensed CS facility;
- (iv) in any case—a representative of the SEGC.
- (5) If, before the commencement of this regulation, an arbitration:
- (a) was to take place but had not begun; or
  - (b) had begun but had not been concluded;
- the arbitration must take place, or continue, as if it were an arbitration under this regulation.
- (6) In this regulation:
- cash settlement provision*** means any of the following provisions:
- (a) regulation 7.5.28;
  - (b) regulation 7.5.29;
  - (j) regulation 7.5.57;
  - (k) regulation 7.5.62;
  - (l) subregulation 7.5.65(1);
  - (m) subregulation 7.5.65(2).

### **7.5.82 Instalment payments**

- (1) This regulation applies if, at a particular time, the SEGC is of the opinion that, if all the amounts that, as at that time, are payable out of the Fund in connection with claims were so paid, the Fund would be exhausted or substantially depleted.
- (2) The SEGC may determine in writing that amounts so payable as at that time must be so paid in instalments of specified amounts payable on specified days.

### **7.5.83 Notification of payment of levies**

For subsection 889J(7) of the Act, a notification to the Commonwealth of payments of levy received by the operator of a financial market as agent for the Commonwealth must:

- (a) be given for each period of 6 months ending on 31 December and 30 June; and
- (b) be given in writing to:
  - (i) the Secretary of the Department of the Treasury; or
  - (ii) another officer of that Department notified in writing by the Secretary to the receiver of the levy; and
- (c) set out the total of the levies (if any) that became payable in the period; and
- (d) set out the total of the levies (if any) received in the period; and
- (e) be given not later than 2 weeks after the end of the period.

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**7.5.84 Notification of payment of levies**

For subsection 889K(6) of the Act, a notification to the Commonwealth of payments of levy received by an operator of a financial market as agent for the Commonwealth must:

- (a) be given for each period of 6 months ending on 31 December and 30 June; and
- and
- (b) be given in writing to:
  - (i) the Secretary of the Department of the Treasury; or
  - (ii) another officer of that Department notified in writing by the Secretary to the receiver of the levy; and
- (c) set out the total of the levies (if any) that became payable in the period; and
- (d) set out the total of the levies (if any) received in the period; and
- (e) be given not later than 2 weeks after the end of the period.

**Subdivision 4.11—Other provisions relating to compensation**

**7.5.85 Prescribed body corporate with arrangements covering clearing and settlement facility support**

For subsection 891A(1) of the Act, each of the following bodies is a prescribed body corporate:

- (a) ASX Settlement and Transfer Corporation Pty Limited (also known as 'ASTC');
- (b) ACH.

## **Division 5—Provisions common to both kinds of compensation arrangements**

### **7.5.86 Excess money in National Guarantee Fund**

- (1) The Minister may notify the SEGC that the Minister is satisfied that:
  - (a) a market licensee specified in the notification is operating a financial market to which Division 4 of Part 7.5 of the Act applies; or
  - (b) each market licensee specified in the notification is operating a financial market to which Division 4 of Part 7.5 of the Act applies.
- (2) For section 892G of the Act, if, on a day, the amount in the NGF is greater than the minimum amount identified in accordance with section 889I of the Act, the amount by which it is greater is excess money.

### **7.5.87 Excess money in fidelity fund**

- (1) For section 892G of the Act, if, on a day:
  - (a) a fidelity fund (other than the NGF) is the sole source of funds available to cover claims for the purposes of Division 3 arrangements; and
  - (b) the amount in the fidelity fund is greater than the minimum amount of cover identified in accordance with paragraph 882A(4)(a) of the Act; the amount by which it is greater is excess money.
- (2) For section 892G of the Act, if, on a day:
  - (a) a fidelity fund (other than the NGF) is not the sole source of funds available to cover claims for the purposes of Division 3 arrangements; and
  - (b) the amount in the fidelity fund is greater than the minimum amount of cover specified in accordance with paragraph 882A(4)(a) of the Act, reduced by the sum of the amounts of cover from each other source of funds available for the purposes of the same Division 3 arrangements; the amount by which it is greater is excess money.

### **7.5.88 Minister's arrangements for use of excess money from compensation funds**

- (1) The Minister may approve, in writing, a matter as an approved purpose for which excess money may be used by a market licensee.
- (2) The matter must relate to:
  - (a) the creation of, or participation in, a program for the development of the financial industry that:
    - (i) is conducted primarily for a public benefit; and
    - (ii) is not conducted primarily to promote the profitability of the commercial operations of any market; or

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- (b) the payment of premiums for fidelity insurance or other compensation arrangements for the financial market as part of an approved compensation arrangement for Division 3 of Part 7.5 of the Act; or
- (c) costs paid by the market licensee in relation to ASIC's responsibilities for market supervision created by the *Corporations Amendment (Financial Market Supervision) Act 2010*; or
- (d) the making of payments to ASIC by the market licensee in relation to ASIC's responsibilities for market supervision created by the *Corporations Amendment (Financial Market Supervision) Act 2010*.

Examples for paragraph (2)(a):

- 1 Public education activities.
- 2 Research into future product or service needs.
- 3 Research and consulting services intended to improve the international performance of Australian financial markets.
- 4 Improvement of Australia's role as a financial centre.

- (3) The Minister may, in relation to an approved purpose, determine conditions to which the use of excess money for the approved purpose must be subject.

**7.5.89 Payment of excess money from NGF**

- (1) If the Minister notifies the SEGC in accordance with subregulation 7.5.86(1), the SEGC may determine, in writing, that an amount of excess money specified in the determination be paid to 1 or more of the market licensees specified in the Minister's notification.
- (2) The amount must be paid in accordance with the SEGC's determination.
- (3) A market licensee that receives a payment of excess money from the NGF must pay the excess money into an account that:
  - (a) is kept separately from other accounts used by the market licensee; and
  - (b) is designated as a 'financial industry development account'.

**7.5.90 Use of excess money from NGF**

- (1) A market licensee that receives a payment of excess money from the NGF must use the money only:
  - (a) for a purpose approved under subregulation 7.5.88(1), and in accordance with any conditions to which the use of the money is subject under subregulation 7.5.88(3); or
  - (b) in accordance with subregulation (3); or
  - (c) to make a repayment to the NGF.
- (2) If the market licensee contravenes subregulation (1), the market licensee must:
  - (a) notify the SEGC of the contravention as soon as practicable; and
  - (b) repay the amount involved into its financial industry development account.

- (3) If there is no immediate requirement for the market licensee to use an amount of excess money in its financial industry development account:
  - (a) the market licensee may invest the amount in a way authorised by section 892C of the Act; and
  - (b) if the market licensee invests excess money during a financial year, the market licensee must pay any interest or profit from the investment into its financial industry development account.
- (4) The market licensee must, in respect of each financial year during which, at any time, there is money in its financial industry development account, lodge a completed Form 719 with ASIC not later than 3 months after the end of the financial year.

#### **7.5.91 Payment of excess money from fidelity fund**

If there is excess money in a fidelity fund (other than the NGF), the market licensee to which the excess money relates may pay an amount of the excess money into an account that:

- (a) is kept separately from other accounts used by the market licensee; and
- (b) is designated as a ‘financial industry development account’.

#### **7.5.92 Use of excess money from fidelity fund**

- (1) A market licensee that receives a payment of excess money from a fidelity fund must use the money only:
  - (a) for a purpose approved under subregulation 7.5.88(1), and in accordance with any conditions to which the use of the money is subject under subregulation 7.5.88(3); or
  - (b) in accordance with subregulation (3); or
  - (c) to make a repayment to the fidelity fund.
- (2) If the market licensee contravenes subregulation (1), the market licensee must repay the amount involved into its financial industry development account.
- (3) If there is no immediate requirement for the market licensee to use an amount of excess money in its financial industry development account:
  - (a) the market licensee may invest the amount in a way authorised by section 892C of the Act; and
  - (b) if the market licensee invests excess money during a financial year, the market licensee must pay any interest or profit from the investment into its financial industry development account.
- (4) The market licensee must, in respect of each financial year during which, at any time, there is money in its financial industry development account, lodge a completed Form 719 with ASIC not later than 3 months after the end of the financial year.

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**7.5.93 Qualified privilege**

- (1) For section 892J of the Act, the following persons each have qualified privilege in respect of the publication of a statement, in accordance with Division 3 of Part 7.5 of the Act, that a contract of insurance does, or does not cover a particular participant:
  - (a) a market licensee;
  - (b) the board of the market licensee;
  - (c) an agent of the board of the market licensee;
  - (d) an employee of a market licensee.
  
- (2) For section 892J of the Act, the following persons each have qualified privilege in respect of a notice, in accordance with Division 3 of Part 7.5 of the Act, seeking claims in relation to a particular participant of a financial market:
  - (a) a market licensee;
  - (b) the board of the market licensee;
  - (c) an agent of the board of the market licensee;
  - (d) an employee of a market licensee.



## **Part 7.5A—Regulation of derivative transactions and derivative trade repositories**

### **Division 2—Regulation of derivative transactions: derivative transaction rules**

#### **Subdivision 2.1—Power to make derivative transaction rules**

##### **7.5A.30 Reporting requirements—prescribed facilities**

- (1) This regulation is made for paragraph 901A(6)(b) of the Act.
- (2) Each facility in the following list is prescribed in relation to a class of derivatives if the facility is licensed, authorised or registered to operate as a derivative trade repository for that class of derivatives under a law of a foreign jurisdiction:
  - (a) DTCC Data Repository (U.S.) LLC;
  - (b) DTCC Derivatives Repository Ltd.;
  - (c) DTCC Data Repository (Japan) KK;
  - (d) DTCC Data Repository (Singapore) Pte Ltd;
  - (e) Chicago Mercantile Exchange Inc.;
  - (f) INFX SDR, Inc.;
  - (g) ICE Trade Vault, LLC;
  - (h) the Monetary Authority appointed under section 5A of the *Exchange Fund Ordinance* of Hong Kong;
  - (i) UnaVista Limited;
  - (j) a facility determined by ASIC for the purposes of this paragraph.
- (2A) ASIC must not determine a facility under paragraph (2)(j), unless ASIC is satisfied that:
  - (a) either:
    - (i) the facility has adopted rules, procedures or processes that substantially implement the CPSS-IOSCO Principles applicable to the regulation of derivative trade repositories; or
    - (ii) the foreign jurisdiction concerned has adopted legislation, policies, standards or practices that substantially implement the CPSS-IOSCO Principles applicable to the regulation of derivative trade repositories; and
  - (b) adequate arrangements exist for cooperation between ASIC and an appropriate authority responsible for licensing, authorising or registering the facility as a derivative trade repository in the foreign jurisdiction.
- (2B) A determination made under paragraph (2)(j):
  - (a) must be published by ASIC in the Gazette; and
  - (b) is not a legislative instrument.

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(3) Paragraphs (2)(a) to (i) cease to have effect at the end of 30 June 2015.

(4) In this regulation:

**CPSS-IOSCO Principles** means the principles for financial market infrastructures:

- (a) issued in April 2012 by the Committee on Payment and Settlement Systems (the **CPSS**) and the International Organization of Securities Commissions (the **IOSCO**); and
- (b) as supplemented, superseded or modified from time to time by principles, recommendations or standards issued by the CPSS or IOSCO (or a successor of the CPSS or IOSCO).

**7.5A.50 Persons on whom requirements cannot be imposed**

(1) This regulation is made for paragraph 901D(a) of the Act.

(2) The class of persons on whom the derivative transaction rules cannot impose requirements consists of end users.

(2A) Also, the derivative transaction rules cannot impose requirements relating to a class of derivatives on financial services licensees:

- (a) who are taken not to be end users only because of paragraph (3)(c); and
- (b) whose Australian financial services licences do not authorise them to provide financial services in relation to that class of derivatives.

(3) An **end user** is a person who is not:

- (a) an Australian ADI; or
- (b) a CS facility licensee; or
- (c) a financial services licensee; or
- (d) a person:
  - (i) who, in this jurisdiction, provides financial services relating to derivatives to wholesale clients only; and
  - (ii) whose activities, relating to derivatives, are regulated by an overseas regulatory authority.

(4) This regulation does not apply to a provision of any derivative transaction rules to the extent that the provision imposes clearing requirements or requirements that are incidental or related to clearing requirements.

**Subdivision 2.1A—Derivative transaction rules imposing clearing requirements**

**7.5A.60 Definitions for Subdivision 2.1A**

(1) In this Subdivision:

**Australian clearing entity**, in relation to a derivative transaction, has the meaning given by regulation 7.5A.61.

**Derivative Transaction Rules (Reporting)** means the *ASIC Derivative Transaction Rules (Reporting) 2013*.

**foreign clearing entity**, in relation to a derivative transaction, has the meaning given by regulation 7.5A.62.

**representative capacity**: an entity is a party to a derivative transaction, or holds a position relating to a derivative transaction, in a **representative capacity** if the entity is such a party, or holds such a position, in a capacity as:

- (a) the responsible entity of a registered scheme; or
- (b) the operator of a notified foreign passport fund; or
- (c) the responsible holding party for a notified foreign passport fund; or
- (d) the trustee of a trust.

**total gross notional outstanding positions**, in relation to an entity, means an amount worked out for the entity under derivative transaction rules, in accordance with subregulation (2).

- (2) For the purposes of this Subdivision, derivative transaction rules may:
  - (a) set out a method for working out the total gross notional outstanding positions held by an entity in a representative capacity, or otherwise; and
  - (b) provide for an entity that starts, or stops, meeting a threshold referred to in subparagraph 7.5A.61(1)(a)(ii), 7.5A.62(1)(a)(ii) or (b)(iv) to be taken to meet, or not to meet, the threshold for transitional purposes specified by the rules.

### **7.5A.61 Meaning of *Australian clearing entity***

- (1) An entity is an ***Australian clearing entity***, in relation to a derivative transaction to which it is a party otherwise than in a representative capacity, if:
  - (a) the entity is an Australian ADI, or a financial services licensee, that:
    - (i) is incorporated or formed in Australia; and
    - (ii) holds \$100 billion or more in total gross notional outstanding positions otherwise than in a representative capacity; or
  - (b) the entity is any other entity that:
    - (i) is incorporated or formed in Australia; and
    - (ii) has, in accordance with any derivative transaction rules, opted to be treated, for the purposes of those rules, as an Australian clearing entity in relation to derivative transactions to which the entity is a party otherwise than in a representative capacity.
- (2) An entity is an ***Australian clearing entity*** in relation to a derivative transaction to which it is a party in a representative capacity in the circumstances set out in derivative transaction rules.

### **7.5A.62 Meaning of *foreign clearing entity***

- (1) An entity is a ***foreign clearing entity***, in relation to a derivative transaction to which it is a party otherwise than in a representative capacity, if:
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- (a) the entity is an ADI, or a financial services licensee, that:
    - (i) is incorporated or formed outside Australia; and
    - (ii) holds \$100 billion or more in total gross notional outstanding positions otherwise than in a representative capacity; or
  - (b) the entity:
    - (i) is incorporated or formed outside Australia; and
    - (ii) in this jurisdiction, provides financial services relating to derivatives to wholesale clients only; and
    - (iii) is exempt under the Act (including these Regulations, or another instrument made under or for the purposes of the Act) from the requirement to hold a financial services licence for those financial services; and
    - (iv) is an entity whose activities relating to derivatives are regulated by an overseas regulatory authority; and
    - (v) holds \$100 billion or more in total gross notional outstanding positions otherwise than in a representative capacity; or
  - (c) the entity is any other entity that:
    - (i) is incorporated or formed outside Australia; and
    - (ii) has, in accordance with any derivative transaction rules, opted to be treated, for the purposes of those rules, as a foreign clearing entity in relation to derivative transactions to which it is a party otherwise than in a representative capacity.
- (2) An entity is a **foreign clearing entity** in relation to a derivative transaction to which it is a party in a representative capacity in the circumstances set out in the derivative transaction rules.

**7.5A.63 Clearing requirements—prescribed facilities**

- (1) This regulation is made for paragraph 901A(7)(b) of the Act.
- (2) Each facility in the following list is prescribed in relation to all derivatives:
  - (a) CME Clearing Europe Limited;
  - (b) Eurex Clearing AG;
  - (c) Japan Securities Clearing Corporation;
  - (d) NASDAQ OMX Clearing AB;
  - (e) OTC Clearing Hong Kong Limited.
- (3) A facility determined by ASIC for the purposes of this subregulation is prescribed in relation to the class of derivatives specified in the determination.
- (4) ASIC may, by notifiable instrument, determine a facility for the purposes of subregulation (3) in relation to a specified class of derivatives, but only if ASIC is satisfied that:
  - (a) the facility's principal place of business is located in a foreign country; and
  - (b) the facility is authorised to operate as a central counterparty for the specified class of derivatives in that country; and

- (c) the regulatory regime in the facility's principal place of business has substantially implemented the CPSS-IOSCO Principles applicable to the regulation of central counterparties; and
- (d) adequate arrangements exist for ASIC and the Reserve Bank of Australia to have access to information about the level of clearing activity by participants that are incorporated or formed in Australia, in relation to derivatives that are subject to clearing requirements under the derivative transaction rules.

(6) In this regulation:

**CPSS-IOSCO Principles** means the principles for financial market infrastructures:

- (a) issued in April 2012 by the Committee on Payment and Settlement Systems (the CPSS) and the International Organization of Securities Commissions (the IOSCO); and
- (b) as supplemented, superseded or modified from time to time by principles, recommendations or standards issued by the CPSS or IOSCO (or a successor of the CPSS or IOSCO).

#### **7.5A.64 Persons on whom clearing requirements cannot be imposed**

- (1) This regulation is made for paragraph 901D(a) of the Act.
- (2) The derivative transaction rules cannot impose clearing requirements in relation to a derivative transaction on a person who is not:
  - (a) an Australian clearing entity in relation to the transaction; or
  - (b) a foreign clearing entity in relation to the transaction.

Example: This regulation prevents the derivative transaction rules imposing clearing requirements on, among other things, a range of foreign public entities including the following (subject to paragraphs (2)(a) and (b)):

- (a) central banks;
- (b) Government debt offices;
- (c) multilateral development banks;
- (d) the Bank for International Settlements and other similar international organisations.

#### **7.5A.65 Circumstances in which clearing requirements can be imposed**

- (1) This regulation is made for paragraph 901D(b) of the Act.
- (2) The derivative transaction rules can only impose clearing requirements in relation to a derivative transaction on an entity that is an Australian clearing entity in relation to the transaction if the other party to the transaction is:
  - (a) an Australian clearing entity in relation to the transaction; or
  - (b) a foreign clearing entity in relation to the transaction; or
  - (c) a foreign internationally active dealer.

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- (3) The derivative transaction rules can only impose clearing requirements in relation to a derivative transaction on an entity that is a foreign clearing entity in relation to the transaction if the other party to the transaction is:
- (a) an Australian clearing entity in relation to the transaction; or
  - (b) a foreign clearing entity in relation to the transaction; or
  - (c) a foreign internationally active dealer.

- (4) In this regulation:

***foreign internationally active dealer*** means any foreign entity, other than a foreign clearing entity, that is registered or provisionally registered as:

- (a) a swap dealer with the Commodity Futures Trading Commission of the United States of America; or
- (b) a securities-based swap dealer with the Securities and Exchange Commission of the United States of America.

### **Subdivision 2.1B—Phase 3 reporting entities—exemption from OTC derivative reporting requirements**

#### **7.5A.70 Definitions for Subdivision 2.1B**

In this Subdivision:

***ASIC exemption instrument*** means *ASIC Instrument [14/0633]*.

***Derivative Transaction Rules (Reporting)*** means the *ASIC Derivative Transaction Rules (Reporting) 2013*.

***OTC derivative*** (short for over-the-counter derivative) means an OTC Derivative within the meaning of the Derivative Transaction Rules (Reporting).

***OTC derivative position*** means a position relating to an OTC derivative transaction.

***OTC derivative position information*** means Derivative Position Information within the meaning of the Derivative Transaction Rules (Reporting), as in force on 1 October 2015, about OTC derivative positions.

***OTC derivative transaction*** means a derivative transaction (within the meaning of Chapter 7 of the Act) relating to an OTC derivative.

***phase 3 reporting entity*** means a Phase 3 Reporting Entity within the meaning of the ASIC exemption instrument as in force on 1 October 2015.

***reporting counterparty***: see regulation 7.5A.72.

***reporting entity*** means a Reporting Entity within the meaning of the Derivative Transaction Rules (Reporting), as in force on 1 October 2015.

**representative capacity:** an entity is a party to an OTC derivative transaction, or holds an OTC derivative position, in a **representative capacity** if the entity is such a party, or holds such a position, in a capacity as:

- (a) the responsible entity of a registered scheme; or
- (b) the operator of a notified foreign passport fund; or
- (c) the responsible holding party for a notified foreign passport fund; or
- (d) the trustee of a trust.

**total gross notional outstanding positions,** in relation to a phase 3 reporting entity, has a meaning affected by the ASIC exemption instrument, as in force on 1 October 2015.

### **7.5A.71 Exemption—single-sided transaction and position reporting**

- (1) This regulation is made for paragraph 907E(2)(a) of the Act.

#### *Exemptions*

- (2) A phase 3 reporting entity is exempt from a provision of the Derivative Transaction Rules (Reporting) requiring the entity, at a particular time, to report information about an OTC derivative transaction to which the entity is a party if, at that time:
  - (a) regulation 7.5A.73 applies to the entity in relation to the transaction; and
  - (b) the other party to the transaction is a reporting counterparty in relation to the phase 3 reporting entity and the information.
- (3) A phase 3 reporting entity is exempt from a provision of the Derivative Transaction Rules (Reporting) requiring the entity, at a particular time, to report OTC derivative position information in relation to an OTC derivative position to which the entity is a party if, at that time:
  - (a) regulation 7.5A.73 applies to the entity in relation to the position; and
  - (b) the other party to the position is a reporting counterparty in relation to the phase 3 reporting entity and the information.

#### *Effect of exemption on ASIC exemption instrument*

- (4) Subregulation (5) applies if a phase 3 reporting entity is exempt under this regulation from a provision of the Derivative Transaction Rules (Reporting) requiring the entity to report information about a particular OTC derivative transaction or OTC derivative position.
- (5) The entity is also exempt from subsection 907D(3) of the Act in relation to a provision of the ASIC exemption instrument that imposes a requirement to report information about the transaction or position as a condition of an exemption under that instrument.

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**7.5A.72 Reporting counterparties**

- (1) This regulation sets out, for the purposes of regulation 7.5A.71, the circumstances in which an entity (the *other entity*) is a *reporting counterparty* in relation to:
  - (a) a phase 3 reporting entity that proposes to rely on an exemption in that regulation (the *exempt entity*); and
  - (b) information that is:
    - (i) information about an OTC derivative transaction; or
    - (ii) OTC derivative position information.

*Reporting entities*

- (2) The other entity is a *reporting counterparty* in relation to the exempt entity and the information if:
  - (a) the other entity has made a representation to the exempt entity:
    - (i) that the other entity is a reporting entity, other than a phase 3 reporting entity, that is required to report such information under the Derivative Transaction Rules (Reporting); or
    - (ii) that the other entity is a phase 3 reporting entity that is required to report such information under the Derivative Transaction Rules (Reporting), and that regulation 7.5A.73 does not apply to the other entity in relation to such OTC derivative transactions or OTC derivative positions; and
  - (b) the exempt entity makes regular enquiries reasonably designed to determine whether the representation is correct; and
  - (c) the exempt entity has no reason to suspect that the representation is incorrect.
- (3) The other entity is a *reporting counterparty* in relation to the exempt entity and the information if:
  - (a) the other entity has made the following representations to the exempt entity:
    - (i) that the other entity is a reporting entity;
    - (ii) that the other entity will report such information in accordance with the Derivative Transaction Rules (Reporting); and
  - (b) the exempt entity makes regular enquiries reasonably designed to determine whether the other entity has been making reports in accordance with the representation referred to in subparagraph (a)(ii); and
  - (c) the exempt entity has no reason to suspect that the other entity has not been making such reports.

*Foreign entities*

- (4) The other entity is a *reporting counterparty* in relation to the exempt entity and the information if:
  - (a) the other entity is a foreign entity; and



- (b) the other entity has made the following representations to the exempt entity:
    - (i) that the other entity is subject to reporting requirements (***alternative reporting requirements***) in one or more foreign jurisdictions that are substantially equivalent to requirements under the Derivative Transaction Rules (Reporting);
    - (ii) that the other entity will report such information to a facility prescribed by or under subregulation 7.5A.30(2), in accordance with the alternative reporting requirements;
    - (iii) that the other entity will designate such information reported to that facility as information that has been reported in accordance with the Derivative Transaction Rules (Reporting); and
  - (c) the exempt entity makes regular enquiries reasonably designed to determine whether the other entity has been making reports in accordance with the representations referred to in subparagraphs (b)(ii) and (iii); and
  - (d) the exempt entity has no reason to suspect that the other entity has not been making such reports.
- (5) The other entity is a ***reporting counterparty*** in relation to the exempt entity and the information if:
- (a) the other entity is a foreign entity; and
  - (b) the other entity has made the following representations to the exempt entity:
    - (i) that the other entity will report such information to a licensed derivative trade repository in accordance with the Derivative Transaction Rules (Reporting);
    - (ii) that the other entity will designate such information reported to that repository as information that has been reported in accordance with the Derivative Transaction Rules (Reporting); and
  - (c) the exempt entity makes regular enquiries reasonably designed to determine whether the other entity has been making reports in accordance with the representations referred to in paragraph (b); and
  - (d) the exempt entity has no reason to suspect that the other entity has not been making such reports.

*Subregulations do not limit each other*

- (6) Subregulations (2), (3), (4) and (5) do not limit each other.

### **7.5A.73 Application of exemptions**

#### *New phase 3 reporting entities*

- (1) For the purposes of regulations 7.5A.71 and 7.5A.72, this regulation applies to a new phase 3 reporting entity, in relation to an OTC derivative transaction or an OTC derivative position, at all times during a period:
- (a) starting on the day the entity becomes a phase 3 reporting entity; and

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- (b) ending at the end of the quarter day that next follows 2 successive disqualifying quarter days for the entity.

Example: An entity becomes a phase 3 reporting entity on 1 November 2015. However, 31 December 2015 and 31 March 2016 are both disqualifying quarter days for the entity.

This regulation applies to the entity during a period starting on 1 November 2015 and ending at the end of 30 June 2016 (the quarter day that next follows the disqualifying quarter days on 31 December 2015 and 31 March 2016).

*Continuing phase 3 reporting entities*

- (2) For the purposes of regulations 7.5A.71 and 7.5A.72, this regulation applies to a continuing phase 3 reporting entity, in relation to an OTC derivative transaction or an OTC derivative position, at all times during a period:
- (a) starting on the day after the quarter day that next follows 2 successive qualifying quarter days for the entity; and
  - (b) ending at the end of the quarter day that next follows 2 successive disqualifying quarter days for the entity.

Example: An entity becomes a phase 3 reporting entity on 1 November 2015. However, 31 December 2015 and 31 March 2016 are both disqualifying quarter days for the entity, so this regulation stops applying under subregulation (1) at the end of 30 June 2016.

30 June 2016 and 30 September 2016 are qualifying quarter days for the entity. This regulation applies to the entity again during the period starting on 1 January 2017 (the day after the quarter day that next follows the qualifying quarter days) and ending as provided for by paragraph (2)(b).

- (3) In this regulation:

***continuing phase 3 reporting entity*** means:

- (a) an entity that was a phase 3 reporting entity on 30 September 2015; or
- (b) a new phase 3 reporting entity for which the period mentioned in subregulation (1) has ended.

Note: For when this regulation first applies to an entity that was a phase 3 entity on 30 September 2015, see regulation 10.21.01.

***disqualifying quarter day***, for an entity, means a quarter day at the end of which the total gross notional outstanding positions held by the entity in the relevant capacity is 5 billion Australian dollars or more.

***new phase 3 reporting entity*** means an entity that becomes a phase 3 reporting entity on or after 1 October 2015.

***qualifying quarter day***, for an entity, means a quarter day at the end of which the total gross notional outstanding positions held by the entity in the relevant capacity is less than 5 billion Australian dollars.

***quarter day*** has the same meaning as in the Act.

Note: Under the Act, ***quarter days*** are 31 March, 30 June, 30 September and 31 December.

**relevant capacity**: a position is held by the entity in the **relevant capacity**, for the purpose of the definition of **qualifying quarter day** or **disqualifying quarter day** in this subregulation, if:

- (a) the position is held by the entity otherwise than in a representative capacity, in the following circumstances:
  - (i) in a case in which the relevant definition is applied in relation to an OTC derivative transaction to which the entity is a party otherwise than in a representative capacity;
  - (ii) in a case in which the relevant definition is applied in relation to an OTC derivative held by the entity otherwise than in a representative capacity; or
- (b) the position is held by the entity in a representative capacity in relation to a particular registered scheme, notified foreign passport fund or trust, in the following circumstances:
  - (i) in a case in which the relevant definition is applied in relation to an OTC derivative transaction to which the entity is a party in that capacity;
  - (ii) in a case in which the relevant definition is applied in relation to an OTC derivative held by the entity in that capacity.

#### **7.5A.74 Reporting requirement—exemption stops applying**

##### *Scope*

- (1) This regulation applies to a phase 3 reporting entity, in relation to an OTC derivative transaction or an OTC derivative position, if:
  - (a) regulation 7.5A.73 applies in relation to the entity, in relation to the transaction or position, during a particular period, and the period has ended (at the **exemption end time**); and
  - (b) the entity is a counterparty to the relevant OTC derivative (including the derivative as modified) at the exemption end time; and
  - (c) in reliance on an exemption under regulation 7.5A.71 (the **applicable exemption**), the entity does not report OTC derivative position information (the **exempt information**) in relation to the transaction or position during that period; and
  - (d) if it were not for the applicable exemption, the entity would have been required to report the exempt information under:
    - (i) the Derivative Transaction Rules (Reporting); or
    - (ii) subsection 907D(3) of the Act, in relation to a provision of the ASIC exemption instrument that imposes a requirement, as a condition of an exemption under that instrument, to report that information.

##### *Single-sided reporting requirement*

- (2) Despite the applicable exemption, the entity must report OTC derivative position information in relation to the OTC derivative, as at the exemption end time, in

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accordance with the Derivative Transaction Rules (Reporting), within 6 months after the exemption end time.

- (3) If the entity fails to comply with subregulation (2), the applicable exemption is taken never to have applied to the entity in relation to the transaction or position.

**Subdivision 2.2—Enforceable undertakings**

**7.5A.101 Enforceable undertakings**

- (1) This regulation is made for paragraphs 901F(1)(d) and 903E(1)(d) of the Act.
- (2) ASIC may accept a written undertaking, entered into by a person who is alleged to have contravened section 901E or 903D of the Act, as an alternative to civil proceedings.
- (3) Without limiting subregulation (2), ASIC may accept an undertaking that includes any of the following:
- (a) an undertaking to take specified action within a specified period;
  - (b) an undertaking to refrain from taking specified action;
  - (c) an undertaking to pay a specified amount within a specified period to the Commonwealth or to some other specified person.

Note: An undertaking may relate to an infringement notice given in relation to the alleged contravention. For example, an infringement notice may require a person to enter into an undertaking; a person may enter into an undertaking to comply with an infringement notice; a person may enter into an undertaking if the person does not comply with an infringement notice or the infringement notice is withdrawn.

- (4) If ASIC agrees, in writing, to the withdrawal or variation of the undertaking, the person who entered into the undertaking may withdraw or vary the undertaking.
- (5) If ASIC is satisfied that the person who entered into the undertaking has breached a term of the undertaking, ASIC may apply to a Court for an order under subregulation (6).
- (6) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make one or more of the following orders:
- (a) an order directing the person to comply with the term of the undertaking;
  - (b) an order directing the person to pay to the Commonwealth an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
  - (c) an order directing the person to compensate another person who has suffered loss or damage as a result of the breach;
  - (d) any other order that the Court considers appropriate.
- (7) This regulation does not affect the liability of a person to civil proceedings if ASIC does not accept an undertaking in relation to the alleged contravention of section 901E or 903D of the Act.

## **Subdivision 2.3—Infringement notices**

### **7.5A.102 Infringement notices**

- (1) This Subdivision is made for sections 901F and 903E of the Act.
- (2) This Subdivision does not require ASIC to give an infringement notice to a person in relation to the alleged contravention of those sections.
- (3) This Subdivision does not affect the liability of a person to civil proceedings if ASIC does not give an infringement notice to the person in relation to the alleged contravention of those sections.
- (4) This Subdivision does not affect the liability of a person to civil proceedings if:
  - (a) ASIC gives an infringement notice to the person in relation to the alleged contravention of those sections; and
  - (b) either:
    - (i) the notice is withdrawn; or
    - (ii) the person does not comply with the notice in accordance with regulation 7.5A.108.
- (5) This Subdivision does not limit or otherwise affect the penalty that a Court could impose on the person for a contravention of those sections.

### **7.5A.103 Definitions for Subdivision**

In this Subdivision:

***compliance period*** has the meaning given by subregulation 7.5A.108(2).

***infringement notice*** means an infringement notice given under regulation 7.5A.104.

***recipient***, in relation to an infringement notice, means the person to whom ASIC gives the infringement notice or intends to give the infringement notice under regulation 7.5A.104.

***rule*** means a provision of:

- (a) the derivative transaction rules mentioned in section 901E of the Act; or
- (b) derivative trade repository rules mentioned in section 903D of the Act.

### **7.5A.104 When infringement notice can be given**

- (1) If ASIC has reasonable grounds to believe that a person has contravened a rule, ASIC may give the person an infringement notice in relation to the alleged contravention.
- (2) ASIC may give a person an infringement notice that is in relation to more than one alleged contravention of a rule.

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- (3) If ASIC withdraws an infringement notice given to a person in relation to the alleged contravention of a rule, ASIC may give the person a new infringement notice in relation to the alleged contravention.

Example: An infringement notice given to a person in relation to an alleged contravention of a rule may be withdrawn, and a new infringement notice given to the person in relation to that alleged contravention, if the original infringement notice contained an error.

#### 7.5A.105 Statement of reasons must be given

- (1) Before giving a recipient an infringement notice, ASIC must:
- (a) give the recipient a written statement that sets out ASIC's reasons for believing that the recipient has contravened a rule; and
  - (b) give the recipient, or a representative of the recipient, an opportunity to:
    - (i) appear at a private hearing before ASIC; and
    - (ii) give evidence to ASIC; and
    - (iii) make submissions to ASIC;
- in relation to the alleged contravention of the rule.
- (2) If a recipient, or a representative of a recipient, gives ASIC evidence or information under paragraph (1)(b), the evidence or information is not admissible in evidence in any proceedings against the recipient, other than proceedings relating to the evidence or information being false or misleading.

#### 7.5A.106 Contents of infringement notice

An infringement notice:

- (a) must state the date on which it is given; and
- (b) must be identified by a unique code; and
- (c) must state the name and address of the recipient; and
- (d) must state that it is being given by ASIC under regulation 7.5A.104; and
- (e) must specify details of each alleged contravention of the rule to which the infringement notice relates, including:
  - (i) the conduct that made up each alleged contravention (including, to the extent known, the date on which it occurred and the place at which it occurred); and
  - (ii) each rule that ASIC alleges the recipient has contravened; and
- (f) must, in relation to each rule that ASIC alleges the recipient has contravened, state the maximum pecuniary penalty that a Court could order the recipient to pay for contravening the rule; and
- (g) must, in relation to each alleged contravention of the rule to which the infringement notice relates:
  - (i) specify the penalty (if any) payable for each alleged contravention of the rule; and
  - (ii) if subparagraph (i) applies:
    - (A) specify the total penalty that the recipient must pay to the Commonwealth; and

- (B) state that the penalty is payable to ASIC on behalf of the Commonwealth; and
- (C) explain how payment of the penalty can be made; and
- (iii) specify the remedial measures (if any) that the recipient must undertake or institute; and
- (iv) specify the sanctions (if any) that the recipient must accept; and
- (v) specify the terms of an undertaking (if any) that the recipient must enter into under regulation 7.5A.101; and
- (h) must state that the recipient may choose not to comply with the infringement notice, but that if the recipient does not comply, civil proceedings may be brought against the recipient in relation to the alleged contravention; and
- (i) must explain what the recipient must do to comply with the infringement notice and the effect of compliance with the infringement notice; and
- (j) must state that the recipient may apply to ASIC:
  - (i) for withdrawal of the notice under regulation 7.5A.111; or
  - (ii) for an extension of time under regulation 7.5A.109; and
- (k) must state that ASIC may publish details of the infringement notice under regulation 7.5A.115; and
- (l) may include any other information that ASIC considers necessary.

Note: For sub-subparagraph (g)(ii)(A), the total penalty is the sum of the penalties payable under subparagraph (g)(i).

### **7.5A.107 Amount of penalty payable to the Commonwealth**

- (1) The penalty payable (if any) for an alleged contravention of a rule is the amount determined by ASIC.

Note: See subsections 901F(2) and 903E(2) of the Act for the maximum penalty payable.

- (2) If an infringement notice is in relation to more than one alleged contravention of a rule, the total penalty payable under the infringement notice is the sum of the penalties payable (if any) for the alleged contraventions.

### **7.5A.108 Compliance with infringement notice**

- (1) A recipient complies with an infringement notice if, during the compliance period, the recipient does all of the following:
  - (a) pays the penalty specified in the infringement notice under sub-subparagraph 7.5A.106(g)(ii)(A) (if any);
  - (b) undertakes or institutes the remedial measures specified in the infringement notice under subparagraph 7.5A.106(g)(iii) (if any);
  - (c) accepts the sanctions specified in the infringement notice under subparagraph 7.5A.106(g)(iv) (if any);
  - (d) enters into an undertaking (including an undertaking to comply with the infringement notice) with the terms specified in the infringement notice under subparagraph 7.5A.106(g)(v) (if any).

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- (2) The **compliance period** for an infringement notice:
  - (a) starts on the day on which the infringement notice is given to the recipient; and
  - (b) ends:
    - (i) 27 days after the day on which the infringement notice is given to the recipient; or
    - (ii) on another day permitted by this regulation.
- (3) If the recipient applies for a further period of time in which to comply with the infringement notice, and the application is granted, the compliance period ends at the end of the further period allowed.
- (4) If the recipient applies for a further period of time in which to comply with the infringement notice, and the application is refused, the compliance period ends on the later of:
  - (a) 28 days after the day on which the infringement notice was given to the recipient; and
  - (b) 7 days after the notice of refusal is given to the recipient.
- (5) If the recipient applies for the infringement notice to be withdrawn, and the application is refused, the compliance period ends 28 days after the notice of refusal is given to the recipient.

**7.5A.109 Extension of compliance period**

- (1) During the compliance period, a recipient may apply, in writing, to ASIC for a further period of no more than 28 days in which to comply with the infringement notice.
- (2) The application must:
  - (a) specify the infringement notice's unique code; and
  - (b) set out the reasons for the application.
- (3) Within 14 days after receiving the application, ASIC must:
  - (a) grant or refuse a further period no longer than the period sought (and no more than 28 days); and
  - (b) notify the recipient in writing of the decision and, if the decision is a refusal, the reasons for the decision.
- (4) If ASIC refuses a further period under paragraph (3)(a), the recipient may not make a further application under subregulation (1) in relation to that infringement notice.
- (5) If ASIC has not granted or refused a further period under paragraph (3)(a) within 14 days after receiving the application, ASIC is taken to have refused the further period.

**7.5A.110 Effect of compliance with infringement notice**

- (1) Subject to subregulation (3), if:
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- (a) an infringement notice is given to a recipient in relation to an alleged contravention of a rule; and
  - (b) the infringement notice is not withdrawn; and
  - (c) the recipient complies with the infringement notice;
- the effects in subregulation (2) apply.

- (2) The effects are:
- (a) any liability of the recipient to the Commonwealth for the alleged contravention of the rule is discharged; and
  - (b) no civil or criminal proceedings may be brought or continued by the Commonwealth against the recipient for the conduct specified in the infringement notice as being the conduct that made up the alleged contravention of the rule; and
  - (c) no administrative action may be taken by ASIC under section 914A, 915B, 915C or 920A of the Act against the recipient for the conduct specified in the infringement notice as being the conduct that made up the alleged contravention of the rule; and
  - (d) the recipient is not taken to have admitted guilt or liability in relation to the alleged contravention; and
  - (e) the recipient is not taken to have contravened the rule.

Note: Third parties are not prevented from commencing civil proceedings against the recipient, including under section 1101B of the Act. ASIC is not prevented from applying for an order on behalf of a plaintiff in accordance with the Act.

- (3) Subregulation (2) does not apply if the recipient has knowingly:
- (a) provided false or misleading information to ASIC; or
  - (b) withheld evidence or information from ASIC;
- in relation to the alleged contravention of the rule.

### **7.5A.111 Application to withdraw infringement notice**

- (1) During the compliance period, a recipient of an infringement notice may apply, in writing, to ASIC for the infringement notice to be withdrawn.
- (2) The application must:
  - (a) specify the infringement notice's unique code; and
  - (b) set out the reasons for the application.
- (3) Within 14 days after receiving the application, ASIC must:
  - (a) withdraw or refuse to withdraw the infringement notice; and
  - (b) notify the recipient in writing of the decision and, if the decision is a refusal, the reasons for the decision.
- (4) Without limiting subregulation (3), ASIC may withdraw the infringement notice after taking into account the following matters:
  - (a) whether the recipient has previously been found to have contravened the rule to which the notice relates;

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- (b) the circumstances in which the contravention set out in the infringement notice is alleged to have occurred;
  - (c) whether an infringement notice has previously been given to the recipient in relation to an alleged contravention of the rule to which the notice relates, and whether the recipient complied with the infringement notice;
  - (d) any other relevant matter.
- (5) If, under paragraph (3)(a), ASIC refuses to withdraw the infringement notice, the recipient may not make a further application under subregulation (1) in relation to that infringement notice.
- (6) If ASIC has not withdrawn, or refused to withdraw, the infringement notice within 14 days after receiving the application, ASIC is taken to have refused to withdraw the infringement notice.

#### **7.5A.112 Withdrawal of infringement notice by ASIC**

- (1) ASIC may withdraw an infringement notice given by ASIC without an application under regulation 7.5A.111 having been made.
- (2) Without limiting subregulation (1), ASIC may withdraw the infringement notice after taking into account a matter mentioned in paragraph 7.5A.111(4)(a), (b), (c) or (d).

#### **7.5A.113 Notice of withdrawal of infringement notice**

- (1) A notice withdrawing an infringement notice must include the following information:
- (a) the name and address of the recipient;
  - (b) the date the infringement notice was given;
  - (c) the infringement notice's unique code.
- (2) The notice must also state that the infringement notice is withdrawn.

#### **7.5A.114 Withdrawal of notice after compliance**

- (1) ASIC may withdraw an infringement notice after the recipient has complied with the infringement notice only if the recipient agrees, in writing, to the withdrawal.
- (2) If an infringement notice is withdrawn after the penalty specified in it (if any) has been paid, the Commonwealth must refund the amount of the penalty to the person who paid it.
- (3) If an infringement notice is withdrawn after the recipient has complied with a requirement specified in the infringement notice:
- (a) to undertake or institute remedial measures; or
  - (b) to accept sanctions other than a payment of a penalty to the Commonwealth; or
  - (c) to enter into an undertaking;

the remedial measures, sanctions or undertaking are taken to no longer be enforceable by ASIC.

### **7.5A.115 Publication of details of infringement notice**

- (1) If ASIC gives an infringement notice to a recipient, ASIC may, at the end of the compliance period, publish details of the infringement notice.
- (2) If ASIC decides to publish details of the infringement notice, ASIC must publish the details in accordance with either or both of subregulations (3) and (4).
- (3) ASIC may publish details of an infringement notice by publishing in the *Gazette*:
  - (a) a copy of the infringement notice; and
  - (b) the following statements:
    - (i) a statement as to whether the recipient has complied with the infringement notice;
    - (ii) if the recipient has complied with the infringement notice, a statement that:
      - (A) compliance is not an admission of guilt or liability; and
      - (B) the recipient is not taken to have contravened the rule;
    - (iii) if the recipient has not complied with the infringement notice, a statement that:
      - (A) the giving of an infringement notice to a recipient is only an allegation that the recipient has contravened the rule; and
      - (B) the recipient is not taken to have contravened the rule.
- (4) ASIC may publish details of an infringement notice by issuing a written or oral statement that:
  - (a) includes an accurate summary of the details of the infringement notice, including:
    - (i) the name of the recipient; and
    - (ii) the amount of the penalty specified in the infringement notice (if any); and
    - (iii) the remedial measures specified in the infringement notice (if any); and
    - (iv) the sanctions specified in the infringement notice (if any); and
    - (v) the terms of an undertaking specified in the infringement notice (if any); and
    - (vi) the conduct specified in the infringement notice as being the conduct that made up the alleged contravention of the rule; and
  - (b) includes the following statements:
    - (i) a statement as to whether the recipient has complied with the infringement notice;
    - (ii) if the recipient has complied with the infringement notice, a statement that:
      - (A) compliance is not an admission of guilt or liability; and
      - (B) the recipient is not taken to have contravened the rule;

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- (iii) if the recipient has not complied with the infringement notice, a statement that:
  - (A) the giving of an infringement notice to a recipient is only an allegation that the recipient has contravened the rule; and
  - (B) the recipient is not taken to have contravened the rule.

## **Division 5—Regulation of licensed derivative trade repositories: other obligations and powers**

### **7.5A.150 Obligations and powers—confidential information**

- (1) This regulation is made for subsection 903A(5) of the Act and applies to information given to ASIC, by the operator (or an officer of the operator) of a licensed derivative trade repository, under a provision of:
  - (a) Part 7.5A of the Act; or
  - (b) the regulations made for that Part; or
  - (c) the derivative transaction rules or derivative trade repository rules.
- (2) The information is taken, for the purpose of section 127 (confidentiality) of the ASIC Act, to be given to ASIC in confidence in connection with the performance of ASIC's functions under the Act, unless:
  - (a) the information has been made publicly available in accordance with the provisions mentioned in paragraph (1)(a), (b) or (c); or
  - (b) a law requires or permits the information to be released.

### **7.5A.150A European Union requests for derivative trade data**

- (1) For paragraph 904B(2)(d) of the Act, the persons or bodies mentioned in Article 81(3)(a) to (e), (g), (h) and (j) of Regulation (EU) No 648/2012 of the European Parliament and the Council of the European Union, dated 4 July 2012, may request a derivative trade repository licensee to provide the person or body with derivative trade data that is retained in the derivative trade repository.
- (2) For subsection 904B(4) of the Act, information must not be included in derivative trade data provided in response to a request under subregulation (1) unless:
  - (a) the information relates to a transaction or position that is required to be reported under either of the following:
    - (i) rules made under paragraph 901A(2)(b) of the *Corporations Act 2001*;
    - (ii) the conditions of an exemption given under section 907D of the *Corporations Act 2001*; and
  - (b) subregulation (3) or (4) applies.
- (3) This subregulation applies if the information relates to a transaction or position that would, but for mutual regulatory recognition arrangements, be required to be reported under one or more of the following:
  - (a) Regulation (EU) No 648/2012 of the European Parliament and the Council of the European Union dated 4 July 2012;
  - (b) Commission Implementing Regulation (EU) No 1247/2012 of the European Parliament and the Council of the European Union, dated 19 December 2012;
  - (c) Commission Delegated Regulation (EU) No 148/2013 of the European Commission, dated 19 December 2012.

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- (4) This subregulation applies if the information:
  - (a) relates to a European Union or European Economic Area underlying asset, index, rate or currency; and
  - (b) is not covered by subregulation (3).

**7.5A.150B Other requests for derivative trade data**

- (1) For paragraph 904B(2)(d) of the Act, the Monetary Authority of Singapore may request a derivative trade repository licensee to provide the Monetary Authority of Singapore with derivative trade data that is retained in the derivative trade repository.
- (2) The request must be made in accordance with the standards set out in the report “Authorities’ access to trade repository data”:
  - (a) issued jointly by the Committee on Payment and Settlement Systems (the **CPSS**) and the International Organization of Securities Commissions (the **IOSCO**); and
  - (b) as supplemented, superseded or modified from time to time by principles, recommendations or standards issued by the CPSS or IOSCO (or a successor of the CPSS or IOSCO).
- (3) If part of a request under subregulation (1) is made in accordance with the standards mentioned in subregulation (2), the part is taken to be a request for the purpose of this regulation.
- (4) For subsection 904B(4) of the Act, information must not be included in derivative trade data provided to a person or body in response to a request under subregulation (1) unless:
  - (a) the information relates to a transaction or position that is required to be reported under either of the following:
    - (i) rules made under paragraph 901A(2)(b) of the *Corporations Act 2001*;
    - (ii) the conditions of an exemption given under section 907D of the *Corporations Act 2001*; and
  - (b) subregulation (5) or (6) applies.
- (5) This subregulation applies if the information:
  - (a) relates to a transaction or position that is, or would be, but for mutual regulatory recognition arrangements, required to be reported under the laws of the jurisdiction in which the person or body is located; and
  - (b) is required by the person or body as part of the performance of its functions or exercise of its powers.
- (6) This subregulation applies if the information:
  - (a) either:
    - (i) relates to an underlying asset, index, rate or currency of the jurisdiction in which the person or body is located; or
    - (ii) relates to a counterparty located in the jurisdiction in which the person or body is located; and

- (b) is required by the person or body as part of the performance of its functions or exercise of its powers; and
- (c) is not covered by subregulation (5).

### **7.5A.151 Obligations relating to derivative trade data**

For subparagraph 904B(5)(b)(i) of the Act, every derivative trade repository licensee is excused from complying with a request for derivative trade data under paragraph 904B(2)(e) of the Act.

### **7.5A.200 ASIC may assess licensee's compliance**

- (1) This regulation is made for paragraph 904J(4)(d) of the Act.
- (2) The following persons or bodies are prescribed for that paragraph:
  - (a) the Clean Energy Regulator;
  - (b) the Australian Competition and Consumer Commission;
  - (c) the Australian Prudential Regulation Authority;
  - (d) the Australian Taxation Office;
  - (e) the Australian Transaction Reports and Analysis Centre;
  - (f) an authority of a State or Territory having functions and powers similar to those of the Director of Public Prosecutions;
  - (g) the police force or service of each State and the Northern Territory;
  - (h) Consumer Protection, Western Australia;
  - (i) the Commissioner of State Revenue of Western Australia;
  - (j) NSW Fair Trading;
  - (k) Consumer Affairs Victoria;
  - (l) the State Revenue Office of Victoria;
  - (m) the Office of Fair Trading of Queensland;
  - (n) the Office of State Revenue of Queensland;
  - (o) Consumer and Business Services, South Australia;
  - (p) Consumer Affairs and Fair Trading, Tasmania;
  - (q) the Department of Treasury and Finance of Tasmania;
  - (r) the Office of Regulatory Services of the Australian Capital Territory;
  - (s) Consumer Affairs, the Northern Territory.

## **Division 7—Regulation of prescribed derivative trade repositories**

### **7.5A.250 Obligations and powers—confidential information**

- (1) This regulation is made for subsection 906A(3) of the Act and applies to information given to ASIC, by the operator (or an officer of the operator) of a prescribed derivative trade repository, under a provision of:
  - (a) Part 7.5A of the Act; or
  - (b) the regulations made for that Part; or
  - (c) the derivative transaction rules or derivative trade repository rules.
- (2) The information is taken, for the purpose of section 127 (confidentiality) of the ASIC Act, to be given to ASIC in confidence in connection with the performance of ASIC's functions under the Act, unless:
  - (a) the information has been made publicly available in accordance with the provisions mentioned in paragraph (1)(a), (b) or (c); or
  - (b) a law requires or permits the information to be released.



## **Division 8—Other matters**

### **7.5A.270 Record-keeping**

- (1) This regulation is made for paragraph 854A(1)(b) of the Act.
- (2) A derivative trade repository licensee must keep the following records:
  - (a) a list of names and contact details of each director, secretary and senior manager of the licensee;
  - (b) a list of names and contact details of individuals who hold more than 15% of the voting power in the licensee.
- (3) The licensee must keep the records for at least 5 years.

## Part 7.6—Licensing of providers of financial services

### 7.6.01 Need for Australian financial services licence: general

- (1) For paragraph 911A(2)(k) of the Act, the provision of the following services is covered by an exemption from the requirement to hold an Australian financial services licence:
  - (a) dealing in a financial product by a person in the capacity of the trustee of a superannuation entity (other than the trustee of a public offer entity);
  - (b) dealing in a financial product by a person in the capacity of the trustee of a pooled superannuation trust in the following circumstances:
    - (i) the pooled superannuation trust is used for investment of the assets of a regulated superannuation fund;
    - (ii) the regulated superannuation fund has net assets of at least \$10 million on the date that it first invests in the pooled superannuation trust;
  - (c) dealing in a financial product by a person in the capacity of the trustee of a pooled superannuation trust in the following circumstances:
    - (i) the pooled superannuation trust is used for investment of the assets of a regulated superannuation fund;
    - (ii) the regulated superannuation fund has net assets of at least \$5 million, but less than \$10 million, on the date that it first invests in the pooled superannuation trust (whether that date is before or after the FSR commencement);
    - (iii) the trustee has a reasonable expectation that the net assets of the regulated superannuation fund will equal or exceed \$10 million not later than 3 months of the date on which it first invests in the pooled superannuation trust (whether that date is before or after the FSR commencement);
  - (d) dealing in a financial product by a person in the capacity of the trustee of a pooled superannuation trust in circumstances in which the pooled superannuation trust is not used for the investment of the assets of a regulated superannuation fund;
  - (e) a financial service provided by a person (*person 1*) in the following circumstances:
    - (i) the service consists only of:
      - (A) informing a person (*person 2*) that a financial services licensee, or a representative of the financial services licensee, is able to provide a particular financial service, or a class of financial services; and
      - (B) giving person 2 information about how person 2 may contact the financial services licensee or representative;
    - (ii) person 1 is not a representative of the financial service licensee, or of a related body corporate of the financial services licensee;

- (iii) person 1 discloses to person 2, when the service is provided:
  - (A) any benefits (including commission) that person 1, or an associate of person 1, may receive in respect of the service; and
  - (B) any benefits (including commission) that person 1, or an associate of person 1, may receive that are attributable to the service;
- (iv) the disclosure mentioned in subparagraph (iii) is provided in the same form as the information mentioned in subparagraph (i);
- (ea) a financial service provided by a person (**person 1**) in the following circumstances:
  - (i) the service consists only of:
    - (A) informing a person (**person 2**) that a financial services licensee, or a representative of the financial services licensee, is able to provide a particular financial service, or a class of financial services; and
    - (B) giving person 2 information about how person 2 may contact the financial services licensee or representative;
  - (ii) person 1 is a representative of the financial service licensee, or of a related body corporate of the financial services licensee;
- (f) a financial service provided in the following circumstances:
  - (i) a person (**person 1**) is a person that is not in the jurisdiction;
  - (ii) person 1 arranges, on behalf of another person (**person 2**), for a holder of an Australian financial services licence to deal in a financial product;
  - (iii) person 1 believes on reasonable grounds that person 2 is not in the jurisdiction;
- (fa) a financial service is provided in the following circumstances:
  - (i) a person (**person 1**) is a person that is not in the jurisdiction;
  - (ii) person 1 enters into an arrangement with the holder of an Australian financial services licence under which a financial product, or a beneficial interest in a financial product, is to be held on trust for, or on behalf of, another person (**person 2**);
  - (iii) person 1 believes on reasonable grounds that person 2 is not in the jurisdiction;
- (g) a financial service provided in the following circumstances:
  - (i) a person (**person 1**) is a person that is not in the jurisdiction;
  - (ii) person 1 believes on reasonable grounds that another person (**person 2**) is not in the jurisdiction;
  - (iii) person 1 deals on behalf of person 2 in a financial product that cannot be traded on a licensed market;
  - (iv) person 1 believes on reasonable grounds that each person who is a party to the dealing or any transaction to which the dealing relates is a person that is not in the jurisdiction;

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- (h) a dealing in a financial product that consists only of an employer sponsor paying contributions on behalf of an employee into a superannuation product or RSA product;
- (ha) a dealing in a financial product that consists only of a trustee of a superannuation fund paying the benefits of a member into a superannuation product or RSA product;
- (hb) a dealing in a financial product that consists only of an RSA provider paying the benefits of an RSA product holder into a superannuation product or RSA product;
- (hc) a dealing in a financial product that consists only of an employer-sponsor arranging for the issue of a superannuation product to an employee;
- (k) a financial service provided in the following circumstances:
  - (i) the financial service is provided in respect of a financial product by a person (who may be described as a ‘sub-custodian’) under an arrangement with a financial services licensee (the *master-custodian*);
  - (ii) the master-custodian is authorised by its Australian financial services licence to provide a custodial or depository service;
  - (iii) a beneficial interest in the financial product is held by the master-custodian on trust for or on behalf of a client as part of providing a custodial or depository service authorised by its Australian financial services licence;
- (l) a financial service provided by a person (*person 1*) in the following circumstances:
  - (i) the financial service is provided to another person (*person 2*) in the ordinary course of person 1’s business;
  - (ii) person 1 does not provide financial services as a significant part of person 1’s business;
  - (iii) the financial service consists only of either or both of:
    - (A) advising person 2 in relation to a non-cash payments facility that person 2 may use or has used to pay person 1 for goods or services; and
    - (B) arranging to deal in a non-cash payments facility that person 2 will use to pay person 1 for goods or services;
  - (iv) the goods and services do not include any financial products or financial services;

Example:

A retailer might offer its customers a variety of payment methods for payment for goods and services, such as a credit card, Bpay, or direct debit.

A recommendation of a particular payment method, or the expression of an opinion about the payment methods available to the customer, should not require an Australian financial services licence.

- (la) a financial service provided by a person (*person 1*) to another person (*person 2*), if:
  - (i) the financial service is provided in the ordinary course of person 1’s business; and
  - (ii) person 1:

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- (A) holds an Australian financial services licence authorising the provision of financial services other than the financial service mentioned in subparagraph (i); or
- (B) does not hold an Australian financial services licence; and
- (iii) the financial service consists of either or both of the following:
  - (A) advising person 2 in relation to a non-cash payments facility that person 2 may use, or has used, to pay person 1 for a financial product or a financial service;
  - (B) arranging to deal in a non-cash payments facility that person 2 will use to pay person 1 for a financial product or a financial service;
- (lb) a financial service that is the issue of a non-cash payment facility if:
  - (i) it is a facility for making non-cash payments; and
  - (ii) under the facility, payments may be made only to the issuer of the facility or a related body corporate of the issuer;
- (lc) an Australia Post presentment and payment processing facility known as POSTbillpay or billmanager;
- (m) a financial service provided by a person in the following circumstances:
  - (i) the service consists only of either or both of:
    - (A) dealing in derivatives; and
    - (B) dealing in foreign exchange contracts;
  - (ii) the service does not involve the making of a market for derivatives or foreign exchange contracts;
  - (iii) the dealing is entered into for the purpose of managing a financial risk that arises in the ordinary course of a business;
  - (iv) the person does not deal in derivatives or foreign exchange contracts as a significant part of the person's business;
  - (v) the dealing is entered into on the person's own behalf;

Example of financial service to which paragraph (m) applies:

A series of forward foreign exchange contracts entered into by a gold mining company to hedge against the risk of a fall in the price of gold.

Example of financial service to which paragraph (m) does not apply:

The issue and disposal of derivatives relating to the wholesale price of electricity are not transactions to which this paragraph applies.

- (ma) a financial service provided by a person in the following circumstances:
    - (i) the service consists only of 1 or more of the following:
      - (A) dealing in derivatives over carbon units, Australian carbon credit units or eligible international emissions units;
      - (B) dealing in a carbon unit, an Australian carbon credit unit or an eligible international emissions unit;
      - (C) dealing in foreign exchange contracts for carbon units, Australian carbon credit units or eligible international emissions units;
    - (ii) the service does not involve the making of a market for those derivatives, units or foreign exchange contracts;
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- (iii) the dealing is entered into for the purpose of managing financial risk in relation to the surrender, cancellation or relinquishment of carbon units, Australian carbon credit units or eligible international emissions units by:
  - (A) the person; or
  - (B) a related body corporate of the person; or
  - (C) an associated entity of the person;

Note: Section 175 of the *Carbon Credits (Carbon Farming Initiative) Act 2011* deals with the relinquishment of Australian carbon credit units. Section 210 of the *Clean Energy Act 2011* deals with the relinquishment of carbon units.

- (iv) the person does not deal in those derivatives, units or foreign exchange contracts as the principal activity of the person's business;
- (v) the dealing is entered into:
  - (A) on the person's own behalf; or
  - (B) on behalf of a related body corporate of the person; or
  - (C) on behalf of an associated entity of the person;
- (mb) a financial service that a person is engaged by the Clean Energy Regulator to provide to the Clean Energy Regulator, or on behalf of the Clean Energy Regulator, that relates to the conduct of an auction of carbon units under the *Clean Energy Act 2011*, other than a financial service that arises in the course of the following activities:
  - (i) the management of any deposit lodged to participate in an auction under the *Clean Energy Act 2011*;
  - (ii) direct participation in an auction under the *Clean Energy Act 2011*, whether on the person's own behalf or on behalf of a person other than the Clean Energy Regulator;
- (n) a financial service provided by a person (**person 1**) to another person (**person 2**) in the following circumstances:
  - (i) person 1 is not in this jurisdiction;
  - (ii) person 2 is in this jurisdiction;
  - (iii) the service consists only of dealing in a financial product or class of financial products;
  - (iv) a financial services licensee whose financial services licence covers the provision of the service arranges for person 1 to provide the service to person 2;
- (na) a financial service provided by a person (**person 1**) to another person (**person 2**) in the following circumstances:
  - (i) person 1 is not in this jurisdiction;
  - (ii) person 2 is in this jurisdiction;
  - (iii) the service consists only of 1 or more of:
    - (A) the provision of financial product advice to person 2; and
    - (B) person 1 making a market; and
    - (C) the provision of a custodial or depositary service to person 2;
  - (iv) person 1 is:

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- (A) a related body corporate of a financial services licensee whose financial services licence covers the provision of the service; or
- (B) a party to a business joint venture with a financial services licensee whose financial services licence covers the provision of the service;
- (v) the financial services licensee arranges for person 1 to provide the service;
- (vi) the financial service licensee's licence is subject to a condition requiring it to assume responsibility for the conduct of person 1 in the provision of the financial service mentioned in this paragraph;
- (o) a financial service that is the provision of financial product advice in the following circumstances:
  - (i) the advice is only general advice in relation to a financial product or class of financial products;
  - (ii) the advice is provided by the product issuer of the financial product or class of financial products;
  - (iii) the advice is provided in the media;
  - (iv) the product issuer provides the following information:
    - (A) the advice has been prepared without taking account of the client's objectives, financial situation or needs;
    - (B) for that reason, the client should, before acting on the advice, consider the appropriateness of the advice, having regard to the client's objectives, financial situation and needs;
    - (C) if the advice relates to the acquisition, or possible acquisition, of a particular financial product, the client should obtain a Product Disclosure Statement relating to the product and consider the Statement before making any decision about whether to acquire the product;
- (oa) the provision of financial product advice if the advice:
  - (i) is provided by an actuary in the ordinary course of providing actuarial services; and
  - (ii) could not reasonably be expected to be included in a document that is to be given to a retail client; and
  - (iii) is provided to:
    - (A) a wholesale client; or
    - (B) the Commonwealth, a State or a Territory; or
    - (C) an exempt public authority;
- (p) a financial service provided by a person in the following circumstances:
  - (i) the financial service relates to insurance entered into, or proposed to be entered into, for the purposes of a law (including a law of a State or Territory) that relates to workers compensation;
  - (ii) the person is licensed to provide the service under the law of the State or Territory in which the service is provided;

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Example: The activities of a licensed insurer under the *Workers Compensation Act 1987* of New South Wales.

Note: A licensed insurer would require an Australian financial services licence to the extent that the licensed insurer provides a financial service in respect of a non-workers compensation product or a non-workers compensation component of a product.

- (pa) a financial service provided to a wholesale client by a body that:
- (i) is not a company; and
  - (ii) is established or constituted under a law of the Commonwealth or a State or Territory; and
  - (iii) is required under a law of the Commonwealth or a State or Territory to carry on the business of insurance or to undertake liability under a contract of insurance; and
  - (iv) is regulated for the provision of insurance under a law of the Commonwealth or a State or Territory;
- (q) a financial service provided by a person in the following circumstances:
- (i) the financial service consists only of the variation or disposal of a financial product by the person;
  - (ii) the person also issued the original product;
  - (iii) the person provides the financial service under the terms of the financial product;
- (r) a financial service that is a dealing (or arranging for a dealing) in:
- (i) a debenture; or
  - (ii) a legal or equitable right or interest in a debenture; or
  - (iii) an option to acquire, by way of issue or transfer, a debenture or a legal or equitable right or interest in a debenture;
- by the issuer of the debenture, the legal or equitable right or interest or the option;
- (s) the provision of financial product advice if the advice:
- (i) is provided to a financial services licensee; and
  - (ii) is only general advice in relation to a financial product or a class of financial products; and
  - (iii) is advice that the financial services licensee is authorised to provide; and
  - (iv) is provided by:
    - (A) the product issuer; or
    - (B) a related body corporate of the product issuer;
- (t) advising in relation to, or dealing in, a medical indemnity insurance product;
- (u) a financial service provided by a person in the following circumstances:
- (i) the financial service is advice included in a document issued in connection with a takeover bid or an offer of a financial product;
  - (ii) the advice is an opinion on matters other than financial products and does not include advice on a financial product;
  - (iii) the document includes a statement that the person is not operating under an Australian financial services licence when giving the advice;



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- (iv) the person discloses, in the document, the information mentioned in paragraphs 947B(2)(d) and (e) of the Act;

Example: A geologist's report on a mining lease included in a PDS.

- (v) a financial service provided by a person (the **nominee**) in the following circumstances:
    - (i) the nominee holds a financial product or a beneficial interest in a financial product on trust for or on behalf of a client of a financial services licensee who is a participant in a licensed market (the **participant**);
    - (ii) the financial product:
      - (A) was acquired on the licensed market by the participant on behalf of the client; or
      - (B) is to be disposed of on the licensed market by the participant on behalf of the client;
    - (iii) the participant is authorised by an Australian financial services licence to provide a custodial or depository service;
    - (iv) the participant's licence is subject to a condition requiring it to assume responsibility for the conduct of the nominee in relation to the provision of a financial service mentioned in this paragraph;
    - (v) the nominee is a wholly-owned subsidiary of the participant;
  - (w) a financial service that is provided:
    - (i) by the Export Finance and Insurance Corporation established by the *Export Finance and Insurance Corporation Act 1991*; and
    - (ii) only to a wholesale client;
  - (x) a service in relation to a litigation funding scheme mentioned in regulation 5C.11.01;
  - (y) a service in relation to a litigation funding arrangement mentioned in regulation 5C.11.01;
  - (z) a financial service provided by a person in the following circumstances:
    - (i) the person is:
      - (A) the operator of a qualifying gas trading exchange; or
      - (B) a participant in relation to a qualifying gas trading exchange;
    - (ii) the service is provided in relation to a qualifying gas exchange product traded on the qualifying gas trading exchange.
- (2) If paragraph (1)(c) applies, and the net assets of the regulated superannuation fund do not equal or exceed \$10 million at the end of the 3 month period mentioned in subparagraph (1)(c)(ii):
- (a) the trustee of the pooled superannuation trust must offer to redeem the investment of the regulated superannuation fund as soon as practicable after the end of the period; and
  - (b) the regulated superannuation fund has not accepted the redemption offer within 3 months after the offer was made; and
  - (c) the net assets of the regulated superannuation fund do not equal or exceed \$10 million by the end of the 3 month period mentioned in paragraph (b);

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the trustee of the pooled superannuation trust must apply for an Australian financial services licence.

- (3) Subregulation (1) is not intended to affect the determination of whether the provision of a service that is not described by that paragraph is, or is not, the provision of a financial service.
- (4) In relation to a regulated principal under Division 1 of Part 10.2 of the Act:
  - (a) a reference in paragraph (1)(e) or (ea) to a financial services licensee includes the regulated principal; and
  - (b) paragraph (a) ceases to apply at the end of the transition period in relation to the regulated principal.
- (5) For paragraphs (1)(b) and (c), if a pooled superannuation trust is used for investment of the assets of more than 1 regulated superannuation fund:
  - (a) each of the regulated superannuation funds must comply with paragraph (1)(b) or (c); and
  - (b) it is not necessary for each of the regulated superannuation funds to comply with the same paragraph in relation to a particular pooled superannuation trust.
- (6) Paragraph (1)(r) ceases to have effect at the end of 2 years after the FSR commencement.
- (6A) Paragraph (1)(t) ceases to have effect in respect of a person advising in relation to, or dealing in, a medical indemnity insurance product, on the earlier of:
  - (a) the date on which the person obtains an Australian financial services licence in respect of the product; and
  - (b) 11 March 2004.
- (7) In this regulation:

**business joint venture** means a contractual agreement between 2 or more parties for the purpose of carrying on a business undertaking.

**media** means any of the following:

- (a) a newspaper, magazine, journal or other periodical;
- (b) a radio or television broadcasting service;
- (c) an electronic service (including a service provided by the Internet) that is:
  - (i) operated on a commercial basis; and
  - (ii) similar to a newspaper, a magazine, a radio broadcast or a television broadcast.

### 7.6.01AAA Particular financial products not exempted

For subsection 911A(5A) of the Act, the exemption under paragraph 911A(2)(b) of the Act does not apply in relation to a margin lending facility.

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**7.6.01AB Obligation on persons providing exempt financial service**

- (1) For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies as if section 911A of the Act were modified to insert the following subsection after subsection (5A):
- ‘(5B) If the regulations prescribe an exemption under paragraph (2)(k) that covers the provision of a service by a person in relation to:
- (a) a litigation funding scheme mentioned in regulation 5C.11.01 of the *Corporations Regulations 2001*; or
  - (b) a litigation funding arrangement mentioned in that regulation;
- the regulations may require the person to have adequate practices, and follow certain procedures, for managing conflicts of interest in relation to the scheme or arrangement.’
- (2) For subsection 911A(5B) of the Act, if a person is providing, or has provided, a financial service covered by the exemption mentioned in paragraph 7.6.01(1)(x) or (y), the person must:
- (a) maintain, for the duration of the litigation funding scheme or arrangement, adequate practices for managing any conflict of interest that may arise in relation to activities undertaken by the person, or an agent of the person, in relation to the scheme or arrangement; and
  - (b) follow the written procedures mentioned in subregulation (4) for the duration of the scheme or arrangement.

Note: The exemption mentioned in paragraph 7.6.01(1)(x) relates to a litigation funding scheme mentioned in regulation 5C.11.01. The exemption mentioned in paragraph 7.6.01(1)(y) relates to a litigation funding arrangement mentioned in that regulation.

- (3) A person commits an offence if the person contravenes subregulation (2).

Penalty: 50 penalty units.

- (4) For subregulation (2), a person has adequate practices for managing a conflict of interest that may arise if the person can show through documentation that:
- (a) the person has conducted a review of the person’s business operations that relate to the scheme or arrangement to identify and assess potential conflicting interests; and
  - (b) the person:
    - (i) has written procedures for identifying and managing conflicts of interest; and
    - (ii) has implemented the procedures; and
  - (c) the written procedures are reviewed at intervals no greater than 12 months; and
  - (d) the written procedures include procedures about the following:
    - (i) monitoring the person’s operations to identify potential conflicting interests;
    - (ii) how to disclose conflicts of interest to general members and prospective general members;

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- (iii) managing situations in which interests may conflict;
- (iv) protecting the interests of general members and prospective general members;
- (v) how to deal with situations in which a lawyer acts for both the funder and general members;
- (vi) how to deal with a situation in which there is a pre-existing relationship between any of a funder, a lawyer and a general member;
- (vii) reviewing the terms of a funding agreement to ensure the terms are consistent with Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001*;
- (viii) recruiting prospective general members; and
- (e) the terms of the funding agreement are reviewed to ensure the terms are consistent with Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001*; and
- (f) the matters mentioned in paragraphs (a) to (e) are implemented, monitored and managed by:
  - (i) if the person is an entity other than an individual—the senior management or partners of the person; or
  - (ii) if the person is an individual that represents an entity—the senior management or partners of the entity.

#### **7.6.01A Providing financial services on behalf of a person who carries on a financial services business**

For subparagraph 911B(1)(c)(iv) of the Act, travellers' cheques are prescribed.

#### **7.6.01B Need for Australian financial services licence: financial product advice provided by the media**

- (1) For paragraph 911A(5)(a) of the Act, the exemptions from the requirement to hold an Australian financial services licence provided for in paragraphs 911A(2)(ea), (eb) and (ec) apply subject to the condition that a person mentioned in any of those paragraphs, or a representative of a person mentioned in any of those paragraphs, who provides financial product advice states the following matters, to the extent to which they would reasonably be expected to influence, or be capable of influencing, the provision of the financial product advice:
  - (a) any remuneration the person or the person's representative is to receive for providing the advice;
  - (b) any pecuniary or other interest that the provider of the advice, or an associate of the provider, has in relation to the advice, if the provider of the advice, or an associate of the provider, would be likely to obtain a material financial benefit, or avoid a material financial loss, if the advice were acted upon.
- (2) The statement mentioned in subregulation (1) must be presented in a way that:
  - (a) will adequately bring it to the attention of a reasonable person who may read or hear the financial product advice to which the statement relates; and

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- (b) is easy for a reasonable person to understand.
- (3) Subregulation (1) does not apply if:
- (a) a person mentioned in paragraph 911A(2)(ea), (eb) or (ec) of the Act, and the person's representatives:
    - (i) comply with an industry code of practice; or
    - (ii) comply with the Statement of Principles laid down by the Australian Press Council; or
    - (iii) are subject to an internal policy that is approved by the board or governing body of the person; and
  - (b) the code, Statement of Principles or policy contains requirements relating to:
    - (i) the manner in which financial conflicts of interest are dealt with; or
    - (ii) the prevention of financial conflicts of interest.
- (4) Subregulation (1) does not apply in relation to:
- (a) a newspaper or periodical, a transmission made by means of an information service, or a sound recording, video recording or data recording, the principal purpose of which is to report and provide comment on news, and not to provide financial product advice; and
  - (b) paid advertising in relation to which a reasonable person is able to distinguish the advertising from other material in the newspaper, periodical, transmission, sound recording, video recording or data recording.
- (5) A reference in subparagraph 911A(2)(eb)(ii) of the Act to transmissions that are generally available to the public includes transmissions provided as part of a subscription broadcasting service within the meaning of the *Broadcasting Services Act 1992*.
- (6) For paragraph 911A(6)(d) of the Act, each of the following services is an information service:
- (a) a broadcasting service within the meaning of the *Broadcasting Services Act 1992*;
  - (b) a datacasting service within the meaning of the *Broadcasting Services Act 1992*;
  - (c) a service provided by the Internet.
- (7) In this regulation:
- associate** means:
- (a) in relation to a body corporate—a related body corporate; and
  - (b) in relation to an individual—a spouse (including a defacto partner), child, step-child, parent, step-parent, brother, half-brother, sister or half-sister of the individual.
- internal policy** includes a code of ethics or editorial guidelines.
- material financial benefit** means a financial benefit exceeding \$10 000 in value.
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**material financial loss** means a financial loss exceeding \$10 000 in value.

**7.6.01BA Modification of section 912A of the Act**

- (1) For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies as if paragraph 912A(1)(e) were modified to read as follows:  
“(e) for a licensee other than a limited licensee—maintain the competence to provide the financial services covered by the licence; and”.
- (2) For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies as if section 912A of the Act were modified by inserting after paragraph 912A(1)(e) the following paragraphs:  
“(ea) for a limited licensee who is an individual—maintain knowledge of the financial services covered by the licence; and  
(eb) for a limited licensee that is a corporation or partnership—ensure that each recognised accountant that supervises and has responsibility for the provision of financial services covered by the licence maintain knowledge of the financial services covered by the licence; and”.
- (3) For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies as if section 912A of the Act were modified by inserting after subsection 912A(3) the following subsections:  
“(4) In this section:

**class of product advice** means financial product advice about a class of products but does not include a recommendation about a specific product in the class.

Example: A financial services licensee may give a recommendation about term deposit products but must not make a specific recommendation that a person deposit their money into a term deposit product offered by a particular bank or building society.

**limited financial services** means the following financial services:

- (a) financial product advice on self-managed superannuation funds;
- (b) financial product advice on superannuation products in relation to a person’s existing holding in a superannuation product but only to the extent required for:
  - (i) making a recommendation that the person establish a self-managed superannuation fund; or
  - (ii) providing advice to the person on contributions or pensions under a superannuation product;
- (c) class of product advice on the following:
  - (i) superannuation products;
  - (ii) securities;
  - (iii) simple managed investment schemes;
  - (iv) general insurance products;
  - (v) life risk insurance products;
  - (vi) basic deposit products;
- (d) arrange to deal in an interest in a self-managed superannuation fund.

Note 1: See section 761A for the meaning of *basic deposit product*, *financial product advice*, *general insurance product*, *life risk insurance product*, *self-managed superannuation fund* and *superannuation product*.

Note 2: Financial product advice on self-managed superannuation funds includes advice about acquiring or disposing an interest in a self-managed superannuation fund.

**limited licensee** means a financial services licensee that:

- (a) is:
  - (i) a recognised accountant; or
  - (ii) a corporation that has one or more recognised accountants that supervise and have responsibility for the provision of financial services covered by its licence; or
  - (iii) a partnership that has one or more recognised accountants that supervise and have responsibility for the provision of financial services covered by its licence; and
- (b) applied for the financial services licence between 1 July 2013 and 30 June 2016; and
- (c) is only licensed to provide one or more limited financial services.

**recognised accountant** means:

- (a) a member of CPA Australia who:
  - (i) holds a Public Practice Certificate issued by CPA Australia Ltd; and
  - (ii) is entitled to use the letters “CPA” or “FCPA”; and
  - (iii) is subject to, and complies with, CPA Australia’s continuing professional education requirements; or
- (b) a member of The Institute of Chartered Accountants in Australia (**ICAA**) who:
  - (i) holds a Certificate of Public Practice issued by ICAA; and
  - (ii) is entitled to use the letters “ACA”, “CA” or “FCA”; and
  - (iii) is subject to, and complies with, ICAA’s continuing professional education requirements; or
- (c) a member of the Institute of Public Accountants (**IPA**) who:
  - (i) holds a Public Practice Certificate issued by IPA; and
  - (ii) is entitled to use the letters “FIPA” or “MIPA”; and
  - (iii) is subject to, and complies with, IPA’s continuing professional education requirements.

**simple managed investment scheme** has the same meaning as in the regulations.”.

### 7.6.01C Obligation to cite licence number in documents

- (1) For subsection 912F(1) of the Act, the following documents are specified:
  - (a) a Financial Services Guide described in Division 2 of Part 7.7 of the Act;
  - (b) a supplementary Financial Services Guide described in Division 2 of Part 7.7 of the Act;
  - (c) a Product Disclosure Statement;

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- (d) a supplementary Product Disclosure Statement;
  - (e) a Statement of Advice described in Division 3 of Part 7.7 of the Act;
  - (f) an application form for an application under section 1016A of the Act;
  - (g) a document containing information required by regulations made under section 1017DA of the Act;
  - (h) a document prepared for section 1017B of the Act, notifying a person of changes and events;
  - (i) a Replacement Product Disclosure Statement.
- (2) On and after 1 July 2004, for subsection 912F(1) of the Act, a periodic statement under section 1017D of the Act is specified.

**7.6.02 Alternative dispute resolution systems**

- (1) For subparagraph 912A(2)(a)(i) of the Act, ASIC must take the following matters into account when considering whether to make or approve standards or requirements relating to internal dispute resolution:
- (a) Australian/New Zealand Standard AS/NZS 10002:2014 *Guidelines for complaint management in organizations* published jointly by, or on behalf of, Standards Australia and Standards New Zealand, as in force or existing on 29 October 2014;
  - (b) any other matter ASIC considers relevant.
- (2) ASIC may:
- (a) vary or revoke a standard or requirement that it has made in relation to an internal dispute resolution procedure; and
  - (b) vary or revoke the operation of a standard or requirement that it has approved in its application to an internal dispute resolution procedure.
- (5) For paragraph 926B(1)(a) of the Act, a financial services licensee who provides a financial service in the capacity of any of the following:
- (a) a trustee appointed under the will or on the intestacy of a person;
  - (b) a trustee appointed under an express trust if:
    - (i) the settlor is a natural person; and
    - (ii) the interest in the trust is not a financial product;
  - (c) an attorney appointed under an enduring power of attorney;
- does not have to comply with paragraph 912A(2)(c) of the Act in relation to the provision of the service if complaints about the service provided by the licensee may be made to the Ombudsman of a State or Territory.
- (6) For paragraph 926B(1)(a) of the Act, a financial services licensee who provides a financial service in the capacity as administrator of the estate of an individual does not have to comply with paragraph 912A(1)(g) of the Act in relation to the provision of the service if complaints about the service provided by the licensee may be made under a State or Territory law listed in Schedule 8AC.



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**7.6.02AAA Compensation arrangements if financial services provided to persons as retail clients (Act s 912B)**

- (1) For paragraph 912B(2)(a) of the Act, arrangements mentioned in subsection 912B(1) of the Act are, unless the financial services licensee is an exempt licensee, subject to the requirement that the licensee hold professional indemnity insurance cover that is adequate, having regard to:
- (a) the licensee's membership of the scheme mentioned in paragraph 912A(2)(c) of the Act, taking account of the maximum liability that has, realistically, some potential to arise in connection with:
    - (i) any particular claim against the licensee; and
    - (ii) all claims in respect of which the licensee could be found to have liability; and
  - (b) relevant considerations in relation to the financial services business carried on by the licensee, including:
    - (i) the volume of business; and
    - (ii) the number and kind of clients; and
    - (iii) the kind, or kinds, of business; and
    - (iv) the number of representatives of the licensee.
- (2) For paragraph 912B(3)(c) of the Act, a matter that ASIC must have regard to, before approving particular arrangements under paragraph 912B(2)(b) of the Act, is whether those arrangements provide coverage that is adequate, having regard to matters of the kind mentioned in subregulation (1).
- (3) In this regulation, **exempt licensee** means:
- (a) a company or institution of any of the following kinds:
    - (i) a general insurance company regulated by APRA under the *Insurance Act 1973*;
    - (ii) a life insurance company regulated by APRA under the *Life Insurance Act 1995*;
    - (iii) an authorised deposit-taking institution regulated by APRA under the *Banking Act 1959*; or
  - (b) a licensee (**related licensee**):
    - (i) that is related, within the meaning of section 50 of the Act, to a company or institution mentioned in paragraph (a); and
    - (ii) in respect of which the company or institution has provided a guarantee that:
      - (A) ensures payment of the obligations of the related licensee to its retail clients to an extent that is adequate within the meaning of subregulation (1); and
      - (B) is approved in writing by ASIC.

Note: A decision to refuse to approve a guarantee is a reviewable decision under section 1317B of the Act.

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*Security bonds held by ASIC*

- (4) A security bond lodged with ASIC by a licensee in consequence of the operation of regulation 7.6.02AA (as affected by any instrument made by ASIC under paragraph 926A(2)(c) of the Act) may be discharged or returned by ASIC (in whole or in part), without application from the licensee or surety who provided the security, in any of the following circumstances:
- (a) the licensee certifies, in the form approved by ASIC, that it holds professional indemnity insurance, or has an alternative compensation arrangement in place that provides compensation protection for clients of the licensee, that is adequate to cover claims to which the security bond could apply;
  - (b) the licensee certifies, in the form approved by ASIC, that it holds professional indemnity insurance, or has an alternative compensation arrangement in place that, together with other financial resources available to it, provides compensation protection for clients of the licensee, that is adequate to cover claims to which the security bond could apply;
  - (c) the licensee is a company or institution of any of the following kinds:
    - (i) a general insurance company regulated by APRA under the *Insurance Act 1973*;
    - (ii) a life insurance company regulated by APRA under the *Life Insurance Act 1995*;
    - (iii) an authorised deposit-taking institution regulated by APRA under the *Banking Act 1959*;
  - (d) the licensee certifies, in the form approved by ASIC, that it holds a guarantee given by a company or institution mentioned in paragraph (c) that, together with other financial resources available to it, provides compensation protection for clients of the licensee that is adequate to cover claims to which the security bond could apply.

Note: A decision to refuse to approve a guarantee is a reviewable decision under section 1317B of the Act.

*Transitional*

- (5) Subregulations (1), (2) and (3) take effect as follows:
- (a) for a financial services licensee whose licence commences before 1 January 2008—on 1 July 2008;
  - (b) for a financial services licensee whose licence commences on or after 1 January 2008—on the date of commencement of the licence.

**7.6.02AA Modification of section 912B of the Act: professional indemnity insurance and security instead of compensation arrangements**

- (1) For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies as if section 912B of the Act were modified by substituting that section with the following:

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**‘912B Financial services provided to persons as retail clients—requirements in certain circumstances**

- (1) Subsection (2) applies in relation to a financial services licensee if the licensee’s financial services licence authorises the licensee to carry on an activity:
  - (a) to which paragraph 19(1)(b) or subparagraph 31B(1)(a)(ii) or (b)(ii) of the *Insurance (Agents and Brokers) Act 1984* (the **repealed Act**) would have applied if that Act were not repealed; and
  - (b) for which the licensee would have been required under those provisions to have in force an acceptable contract of professional indemnity insurance.
- (2) The repealed Act, and any associated provisions, continue to apply in relation to the licensee to the extent necessary to require the licensee to have in force an acceptable contract of professional indemnity insurance in relation to the activity.
- (3) Subsections (4) and (5) apply in relation to a financial services licensee if the licensee’s financial services licence authorises the licensee to carry on an activity:
  - (a) to which Part 7.3 of the old Corporations Act would have applied if that Part were not repealed; and
  - (b) for which the licensee would have been required under that Part to have a dealers licence or investment advisers licence that could have been subject to the condition specified in paragraph 786(2)(d) of the old Corporations Act.
- (4) Section 914A of the Act is taken to authorise ASIC to impose the condition specified in paragraph 786(2)(d) of the old Corporations Act as a condition of the licensee’s financial services licence.
- (5) If ASIC acts under subsection (4), Part 7.3 of the old Corporations Act, and any associated provisions, continue to apply to the extent necessary to specify the content of the condition specified in paragraph 786(2)(d) of the old Corporations Act.’
- (6) In this section:

**associated provisions**, in relation to provisions (the **core provisions**) of a particular Act as in force at a particular time, include (but are not limited to):

  - (a) any regulations or other instruments that are or were in force for the purposes of any of the core provisions at that time; and
  - (b) any interpretation provisions that apply or applied in relation to any of the core provisions at that time (whether or not they also apply or applied for other purposes); and
  - (c) any provisions relating to liability (civil or criminal) that apply or applied in relation to any of the core provisions at that time (whether or not they also apply or applied for other purposes); and
  - (d) any provisions that limit or limited, or that otherwise affect or affected, the operation of any of the core provisions at that time

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(whether or not they also limit or limited, or affect or affected, the operation of other provisions).

*old Corporations Act* means this Act as in force immediately before the FSR commencement.’.

- (2) Subregulation (1) operates only in relation to a financial services licensee (other than an exempt licensee under regulation 7.6.02AAA):
  - (a) who has not complied with subsection 912B(1) of the Act, in its unmodified form; and
  - (b) until the licensee does so comply.
- (3) Subregulations (1) and (2) are not taken to displace, or diminish, the requirement for a financial services licensee to comply with subsection 912B(1) of the Act in its unmodified form.
- (4) A security bond lodged with ASIC by a financial services licensee in compliance with section 912B of the Act as modified by subregulation (1), or with any provision of the old Corporations Act, may be released by ASIC, at its discretion, if:
  - (a) ASIC considers that, in relation to the licensee, a security bond is no longer required because the licensee:
    - (i) has complied with subsection 912B(1) of the Act, in its unmodified form; or
    - (ii) is an exempt licensee within the meaning of regulation 7.6.02AAA; and
  - (b) ASIC has published on its internet website, and in a daily newspaper having national circulation:
    - (i) a proposal that it release the security bond; and
    - (ii) a direction to the web address at which further information may be obtained; and
  - (c) ASIC has advertised, at that web address, the existence of the security bond, and an invitation to submit valid claims against the bond; and
  - (d) 3 months after publication of the advertisement, no valid claim has been submitted.

### **7.6.02AB Modification of section 761G of the Act: meaning of *retail client* and *wholesale client***

For the provisions of the Act set out in column 2 of the following table, the Parts of the Act specified in column 3 apply as if section 761G of the Act were modified by inserting after paragraph 761G(7)(c), the following paragraph:

- “(ca) the financial product, or the financial service, is acquired by a company or trust controlled by a person who meets the requirements of subparagraph (c)(i) or (ii);”

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Column 1	Column 2	Column 3
Item	Provisions of Act	
1	paragraph 926B(1)(c)	Part 7.6
2	paragraph 951C(1)(c)	Part 7.7
2A	section 1368	Part 7.7A
3	paragraph 992C(1)(c)	Part 7.8
4	paragraph 1020G(1)(c)	Part 7.9

**7.6.02AC Modification of section 761G of the Act: meaning of *retail client* and *wholesale client***

For the provisions of the Act set out in column 2 of the following table, the Parts of the Act specified in column 3 apply as if section 761G of the Act were modified by inserting after subsection 761G(7), the following subsections:

“(7A) In determining the net assets of a person under subparagraph (7)(c)(i), the net assets of a company or trust controlled by the person may be included.

Note: *Control* is defined in section 50AA.

(7B) In determining the gross income of a person under subparagraph (7)(c)(ii), the gross income of a company or trust controlled by the person may be included.

Note: *Control* is defined in section 50AA.”

Column 1	Column 2	Column 3
Item	Provisions of Act	
1	paragraph 926B(1)(c)	Part 7.6
2	paragraph 951C(1)(c)	Part 7.7
2A	section 1368	Part 7.7A
3	paragraph 992C(1)(c)	Part 7.8
4	paragraph 1020G(1)(c)	Part 7.9

**7.6.02AD Modification of section 761G of the Act: meaning of *retail client* and *wholesale client***

For the provisions of the Act set out in column 2 of the following table, the Parts of the Act specified in column 3 apply as if section 761G of the Act were modified by inserting after subsection 761G(4), the following subsection:

“(4A) For the purposes of this Chapter, if a financial product, or a financial service, is or would be provided to, or acquired by, a body corporate as a wholesale client, related bodies corporate of the client are taken to be wholesale clients in respect of the provision or acquisition of that financial product or financial service.”

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Column 1	Column 2	Column 3
Item	Provisions of Act	
1	paragraph 926B(1)(c)	Part 7.6
2	paragraph 951C(1)(c)	Part 7.7
2A	section 1368	Part 7.7A
3	paragraph 992C(1)(c)	Part 7.8
4	paragraph 1020G(1)(c)	Part 7.9

**7.6.02AE Modification of section 9 of the Act: Definition of *professional investor***

For the provisions of the Act set out in column 2 of the following table, the Parts of the Act specified in column 3 apply as if section 9 of the Act were modified by omitting paragraph (e) of the definition of *professional investor* and substituting the following paragraph:

“(e) the person has or controls gross assets of at least \$10 million (including any assets held by an associate or under a trust that the person manages);”

Column 1	Column 2	Column 3
Item	Provisions of Act	
1	paragraph 926B(1)(c)	Part 7.6
2	paragraph 951C(1)(c)	Part 7.7
2A	section 1368	Part 7.7A
3	paragraph 992C(1)(c)	Part 7.8
4	paragraph 1020G(1)(c)	Part 7.9

**7.6.02AF Modification of section 761G of the Act: renewal period for accountants’ certificates**

For the provisions of the Act set out in column 2 of the following table, the Parts of the Act specified in column 3 apply as if section 761G of the Act were modified by omitting from paragraph 761G(7)(c) “6 months” and substituting “2 years”.

Column 1	Column 2	Column 3
Item	Provisions of Act	
1	paragraph 926B(1)(c)	Part 7.6
2	paragraph 951C(1)(c)	Part 7.7
2A	section 1368	Part 7.7A
3	paragraph 992C(1)(c)	Part 7.8
4	paragraph 1020G(1)(c)	Part 7.9

### 7.6.02AG Modification of section 911A of the Act

For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies as if section 911A of the Act were modified by inserting after subsection 911A(2) the following subsections:

- “(2A) Also, a person (*person 1*) is exempt from the requirement to hold an Australian financial services licence for a financial service they provide to a person (*person 2*) in the following circumstances:
- (a) person 1 is not in this jurisdiction;
  - (b) person 2 is an Australian citizen or is resident in Australia;
  - (c) the service is provided from outside this jurisdiction;
  - (d) person 1 does not engage in conduct that is:
    - (i) intended to induce people in this jurisdiction to use the service; or
    - (ii) likely to have that effect.
- (2B) Also, a person (*person 1*) is exempt from the requirement to hold an Australian financial services licence for a financial service they provide to a person (*person 2*) in the following circumstances:
- (a) person 1 is not in this jurisdiction;
  - (b) person 1 believes on reasonable grounds that person 2 is not in this jurisdiction;
  - (c) person 1 is a participant in a financial market in this jurisdiction that is licensed under subsection 795B(2) of the Act;
  - (d) the service relates to a financial product traded on the licensed market.
- (2C) Also, a person (*person 1*) is exempt from the requirement to hold an Australian financial services licence for a financial service they provide to a person (*person 2*) in the following circumstances:
- (a) person 1 is not in this jurisdiction;
  - (b) person 2 is:
    - (i) the holder of an Australian financial services licence; or
    - (ii) exempt from the requirement to hold an Australian financial services licence under paragraph 911A(2)(h);
  - (c) person 2 is not, in relation to the service:
    - (i) acting as a trustee; or
    - (ii) acting as a responsible entity of a registered scheme; or
    - (iii) otherwise acting on someone else’s behalf.
- (2D) Also, a person (*person 1*) is exempt from the requirement to hold an Australian financial services licence for a financial service they provide to a person (*person 2*) in the following circumstances:
- (a) person 1 is not in this jurisdiction;
  - (aa) person 1 is not a notified foreign passport fund or the operator of a notified foreign passport fund;
  - (b) person 2 is in this jurisdiction;

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- (c) the service relates to a financial product:
  - (i) issued by person 1 following an application by, or inquiry from, person 2; or
  - (ii) issued by person 1 and acquired by person 2 when person 2 was not in this jurisdiction; or
  - (iii) that supplements a financial product mentioned in subparagraphs (i) or (ii); or
  - (iv) that is of the same kind as, and is issued in substitution for, a financial product mentioned in subparagraphs (i) or (ii);
- (d) person 1 does not actively solicit persons in this jurisdiction in relation to the financial products mentioned in subparagraphs (c)(i) to (iv);
- (e) paragraph (d) does not preclude person 1 from contacting person 2 in relation to the financial products mentioned in subparagraphs (c)(i) to (iv) after they have been acquired by person 2.

Note 1: For subparagraph (c)(iii), an example of this kind of financial product includes a non-cash payment facility (such as a cheque facility) that is added to an existing transaction or investment account.

Note 2: For subparagraph (c)(iv), examples of this kind of financial product include:

- (a) a transaction or investment account that is replaced by another transaction or investment account; or
- (b) the renewal of an insurance policy.

(2E) Also, a person (*person 1*) is exempt from the requirement to hold an Australian financial services licence for a financial service they provide to a person (*person 2*) in the following circumstances:

- (a) person 1 is not in this jurisdiction;
- (b) person 2 is a professional investor;
- (c) the service consists of any or all of the following:
  - (i) dealing in derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units;
  - (ii) providing advice on derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units;
  - (iii) making a market in derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units.

(2F) Also, a person is exempt from the requirement to hold an Australian financial services licence for a financial service that the person provides by bidding at an auction conducted in accordance with a legislative instrument made for subsection 113(1) of the *Clean Energy Act 2011*, if the bidding is:

- (a) on the person's own behalf; or
- (b) for a related body corporate of the person; or
- (c) for an associated entity of the person."



**7.6.02AGA Further modification of section 911A of the Act**

For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies in relation to a carbon unit, an Australian carbon credit unit or an eligible international emissions unit as if section 911A of the Act were modified by inserting after subsection 911A(5A) the following subsections:

*“Australian financial services licence in relation to carbon units, Australian carbon credit units or eligible international emissions units before and after 1 July 2012*

- (5B) Subsections (5C) to (5U) apply during the period that:
- (a) starts on 1 May 2012; and
  - (b) ends on 31 December 2012, or a later day prescribed by the regulations.
- (5C) A person must not provide a financial service in relation to a carbon unit, an Australian carbon credit unit or an eligible international emissions unit that is a financial product unless:
- (a) the person holds a licence authorising the person to provide the financial service; or
  - (b) the person:
    - (i) is registered to provide the financial service; and
    - (ii) applies, no later than 31 October 2012, for a licence authorising the person to provide the service.

Civil penalty: 2,000 penalty units.

Note: Carbon units, Australian carbon credit units and eligible international emissions units become financial products on 1 July 2012. The period mentioned in subsection (5B) relates to the registration process explained in subsection (5F) onwards.

- (5D) A person commits an offence if:
- (a) the person is subject to a requirement under subsection (5C); and
  - (b) the person engages in conduct; and
  - (c) the conduct contravenes the requirement.

Criminal penalty: 200 penalty units, or 2 years imprisonment, or both.

- (5E) For the purposes of subsections (5C) and (5D), it is a defence if the person:
- (a) provides a financial service in relation to a carbon unit, an Australian carbon credit unit or an eligible international emissions unit; and
  - (b) is exempted under this Act or the regulations from the operation of those subsections.

Note: For the purposes of subsection (5E), a defendant bears an evidential burden in relation to the matter in subitem (3): see subsection 13.3(3) of the *Criminal Code*.

- (5F) A person may apply to be registered by lodging an application with ASIC.
- (5G) The application must be lodged during the period that:
- (a) starts on 1 May 2012; and

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- (b) ends on 30 June 2012, or a later day prescribed by the regulations.
- (5H) The application must be in the approved form.
- (5I) ASIC must register a person (the **registrant**) if (and must not register the registrant unless):
- (a) the application makes the statement set out in subsection (5J) in relation to each of the following persons:
    - (i) the registrant;
    - (ii) if the registrant is a body corporate—each director or secretary of the body corporate who would perform duties in relation to the financial services to be authorised by the registration or, if there is no director of that kind, each director or secretary of the body corporate;
    - (iii) if the registrant is a partnership or the trustees of a trust—each partner or trustee who would perform duties in relation to the financial services to be authorised by the registration; and
  - (b) ASIC is satisfied that:
    - (i) the application is not false in a material particular and is not materially misleading; and
    - (ii) no material matter has been omitted from the application.
- (5J) For the purposes of paragraph (5I)(a), the statement is that:
- (a) a banning order or disqualification order under Division 8 of Part 7.6 of the *Corporations Act 2001* is not in force against the person; and
  - (b) if the person is or has been registered—the person’s registration is neither suspended nor cancelled; and
  - (c) an Australian financial services licence of the person is neither suspended, nor has been cancelled within the last 7 years, under:
    - (i) paragraph 915B(1)(d) or subparagraph 915B(4)(b)(iii) (which deals with suspension or cancellation because of mental or physical incapacity); or
    - (ii) section 915C (which deals with suspension or cancellation after offering a hearing); and
  - (d) if the person is not the trustee of a trust—the person is not insolvent; and
  - (e) if the person is a natural person:
    - (i) the person is not disqualified from managing corporations under Part 2D.6; and
    - (ii) the person has not been convicted, within 10 years before the application is made, of serious fraud; and
  - (f) the person is of good fame and character within the meaning of section 913B.
- (5K) A person who is registered under this section is registered on the basis that:
- (a) conditions on the registration may be imposed, varied or revoked under subsection (5L); and
  - (b) the registration will be cancelled under subsection (5U); and

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- (c) the registration may be cancelled, revoked, terminated or varied by or under later legislation; and
  - (d) no compensation is payable if:
    - (i) conditions on the registration are imposed, varied or revoked as referred to in paragraph (a); or
    - (ii) the registration is cancelled, revoked, terminated or varied as referred to in paragraphs (b) and (c).
- (5L) ASIC may, at any time:
- (a) impose conditions, or additional conditions, on a person's registration; and
  - (b) vary or revoke conditions imposed on a person's registration.
- (5M) ASIC may do so:
- (a) on its own initiative; or
  - (b) if the registered person lodges an application with ASIC for the imposition, variation or revocation.
- (5N) ASIC must give the registered person written notice of the imposition, variation or revocation of the conditions. The imposition, variation or revocation of the conditions comes into force on the day specified in the notice, which must not be before the day on which the decision to impose, vary or revoke the conditions was made.
- (5O) Despite subsection (5L), ASIC may only impose conditions or additional conditions, or vary or revoke the conditions, on the registration after giving the registered 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 in relation to the conditions.
- This subsection does not apply to ASIC imposing conditions when a person becomes registered.
- (5P) ASIC must ensure that the registration is subject to a condition that specifies the financial services or classes of financial services that the registered person is authorised to provide in relation to a carbon unit, an Australian carbon credit unit or an eligible international emissions unit.
- (5Q) The registration is subject to such other conditions as are prescribed by the regulations. However, ASIC cannot vary or revoke those conditions.
- (5R) If, after 1 July 2012, a registered person provides a financial service to a retail client in relation to a carbon unit, an Australian carbon credit unit or an eligible international emissions unit, the person must:
- (a) be a member of an approved external dispute resolution scheme; and
  - (b) ensure that the person has in place compensation arrangements within the meaning of section 912B.
- (5S) A registered person must:
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- (a) do all things necessary to ensure that the financial services provided in relation to a carbon unit, an Australian carbon credit unit or an eligible international emissions unit by the registration are engaged in efficiently, honestly and fairly; and
  - (b) comply with the conditions on the registration; and
  - (c) comply with the financial services laws; and
  - (d) take reasonable steps to ensure that its representatives comply with this Act and the regulations; and
  - (e) take reasonable steps to ensure that clients of the registered person are not disadvantaged by any conflict of interest that arises wholly or partly in relation to financial services provided in relation to a carbon unit, an Australian carbon credit unit or an eligible international emissions unit by the registered person or its representatives; and
  - (f) comply with any other obligations that are prescribed by the regulations.
- (5T) For the purposes of this section:
- (a) ASIC may suspend or cancel the registration of a registered person:
    - (i) on its own initiative; or
    - (ii) if the registered person lodges an application with ASIC for the suspension or cancellation; and
  - (b) a suspended registration has no effect while it remains suspended; and
  - (c) ASIC may at any time revoke the suspension of a registered person's registration; and
  - (d) ASIC must exercise its powers under this subsection in a manner that is consistent, as far as practicable, with the manner in which it must exercise its powers to suspend or cancel registrations under Division 4 of Part 3 of Schedule 2 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*.
- (5U) The registration of every registered person is cancelled at the end of 31 December 2012, or a later day prescribed by the regulations.
- Note: After 31 December 2012, a person who has been registered but does not hold a licence authorising the person to provide financial services in relation to a carbon unit, an Australian carbon credit unit or an eligible international emissions unit will be required to cease providing the financial services.’’.

### 7.6.02AH Modification of paragraph 911B(1)(e) of the Act

For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies as if paragraph 911B(1)(e) of the Act were modified by omitting “911A(2)” and substituting “911A(2), (2A), (2B), (2C), (2D), (2E) or (2F)”.

### 7.6.02A Obligation to notify ASIC of certain matters

For subparagraph 912D(1)(a)(iii) of the Act, the following Commonwealth legislation is specified:

- (a) *Australian National Registry of Emissions Units Act 2011*;
- (aa) *Banking Act 1959*;

- (ab) *Carbon Credits (Carbon Farming Initiative) Act 2011*;
- (ac) *Clean Energy Act 2011*;
- (b) *Financial Sector (Collection of Data) Act 2001*;
- (c) *Financial Sector (Shareholdings) Act 1998*;
- (d) *Financial Sector (Transfers of Business) Act 1999*;
- (e) *Insurance Acquisitions and Takeovers Act 1991*;
- (f) *Insurance Act 1973*;
- (g) *Insurance Contracts Act 1984*;
- (h) *Life Insurance Act 1995*;
- (i) *Retirement Savings Accounts Act 1997*;
- (j) *Superannuation Industry (Supervision) Act 1993*;
- (k) *Superannuation (Resolution of Complaints) Act 1993*.

### **7.6.03 Applying for Australian financial services licence**

For paragraph 913A(a) of the Act, the following information is required as part of an application by person for an Australian financial services licence:

- (a) if the person is a body corporate:
  - (i) the person's name (including the person's principal business name, if any); and
  - (ii) the name and address of each director; and
  - (iii) the name and address of each secretary;
- (b) if the person is applying on behalf of a partnership—the partnership's name and address, and the name of each partner;
- (c) if paragraphs (a) and (b) do not apply—the person's name (including the person's principal business name, if any);
- (d) the person's principal business address;
- (e) if the person has an ABN—the ABN;
- (f) a description of the financial services that the person proposes to provide;
- (g) the arrangements (including a description of systems) by which the person will comply with its general obligations set out in section 912A of the Act;
- (h) any other information that ASIC requires for the purpose of considering the application.

#### **7.6.03A Australian financial services licence—requirements for a foreign entity to appoint local agent**

- (1) For paragraph 913B(1)(d) of the Act, a foreign entity that:
  - (a) is not a foreign company; and
  - (b) applies for an Australian financial services licence;must meet the requirements in subregulations (2) and (3).
- (2) The foreign entity must:
  - (a) have appointed, as an agent, a person who is:
    - (i) a natural person or a company; and

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- (ii) resident in this jurisdiction; and
    - (iii) authorised to accept, on the foreign entity's behalf, service of process and notices; and
  - (b) lodge, with the application, a memorandum of appointment or a power of attorney that is duly executed by or on behalf of the foreign entity and states the name and address of the agent.
- (3) If the memorandum of appointment, or power of attorney, lodged under paragraph (2)(b) was executed on behalf of the foreign entity, the foreign entity must also lodge a copy declared in writing to be a true copy of the document authorising the execution.

### 7.6.03B Foreign entity must continue to have local agent

- (1) For paragraph 912A(1)(j) of the Act, a foreign entity that:
- (a) is not a foreign company; and
  - (b) is a financial services licensee;
- must meet the requirements in subregulation (2).
- (2) The foreign entity must:
- (a) at all times, have an agent who is:
    - (i) a natural person or a company; and
    - (ii) resident in this jurisdiction; and
    - (iii) authorised to accept, on the foreign entity's behalf, service of process and notices; and
  - (b) notify ASIC of any change to:
    - (i) the agent; or
    - (ii) the name or address of the agent;not later than 1 month after the change; and
  - (c) make arrangements that ensure that ASIC may treat a document as being served on the foreign entity by leaving it at, or by sending it by post to:
    - (i) an address of the agent that has been notified to ASIC; or
    - (ii) if a notice or notices of a change or alteration to that address has or have been given to ASIC—the address shown in the most recent notice.

### 7.6.04 Conditions on Australian financial services licence

- (1) For subsection 914A(8) of the Act, an Australian financial services licence is subject to the following conditions:
- (a) subject to subregulation (1A)—a condition that, if any event occurs that may make a material adverse change to the financial position of the financial services licensee by comparison with its financial position:
    - (i) at the time of the application for the Australian financial services licence; or
    - (ii) as described in documents lodged with ASIC after the application for the Australian financial services licence;
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the financial services licensee must lodge with ASIC in the prescribed form a notice setting out particulars of the event as soon as practicable, and in any case not later than 3 business days, after the financial services licensee becomes aware of the event;

- (b) a condition that, if:
- (i) there is a change in a matter particulars of which are entered in a register of financial services licensees; and
  - (ii) the change is not a direct consequence of an act by ASIC;
- the financial services licensee must lodge with ASIC in the prescribed form particulars of the change within 10 business days after the change;
- (c) a condition that, if:
- (i) there is a change in a matter particulars of which are entered in a register of authorised representatives of financial services licensees; and
  - (ii) the change is not required to be reported in accordance with section 916F of the Act; and
  - (iii) the change is not a direct consequence of an act by ASIC;
- the financial services licensee must ensure that particulars of the change are lodged with ASIC in the prescribed form within 30 business days after the change;
- (ca) a condition that the financial services licensee must ensure that each representative of the financial services licensee that may give an authorisation to another representative is aware of the requirements in subsections 916F(1) and (3) of the Act;
- (d) a condition that the financial services licensee must maintain a record of the training (relevant to the provision of financial services) that each of its representatives has undertaken, including:
- (i) training undertaken after the representative became a representative of the licensee; and
  - (ii) any training undertaken before the representative became a representative of the licensee to the extent that the financial services licensee is able to obtain the information by reasonable inquiry;
- (e) a condition that the financial services licensee must ensure that, before:
- (i) the financial services licensee authorises a person to provide a financial service on its behalf as mentioned in section 916A of the Act; or
  - (ii) a body corporate that is an authorised representative of the financial services licensee authorises an individual to provide a financial service on behalf of the financial services licensee as mentioned in section 916B of the Act;
- reasonable inquiries are made to establish:
- (iii) the person's identity; and
  - (iv) whether the person has already been allocated a number by ASIC as an authorised representative;
- (f) a condition that the financial services licensee must ensure that, if:
- (i) ASIC has allocated a number to an authorised representative; and
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- (ii) the financial services licensee, or a body corporate that has authorised an individual to provide a financial service on behalf of the financial services licensee as mentioned in section 916B of the Act, lodges a document with ASIC that refers to the authorised representative; the document refers to the number.
  - (g) a condition that the financial services licensees must provide a copy of an authorisation of any of its authorised representatives:
    - (i) on request by any person; and
    - (ii) free of charge; and
    - (iii) as soon as practicable after receiving the request and, in any event, within 10 business days after the day on which it received the request;
  - (h) a condition that the financial services licensees must take reasonable steps to ensure that each of its authorised representatives supplies a copy of its authorisation by the financial services licensee:
    - (i) on request by any person; and
    - (ii) free of charge; and
    - (iii) as soon as practicable after receiving the request and, in any event, within 10 business days after the day on which it received the request;
  - (i) a condition that, if a financial services licensee becomes aware of any change in control of the financial services licensee, the financial services licensee must lodge with ASIC, in the prescribed form, particulars of the change not later than 10 business days after the change;
  - (j) a condition that, on the request of any person, the financial services licensee must make available a copy of its financial services licence within a reasonable time for inspection by that person;
  - (k) if the financial services licensee is a limited licensee—a condition that the licensee must, within 3 years from the date on which the licence is granted and if requested in writing by ASIC, demonstrate to the satisfaction of ASIC that:
    - (i) if the licensee is an individual—the licensee has:
      - (A) knowledge of the licensee’s obligations under the Act and these Regulations; and
      - (B) the competence to provide the financial services covered by the licence; or
    - (ii) if the licensee is a partnership or corporation—each recognised accountant that supervises and has responsibility for the provision of financial services covered by the licence has:
      - (A) knowledge of the licensee’s obligations under the Act and these Regulations; and
      - (B) the competence to provide the financial services covered by the licence.
- (1A) Paragraph (1)(a) does not apply to a body regulated by APRA, unless the body is an RSE licensee that is also the responsible entity of a registered scheme.
- (2) For paragraph (1)(i):



- (a) a **change in control**, in relation to a financial services licensee, includes a transaction, or a series of transactions in a 12 month period, that results in a person having control of the financial services licensee (either alone or together with associates of the person); and
- (b) **control**, in relation to a financial services licensee, means:
  - (i) if the financial services licensee is a body corporate:
    - (A) having the capacity to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the financial services licensee; or
    - (B) directly or indirectly holding more than one half of the issued share capital of the financial services licensee (not including any part of the issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
  - (ii) the capacity to control the composition of the financial services licensee's board or governing body; or
  - (iii) the capacity to determine the outcome of decisions about the licensee's financial and operating policies; and
- (c) for subparagraph (b)(iii), the following matters must be taken into account in determining whether a person has the capacity to determine the outcome of decisions about a financial services licensee's financial and operating policies:
  - (i) the practical influence the person can exert (rather than the rights it can enforce);
  - (ii) any practice or pattern of behaviour affecting the financial services licensee's financial or operating policies is to be taken into account (whether or not it involves a breach of an agreement or a breach of trust).

(3) In this regulation:

**class of product advice** means financial product advice about a class of products but does not include a recommendation about a specific product in the class.

Example: A financial services licensee may give a recommendation about term deposit products but must not make a specific recommendation that a person deposit their money into a term deposit product offered by a particular bank or building society.

**limited financial services** means the following financial services:

- (a) financial product advice on self-managed superannuation funds;
- (b) financial product advice on superannuation products in relation to a person's existing holding in a superannuation product but only to the extent required for:
  - (i) making a recommendation that the person establish a self-managed superannuation fund; or
  - (ii) providing advice to the person on contributions or pensions under a superannuation product;
- (c) class of product advice on the following:

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- (i) superannuation products;
- (ii) securities;
- (iii) simple managed investment schemes;
- (iv) general insurance products;
- (v) life risk insurance products;
- (vi) basic deposit products;
- (d) arrange to deal in an interest in a self-managed superannuation fund.

Note 1: See section 761A of the Act for the meaning of *basic deposit product*, *financial product advice*, *general insurance product*, *life risk insurance product*, *self-managed superannuation fund* and *superannuation product*.

Note 2: See subregulation 1.0.02(1) for the meaning of *simple managed investment scheme*.

Note 3: Financial product advice on self-managed superannuation funds includes advice about acquiring or disposing of an interest in a self-managed superannuation fund.

**limited licensee** means a financial services licensee that:

- (a) is:
  - (i) a recognised accountant; or
  - (ii) a corporation that has one or more recognised accountants that supervise and have responsibility for the provision of financial services covered by its licence; or
  - (iii) a partnership that has one or more recognised accountants that supervise and have responsibility for the provision of financial services covered by its licence; and
- (b) applied for the financial services licence between 1 July 2013 and 30 June 2016; and
- (c) is only licensed to provide one or more limited financial services.

**recognised accountant** means:

- (a) a member of CPA Australia who:
  - (i) holds a Public Practice Certificate issued by CPA Australia Ltd; and
  - (ii) is entitled to use the letters “CPA” or “FCPA”; and
  - (iii) is subject to, and complies with, CPA Australia’s continuing professional education requirements; or
- (b) a member of The Institute of Chartered Accountants in Australia (*ICAA*) who:
  - (i) holds a Certificate of Public Practice issued by ICAA; and
  - (ii) is entitled to use the letters “ACA”, “CA” or “FCA”; and
  - (iii) is subject to, and complies with, ICAA’s continuing professional education requirements; or
- (c) a member of the Institute of Public Accountants (*IPA*) who:
  - (i) holds a Public Practice Certificate issued by IPA; and
  - (ii) is entitled to use the letters “FIPA” or “MIPA”; and
  - (iii) is subject to, and complies with, IPA’s continuing professional education requirements.

**7.6.04AA Time limits for notification of authorised representatives—  
modification of section 916F of the Act**

For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies as if:

- (a) subsection 916F(1) were modified by omitting “15 business days” and substituting “30 business days”; and
- (b) subsection 916F(3) were modified by omitting “10 business days” and substituting “30 business days”.

**7.6.04A Exemptions to notification of authorised representatives**

For paragraph 916F(1AA)(d) of the Act, each of the following financial products is prescribed:

- (a) a general insurance product;
- (b) a basic deposit product;
- (c) a facility for making non-cash payments that is related to a basic deposit product;
- (d) a consumer credit insurance product;
- (e) a cash management trust interest.

**7.6.05 Register of financial services licensees and register of authorised  
representatives of financial services licensees**

- (1) For subsection 922A(2) of the Act, ASIC must include the following details for each financial services licensee in the register of financial service licensees:
    - (a) the financial services licensee’s name (including the financial services licensee’s principal business name, if any);
    - (b) the principal business address of the financial services licensee;
    - (c) the date on which the financial services licensee’s licence was granted;
    - (d) the number of the financial services licence of the financial services licensee;
    - (e) if the financial services licensee has an ABN—the ABN;
    - (f) details of any conditions on the financial services licensee’s licence, including details of the financial service, or class of financial services, that the financial services licensee is authorised to provide;
    - (g) any other information that ASIC believes should be included in the register.
  - (2) For subsection 922A(2) of the Act, ASIC must include the following details for each authorised representative of a financial services licensee in the register of authorised representatives of financial services licensees:
    - (a) the authorised representative’s name (including the authorised representative’s principal business name, if any);
    - (b) the authorised representative’s principal business address;
    - (c) if the authorised representative is a body corporate—the name of each director and secretary;
    - (d) the number allocated to the authorised representative by ASIC;
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- (e) the name of each financial services licensee for which the authorised representative is an authorised representative;
- (f) the number of the financial services licence of each financial services licensee for which the authorised representative is an authorised representative;
- (g) if the authorised representative has an ABN—the ABN;
- (h) the date of the authorised person's authorisation, and any other information about the authorisation that ASIC believes should be included in the register;
- (i) any other information that ASIC believes should be included in the register.

#### **7.6.06 ASIC register relating to persons against whom banning order or disqualification order is made**

- (1) For subsection 922A(2) of the Act, ASIC must include the following details for each person against whom a banning order is made in the register of persons against whom a banning order under Division 8 of Part 7.6 of the Act is made:
  - (a) the person's name;
  - (b) the day on which the banning order took effect;
  - (c) whether the banning order is permanent or for a fixed period;
  - (d) if the banning order is for a fixed period—the period;
  - (e) the terms of the banning order;
  - (f) whether the banning order has been varied or cancelled;
  - (g) if the banning order has been varied:
    - (i) the date of the variation; and
    - (ii) the terms of the variation;
  - (h) if the banning order has been cancelled—the date of the cancellation;
  - (i) any other information that ASIC believes should be included in the register.
- (2) For subsection 922A(2) of the Act, ASIC must include the following details for each person against whom a disqualification order is made in the register of persons against whom a disqualification order under Division 8 of Part 7.6 of the Act is made:
  - (a) the person's name;
  - (b) the day on which the disqualification order took effect;
  - (c) whether the disqualification order is permanent or for a fixed period;
  - (d) if the disqualification order is for a fixed period—the period;
  - (e) the terms of the disqualification order;
  - (f) whether the disqualification order has been varied or revoked;
  - (g) if the disqualification order has been varied:
    - (i) the date of the variation; and
    - (ii) the terms of the variation;
  - (h) if the disqualification order has been revoked—the date of the revocation;

- (i) any other information that ASIC believes should be included in the register.

### **7.6.06C Correcting registers**

ASIC may correct any error in or omission from a register maintained under regulation 7.6.05 or 7.6.06.

Note: Australian Privacy Principle 13 applies to ASIC and requires it to take reasonable steps to correct personal information that is wrong or misleading so that the information is accurate, up to date, complete, relevant and not misleading (see Schedule 1 to the *Privacy Act 1988*).

### **7.6.07 Restriction on use of certain words or expressions**

For subparagraph 923A(2)(b)(iii) of the Act, any other person in respect of whom section 942B or 942C of the Act makes provision for information to be provided in a financial services guide in relation to the receipt of remuneration or other benefits is prescribed.

### **7.6.07A Modification of section 923C**

For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies as if subsections 923C(1) to (10) of the Act were modified to read as follows:

- “(1) An individual contravenes this subsection if:
- (a) the individual carries on a financial services business or provides a financial service (whether or not on behalf of another person); and
  - (b) the individual assumes or uses, in this jurisdiction, a restricted word or expression in relation to the service; and
  - (c) any of the following apply:
    - (i) the individual is not a relevant provider;
    - (ii) the individual is a provisional relevant provider;
    - (iii) the individual is a limited-service time-sharing adviser.

Note 1: For the meanings of *restricted word or expression* and *assume or use*, see subsections (8) and (9) of this section.

Note 2: A contravention of this subsection is an offence (see subsection 1311(1)).

- (2) A person contravenes this subsection if:
- (a) the person carries on a financial services business or provides a financial service; and
  - (b) an individual provides a financial service on behalf of the person; and
  - (c) the person assumes or uses, in this jurisdiction, a restricted word or expression in relation to the service; and
  - (d) any of the following apply:
    - (i) the individual is not a relevant provider;
    - (ii) the individual is a provisional relevant provider;
    - (iii) the individual is a limited-service time-sharing adviser.

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Note 1: For the meanings of *restricted word or expression* and *assume or use*, see subsections (8) and (9) of this section.

Note 2: A contravention of this subsection is an offence (see subsection 1311(1)).

#### *Advice to wholesale clients*

(3) It is not a contravention of subsection (1) for an individual to assume or use a restricted word or expression if:

- (a) the individual provides advice to wholesale clients; and
- (b) the individual assumes or uses the restricted word or expression only in relation to that advice.

Note: A defendant bears an evidential burden in relation to the matters in subsection (3). See subsection 13.3(3) of the *Criminal Code*.

(4) It is not a contravention of subsection (2) for a person to assume or use a restricted word or expression if:

- (a) another person (the *adviser*) provides a financial service on behalf of the person; and
- (b) the adviser provides advice to wholesale clients; and
- (c) the person assumes or uses the restricted word or expression only in relation to that advice.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

#### *Advice as employee or director*

(5) It is not a contravention of subsection (1) for an individual to assume or use a restricted word or expression if:

- (a) the individual is an employee or director of a body; and
- (b) the individual provides advice to the body; and
- (c) the individual assumes or uses the restricted word or expression only in relation to that advice.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5). See subsection 13.3(3) of the *Criminal Code*.

(6) It is not a contravention of subsection (2) for a person to assume or use a restricted word or expression if:

- (a) another person (the *adviser*) is an employee or director of a body; and
- (b) the adviser provides advice to the body; and
- (c) the person assumes or uses the restricted word or expression only in relation to that advice.

Note: A defendant bears an evidential burden in relation to the matters in subsection (6). See subsection 13.3(3) of the *Criminal Code*.

*Continuing contravention*

- (7) If a person assumes or uses a word or expression in circumstances that give rise to the person committing an offence under subsection (1) or (2), the person commits the offence in respect of:
- (a) the first day on which the offence is committed; and
  - (b) each subsequent day (if any) on which the circumstances that gave rise to the person committing the offence continue (including the day of conviction for any such offence or any later day).

*References to restricted word or expression*

- (8) In this section:
- (a) a reference to a restricted word or expression is a reference to:
    - (i) the expression ***financial adviser*** or ***financial planner***; or
    - (ii) any other word or expression specified in the regulations as a restricted word or expression for the purposes of this section; or
    - (iii) any other word or expression (whether or not in English) that is of like import to a word or expression covered by any of the previous subparagraphs; and
  - (b) a reference to a restricted word or expression being assumed or used includes a reference to the restricted word or expression being assumed or used:
    - (i) as part of another word or expression; or
    - (ii) in combination with other words, letters or other symbols.
- (9) However, a reference in this section to a restricted word or expression does not include a reference to a word or expression mentioned in paragraph (8)(a) if:
- (a) the word or expression mentioned in that paragraph is assumed or used in relation to a provisional relevant provider; and
  - (b) the word or expression is assumed or used as part of a word or expression specified by the standards body for the purposes of subparagraph 921U(2)(a)(v).

*Contravention does not affect compensation arrangements*

- (10) To avoid doubt, this section does not affect the obligation of a financial services licensee to have arrangements in place under section 912B.

Note: Section 912B requires financial services licensees to have in place compensation arrangements if the licensee provides financial services to retail clients.”.

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## Part 7.6A—Authorised representatives

### 7.6.08 Authorised representatives

- (1) For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies as if the provisions of section 916B set out in column 2 of the following table were modified as set out in columns 3 and 4:

Column 1 Item	Column 2 provision of Act	Column 3 is modified by...	Column 4 and...
1	subsection 916B(3)	omitting “A body corporate that is an authorised representative”	substituting “An authorised representative ( <i>authoriser</i> )”
2	subsection 916B(3)	omitting “the body corporate”	substituting “the authoriser”
3	subsection 916B(5A)	omitting “a body corporate”	substituting “an authoriser”
4	paragraph 916B(7)(b)	omitting “the body corporate”	substituting “the authoriser”
5	subsection 916B(9)	omitting “the body corporate”	substituting “the authoriser”

- (2) For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies as if the following subsection were inserted after subsection 916B(3):

“(3A) An individual who is authorised as mentioned in subsection (3) cannot, in that capacity, authorise another person under subsection (3).”

- (3) For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies as if subsection 916F(1AA) were omitted and the following subsection were substituted:

“(1AA) Subsection (1) does not apply to an authorisation of a representative by an authorised representative (the *authoriser*) if:

- (a) the authorisation is given as mentioned in section 916B; and
- (b) the relevant consent under subsection 916B(5) was given in respect of a specified class of individuals of which the representative is a member; and
- (c) the representative is an employee of the authoriser; and
- (d) the only financial services that the representative is authorised to provide are one or more of the following:
  - (i) general advice that relates to financial products covered by regulations made for the purposes of this paragraph;
  - (ii) dealing in financial products covered by regulations made for the purposes of this paragraph;
  - (iii) personal advice about a basic deposit product or a facility for making non-cash payments that relates to a basic deposit product; and



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(e) the authoriser provides information about the representative and the representative's authorisation when requested.”

Note 1: Regulations made for the purposes of paragraph (d) may be expressed to cover all financial products, or only 1 or more specified kinds of financial products.

Note 2: A defendant bears an evidential burden in relation to the matters in subsection (1AA). See subsection 13.3(3) of the *Criminal Code*.”

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## Part 7.6B—Provision of information to APRA about contracts of insurance

### 7.6.08A Definitions

In this Part:

*general insurer* has the same meaning as in subsection 3(1) of the *Insurance Act 1973*.

*Lloyd's underwriter* has the same meaning as in subsection 3(1) of the *Insurance Act 1973*.

*unauthorised foreign insurer* has the same meaning as in regulation 4 of the *Insurance Regulations 2002*.

### 7.6.08B Application

This Part applies to a person who is a financial services licensee authorised to deal in general insurance products.

Note: *General insurance product* is defined in section 761A and paragraph 764A(1)(d) of the Act. *Dealing* is defined in section 766C of the Act.

### 7.6.08C Modification of section 912CA of the Act

For paragraph 926B(1)(c) of the Act, Part 7.6 of the Act applies as if section 912CA of the Act were modified to read as follows:

#### **‘912CA Regulations may require information to be provided**

- (1) The regulations may require a financial services licensee, or each financial services licensee in a class of financial services licensees, to provide APRA (acting as ASIC’s agent) with specified information about:
  - (a) the financial services provided by the licensee or its representatives; or
  - (b) the financial services business carried on by the licensee.
- (2) The specified information:
  - (a) must be lodged in the prescribed form; and
  - (b) must include:
    - (i) the information, statements, explanations or other matters required by the form; and
    - (ii) any further information requested by APRA in relation to any of the matters in subparagraph (i); and
  - (c) must be accompanied by any other material required by the form.’

**7.6.08D Information about general insurance products**

- (1) This regulation applies in relation to a general insurance product that:
  - (a) is entered into as a result of a dealing in the product, either wholly or partially, by the person, with a general insurer, Lloyd's underwriter or an unauthorised foreign insurer; and
  - (b) is not a reinsurance contract or a retrocession contract.
- (2) However, if the person is a general insurer, this regulation does not apply in relation to a general insurance product issued by the person.
- (3) For section 912CA of the Act, the person must provide information to APRA about the general insurance product entered into in a reporting period specified in subregulation (5):
  - (a) in accordance with Table 1 in Form 701; and
  - (b) either:
    - (i) within the time specified by ASIC or APRA if that is a reasonable time; or
    - (ii) if ASIC or APRA do not specify a time—within 20 business days after the last day of the applicable reporting period.

Penalty: 10 penalty units.

- (4) For section 912CA of the Act, the person must provide further information to APRA relating to the information provided in accordance with Table 1 in Form 701:
  - (a) if APRA makes a request in writing for the further information; and
  - (b) either:
    - (i) within 5 business days of receiving the request; or
    - (ii) if ASIC or APRA specifies a later date—by that date.

Penalty: 10 penalty units.

- (5) The reporting periods are:
  - (a) 1 May to 30 June 2010; and
  - (b) 1 July to 31 December 2010; and
  - (c) 1 January to 30 June in any year after 2010; and
  - (d) 1 July to 31 December in any year after 2010.
- (6) Strict liability applies to subregulations (3) and (4).

**7.6.08E Information about general insurance products—unauthorised foreign insurers**

- (1) This regulation applies in relation to a general insurance product:
  - (a) that is entered into as a result of a dealing in the product, either wholly or partially, by the person; and
  - (b) that is not a reinsurance contract or a retrocession contract; and

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- (c) in relation to which an unauthorised foreign insurer is a party to the contract that is the general insurance product.

Note: An unauthorised foreign insurer may be a party to a contract of insurance to which Part 2 of the *Insurance Regulations 2002* applies. These are insurance contracts for:

- (a) high-value insured; and
- (b) atypical risks; and
- (c) risks that cannot reasonably be placed in Australia; and
- (d) contracts required by foreign law.

- (2) However, if the general insurance product has been dealt with by more than 1 person, this regulation only applies, in relation to the general insurance product, to the person who has:
- (a) dealt directly with the unauthorised foreign insurer; or
  - (b) dealt indirectly with the unauthorised foreign insurer through a foreign intermediary.
- (3) For section 912CA of the Act, the person must provide information to APRA about the general insurance product entered into within a reporting period specified in subregulation (5):
- (a) in accordance with Table 2 in Form 701; and
  - (b) either:
    - (i) within the time specified by ASIC or APRA if that is a reasonable time; or
    - (ii) if ASIC or APRA do not specify a time—within 20 business days after the last day of the applicable reporting period.

Penalty: 10 penalty units.

- (4) For section 912CA of the Act, the person must provide further information to APRA relating to the information provided in accordance with Table 2 in Form 701:
- (a) if APRA makes a request in writing for the further information; and
  - (b) either:
    - (i) within 5 business days of receiving the request; or
    - (ii) if ASIC or APRA specify a later date—by that date.

Penalty: 10 penalty units.

- (5) The reporting periods are:
- (a) 1 May to 30 June 2010; and
  - (b) 1 July to 31 December 2010; and
  - (c) 1 January to 30 June in any year after 2010; and
  - (d) 1 July to 31 December in any year after 2010.
- (6) Strict liability applies to subregulations (3) and (4).